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February 24, 2014

The Honorable Tani Cantil-Sakauye, Chief Justice
and the Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

**Re: *Asahi Kasei Pharma Corp. v. Actelion Ltd., et al.*, Case No. S216123**
***Amicus Curiae* Letter of Washington Legal Foundation**
**(Court of Appeal Case No. A133927, First Appellate District, Division Five)**

To the Chief Justice and Associate Justices:

The Washington Legal Foundation hereby submits this letter as an *amicus curiae*, urging the Court to grant the petition for review filed by Petitioners Actelion Ltd., *et al*. Actelion's petition sets forth several cogent reasons for reviewing the issues presented in the petition, including that the appeals court's determination that a parent company may be held liable for tortious interference with the contract of its wholly-owned subsidiary conflicts with decisions of this Court. WLF submits this letter to focus on the third issue raised by the petition: the appeals court applied improper legal standards regarding the showing needed to establish lost-profits damages for a new and unproven product.

All parties agree that damages for the loss of prospective profits are recoverable where the evidence makes "reasonably certain their occurrence and extent." (*See, e.g., Grupe v. Glick* (1945) 26 Cal.2d 680, 693.) The parties part company, however, on whether and when prospective lost profits can be deemed "reasonably certain" when sought with respect to a wholly new and unproven product. The appeals court agreed with Plaintiff/Appellant Asahi Kasei Pharma Corp. that "[i]t is for the jury to determine the probabilities as to whether damages are reasonably certain to occur in any particular case." (Typed Opn. 55.) Today, more than seven years after the events giving rise to this litigation, extended-release Fasudil has not been approved for marketing in the United States for any indication, nor has it even proceeded past Phase I clinical testing.[1] Every published drug development study agrees that the great majority

[1] While this case was on appeal, Asahi completed (in Japan) a small Phase II study of Fasudil's effectiveness in treating pulmonary arterial hypertension. Fasudil performed poorly in the study, which called into question both safety and effectiveness. Five of 11 patients who were administered Fasudil experienced creatinine increases of 30% or higher. Moreover, the study suggested that Fasudil is totally ineffective: it was outperformed by placebo on the six-minute walk test, the critical "clinical end point" for purposes of FDA approval. The results of the study are reported at https://www.jstage.jst.go.jp/article/circj/77/10/77_CJ-13-0443/_article. This appears to be the same study whose interim results Asahi succeeded in keeping from the jury.

of drugs that complete Phase I testing never receive FDA marketing approval. The appeals court nonetheless concluded that the evidence was sufficient to justify a finding that, but for Actelion's tortious conduct, it was "reasonably certain" that Fasudil sales would have generated hundreds of millions of dollars in profits for Asahi. Although conceding that case law looks with extreme skepticism at lost-profits claims advanced by new business ventures, the court concluded that the "new business paradigm" was inapplicable to Asahi's lost-profits claims because CoTherix, Inc., the company with which it had contracted to develop Fasudil, "had a track record of obtaining FDA approval for and marketing" a similar drug and "had a sales and marketing team already in place." (Typed Opn. 58.)

The appeals court's holding regarding the quantum of evidence necessary to establish lost-profits damages with "reasonable certainty" conflicts with decisions of this Court and other California appeals courts. Asahi's efforts to market Fasudil in the United States for the first time, and for two indications for which its safety and effectiveness have never been established, undoubtedly constitutes a "new business venture," as this Court used that term in its most recent lost-profits decision. (*See Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal. 4th 747.) This Court went on to explain, "[W]here the operation of an unestablished business is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative." (*Id.* at 774.) Other courts have held explicitly that the rule limiting lost-profits awards to new businesses fully applies to well-established businesses looking to establish new product lines. (*See, e.g., Kids' Universe v. In2Labs* (2002) 95 Cal. App. 4th 870 (the rule governing new businesses applied to a well-established retailer that sought to create an Internet website for the purpose of generating on-line sales).) Review is warranted to resolve the conflict between the decision below and those other decisions. Review is particularly warranted now that the appeals court, in its January 16, 2014 order, granted a motion to publish the lost-profits portion of its opinion.

The word "certainty" means "a state of being free from doubt." (*Webster's New Collegiate Dictionary* (G. & C. Merriam Co. 1981).) By adding the word "reasonable" to the standard governing lost-profits, the Court has indicated that *absolute* certainty is not required, in recognition of the fact that "[t]he lost profit inquiry is always speculative to some degree." (*Sargon*, 55 Cal. 4th at 775.) But the appeals court has adopted a definition of "reasonable certainty" that does violence to any normal understanding of the word "certainty." Under the appeals court's definition, a plaintiff makes the requisite evidentiary showing by demonstrating little more than that, but for the defendant's conduct, there existed a reasonable *possibility* that his business venture would have generated future profits.

Review is also warranted of the appeals court's determination that Asahi was entitled to an award of $18.8 million in damages based on the development costs that CoTherix would have incurred in developing an inhaled formulation of Fasudil but for the termination of the Licensing

Agreement between Asahi and CoTherix. Asahi asserted that it would have benefitted from those expenditures because the eventual FDA approval of inhaled Fasudil would have assisted Asahi in obtaining similar approval in other parts of the world. But the likely accrual of any such benefit is even more speculative than Asahi's lost-profits claims. Not only are such benefits contingent on gaining FDA approval for marketing inhaled Fasudil, but there is also only the loosest of connections between the dollar value of CoTherix's forgone expenditures and any losses suffered by Asahi in terms of its allegedly reduced ability to win marketing approval for Fasudil elsewhere in the world. Asahi introduced no evidence that it ever sought to win marketing approval elsewhere in the world for the two conditions for which it sought FDA approval. In the absence of any such effort, the appeals court had no basis for concluding with "reasonable certainty" either that Asahi's ability to market Fasudil outside the United States had been impaired or that CoTherix's forgone expenditures properly measured the extent of that impairment.

**Interests of *Amicus Curiae***

WLF is a public-interest law and policy center located in Washington, D.C. with supporters in all 50 States, including many in California. WLF devotes a significant portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. WLF opposes excessive damages awards in civil litigation and regularly appears before California courts and other state and federal courts in cases presenting issues regarding the computation of damages. (*See, e.g., Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal. 4th 747; *State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408.) WLF states that no counsel for a party authored this letter brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the submission of this brief.

WLF is concerned that if the decision of the court of appeal is allowed to stand, companies will be discouraged from investing in California for fear of exposing themselves to crippling tort awards. When businesses enter into a business transaction, they understand that if a court later determines that they have acted wrongfully toward another company with an interest in the transaction, the court may order them to pay reasonable damages incurred by the other company as a result of those actions. But in the past, businesses had no reason to expect that those damages might include hundreds of millions of dollars of speculative lost-profits claims based on business ventures that never began operations. The eye-popping $377 million damages award in this case may well cause businesses to conclude that the risks of conducting business in California outweigh the potential rewards. Asahi has already been handsomely compensated for damages it claims to have incurred when its Licensing Agreement with CoTherix was terminated. WLF can see no justification for providing a windfall for Asahi based on highly speculative claims for prospective lost profits.

**Statement of the Case**

The facts of this case are set out in detail in the parties' briefs. WLF wishes to highlight several facts of particular relevance to Asahi's lost profits claims. In 2006, Asahi entered into a Licensing Agreement with CoTherix whereby CoTherix would conduct clinical testing of Fasudil (a drug for which Asahi held the patent) with the goal of obtaining FDA approval to market Fasudil to treat two conditions: stable angina (SA) and pulmonary arterial hypertension (PAH). Fasudil was formulated in 1984 and has been used in Japan since 1995 to treat a type of stroke, but no country has *ever* approved Fasudil for treatment of SA and PAH. Indeed, no one has ever conducted a clinical study meeting FDA standards (*i.e.*, a double-blind, placebo-controlled study) designed to determine either Fasudil's safety or its effectiveness in treating SA and PAH.

Before Asahi entered into the Licensing Agreement with CoTherix, Asahi had entered into a similar licensing agreement with another company, ScheringBerlix. ScheringBerlix elected to terminate the agreement in 2004 and to walk away from its investment in Fasudil. Before doing so, it conducted preliminary clinical tests of an oral, immediate-release version of Fasudil ("IR-Fasudil") for treatment of SA. Those studies revealed safety concerns with higher dosages: taking Fasudil increased creatinine levels, an indicator of possible kidney dysfunction. Based on those studies, the decision was made to abandon IR Fasudil and to develop in its place an oral, extended-release version of Fasudil ("ER-Fasudil"). Just prior to its acquisition by Actelion, CoTherix completed Phase I testing of ER-Fasudil.[2] Actelion completed its acquisition of CoTherix on January 9, 2007 and thereafter notified Asahi that development of Fasudil would be discontinued.

The jury determined that Actelion and several of its executives tortiously interfered with the Licensing Agreement and awarded $547 million in compensatory damages as well as punitive damages against the executives. The compensatory damages award included $359 million for lost profits on sales of oral Fasudil—in the form of royalties and milestone payments that the jury determined would have been made by CoTherix under the Licensing Agreement. It

[2] In Phase I testing, a drug is administered to a very small group of healthy human volunteers to check for immediate side effects and to establish the maximum tolerated dose. Only very limited scientific conclusions can be drawn from a Phase I study. In particular, because the drug is given to healthy individuals only, a Phase I study cannot determine whether the drug can be safely administered to those afflicted with the targeted condition. Moreover, investigators cannot determine whether the maximum tolerated dose determined by the Phase I study will be sufficiently large to provide any benefit to those individuals.

also included $187 million in development costs that CoTherix did not incur because of the contract breach.[3] The court of appeal affirmed the judgments in full.

During the pendency of the appeal, Asahi published the results of a small Phase II PAH trial in Japan. Although Asahi tried to put a good face on it in the article, the study showed serious problems with creatinine increases and also showed that patients administered Fasudil performed *worse* on the six-minute walk test—the key measure of efficacy for FDA approval—than patients given placebo. *See* Footnote 1.

## Why Review Should Be Granted

This petition raises issues of exceptional importance. How courts interpret the "reasonable certainty" standard governing the award of prospective lost- profits damages can lead to huge variances in the total damages recovered by plaintiffs in both tort and breach-of-contract lawsuits. By relaxing long-accepted standards regarding what constitutes "reasonable certainty," the appeals court has created the potential that defendants may be hit with damage awards that are several orders of magnitude greater than they likely thought possible. Review is warranted to resolve the conflict between the appeals court's standard and the widespread understanding of "reasonable certainty" previously adopted by this Court and other appeals courts.

### A. Lost-Profits Damages for New Business Ventures Are Disfavored

In its recent *Sargon* decision, this Court addressed the propriety of awarding lost-profits damages to new business ventures. Like Asahi, the plaintiff in *Sargon* sought assistance in its efforts to market a new medical product—in the case of Sargon Enterprises, a dental implant device. In both cases, the relationships ended acrimoniously, and the inventors filed lawsuits seeking, among other relief, damages based on prospective lost profits. In both cases, the trial court determined that the defendants were at fault, and had acted in a manner that disrupted the plaintiffs' business plans. The Court nonetheless held that Sargon was not entitled to recover lost-profits damages.

The Court's rationale for ruling against Sargon applies fully here. The Court explained that an award of prospective lost-profits damages requires the presentation of the sorts of evidence that are generally unavailable to "unestablished" businesses:

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[3] The superior court later reduced the award for development costs to $18.9 million. It reasoned that an award of damages based on development costs for oral Fasudil would duplicate the lost-profits award. It upheld the award of $18.9 million on the grounds that CoTherix would have been required to incur those costs in developing inhaled Fasudil but for Actelion's actions, and that the jury had not awarded lost profits in connection with future sales of inhaled Fasudil.

> Regarding lost business profits, the courts have generally distinguished between established and unestablished businesses. "[W]here the operation of an established business is prevented or interrupted as by a . . . breach of contract . . . , damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable for the reason that their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales." (*Grupe v. Glick, supra*, 26 Cal. 2d at p. 692.) "Lost profits to an established business may be recovered if their extent and occurrence can be ascertained with reasonable certainty. . . ." (*Berger v. International Harvester Co.* (1983) 142 Cal. App. 3d 152, 161-162.) . . . "On the other hand, where the operation of an unestablished business is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent, and speculative."

*Sargon*, 55 Cal. 4th at 774 (quoting *Grupe*, 26 Cal. 2d at 693). In other words, because in 2007 (or at any other time) Asahi/CoTherix had no history of marketing Fasudil and because such marketing was contingent upon FDA approval (which could only come in the distant future, if at all) *Sargon* teaches that Asahi is not entitled to an award of lost-profits damages.

As occurred in *Sargon*, Asahi proffered testimony from expert witnesses willing to opine that they were "reasonably certain" that Asahi would have earned hundreds of millions of dollars in royalties and milestone payments if Actelion had not interfered with the Licensing Agreement. But *Sargon* held that such guesswork is not sufficient to create the level of *reasonable certainty* required for the award of lost-profits damages, because it generally cannot be supported by the types of evidence (*e.g.*, "past volume of business") that the Court has demanded.

The appeals court sought to distinguish *Sargon* by asserting that CoTherix "had a track record of obtaining FDA approval for and marketing a PAH drug (Ventavis) and had a sales and marketing team already in place." (Typed Opn. 58.) But that assertion does not distinguish *Sargon*; the fact remains that marketing Fasudil was an entirely new venture for Asahi/CoTherix, and Asahi could not point to a "past volume of business" as its basis for establishing lost-profits damages with reasonable certainty. Other appeals courts have recognized that plaintiffs cannot avoid the "new business" rule by noting an extensive track record in operating a business, if that track record does not include sales of the product for which lost-profits damages are sought. (*See, e.g., Kids' Universe v. In2Labs* (2002) 95 Cal. App. 4th 870 (the rule governing new businesses applied to a well-established retailer that sought to create an Internet website for the purpose of generating on-line sales).)

Indeed, in contrast to CoTherix/Asahi, Sargon had actually begun selling its dental implant product. The Court nonetheless held that Sargon could not seek lost-profits damages of

the sort outlined by his expert witness because it had no history of selling its product at the level of a "market leader." (*Sargon*, 55 Cal.4th at 776-77.) If Sargon's lost-profits claims were rejected notwithstanding actual sales, it is difficult to fathom how Asahi's lost-profits claim—which is based on the hoped-for marketing of a product that never advanced beyond Phase I testing and that was years away from any FDA consideration of marketing approval—could be deemed to have been established with "reasonable certainty."

The appeals court rationalized its decision by noting that the jury had been given a "reasonable certainty" instruction and by asserting that "[i]t is for the jury to determine the probabilities as to whether damages are reasonably certain to occur in any particular case." (Typed Opn. 55.) But *Sargon* could not have been clearer that courts must play an important gatekeeping role by ensuring that lost-profits damages are not awarded whenever the proffered evidence does not arise to the level of "reasonable certainty," as that term has been understood in California case law. The word "certainty" means "a state of being free from doubt." (*Webster's New Collegiate Dictionary* (G. & C. Merriam Co. 1981).) Under any understanding of that term, Asahi's lost-profits claim cannot be deemed free from doubt, not even "reasonably" so.

### B. *Sargon* Addressed Lost Profits as Well as Admissibility of Expert Testimony

Asahi seeks to distinguish *Sargon* by noting that the specific issue before the Court was whether proffered expert testimony was admissible, not (as here) whether to overturn a jury award. (Asahi Br. 31.) That assertion is without merit. The *Sargon* decision was based to a considerable degree on the Court's understanding of the law of lost profits. In reaching a decision on the admissibility of the expert testimony, the Court stated explicitly, "[T]he substantive law regarding lost profits is relevant to help define the type of matter on which an expert may reasonably rely." (*Sargon*, 55 Cal. 4th at 775-76.)

Asahi also asserts that review is unwarranted because Actelion is merely asking the Court to review the appeals court's application of well-established legal standards to the facts of this case. (Asahi Br. 32.) As the preceding discussion ought to make clear, that objection is not well-considered. Although all agree that "reasonable certainty" is the appropriate legal standard, the appeals court's understanding of that term is in considerable conflict with the decisions of this Court and other appeals courts. Review is warranted to resolve that conflict.

### C. Only 26% of Drugs That Complete Phase I Testing Receive FDA Approval

The appeals court noted "the acknowledgement by Asahi's witnesses that FDA approval is unpredictable until a Phase III study is done." (Typed Opn. 53.) Yet despite that acknowledgment of unpredictability, the appeals court confidently concluded that the evidence demonstrated with "reasonable certainty" that FDA would approve Fasudil and that its marketing would prove to be extremely profitable. Review is warranted to determine whether

this unorthodox understanding of the term "reasonable certainty" is consistent with lost-profits case law.

Indeed, FDA marketing approval for new drugs is even more unpredictable than the appeals court acknowledged. As Actelion has pointed out, only a small percentage of compounds that begin clinical testing with human subjects ever receive FDA marketing approval. (Pet. 31.) An exhaustive study recently released by the highly respected Tufts Center for the Study of Drug Development concluded that only 19% of compounds that first entered Phase I human testing between 1993 and 2004 ended up being approved for marketing by FDA. (*See* J.A. DiMasi, L. Feldman, A. Seckler, and A. Wisdom, "Trends in Risks Associated with New Drug Development: Success Rates for Investigational Drugs," 87 *Clinical Pharmacology & Therapeutics* 272, 274 (2010) (hereinafter "DiMasi").) The appeals court noted testimony from Asahi's expert witnesses that "the probability of approval increases as development proceeds through the Phase I, II, and III clinical trial process and that oral Fasudil was well along in that process." (Typed Opn. 53.) The assertion that oral IR Fasudil was "well along in that process" was a considerable exaggeration. At the time the Licensing Agreement was terminated, CoTherix had only just completed Phase I testing among a small group of healthy volunteers, and no conclusions had been reached yet regarding a dosage level that would be safe for PAH and SA patients.[4] More importantly, while it is true that the odds increase that a compound will gain FDA marketing approval after it completes Phase I testing, the increase is not dramatic. According to the Tufts study, only 26% of compounds that were first tested between 1993 and 2004 and that successfully transitioned from Phase I to Phase II eventually received FDA marketing approval. (DiMasi, *supra*, at 274.) Under any common understanding of the term, there can be no "reasonable certainty" that a drug will eventually win FDA approval if it is part of a cohort in which only 26% of drugs will eventually reach that goal.

Asahi responds that even if the great majority of drugs that complete Phase I testing never receive FDA approval, Fasudil was different because there was particularly strong evidence that it would be approved. But its principal evidence on that point is a projection prepared by CoTherix in 2006 for the purpose of convincing Actelion that its drug pipeline was quite valuable—and thus that Actelion ought to be willing to pay a premium price to purchase CoTherix. Even putting to one side the likelihood that CoTherix had a motive to exaggerate the likelihood that FDA would approve Fasudil for treatment of SA and PAH, there is little reason to give special weight to evidence that a company conducting clinical trials believes it reasonably likely that its product will eventually be approved by FDA. Conducting such research requires a huge investment of money and human resources. Companies will initiate and continue to fund such an investment only if they believe that eventual FDA approval is reasonably likely. Thus,

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[4] The healthy subjects in the Phase I study experienced creatinine problems. The trial testimony of CoTherix's CEO was that, at the time he left the company, Fasudil's extended release formulation had not solved the problem.

CoTherix's willingness to fund clinical research designed to determine Fasudil's safety and effectiveness in treating SA and PAH does nothing to set Fasudil apart from the many other compounds that successfully complete Phase I testing. And we know from past experience that the great majority of such drugs will never receive FDA marketing approval—and thus cannot be deemed "reasonably certain" to generate future profits.[5]

Asahi complains that the standard espoused by Actelion would prevent lost profits from ever being recovered in pharmaceutical industry cases. (Asahi Br. 38.) Not so. There may well be cases in which clinical testing has progressed to such an extent that one can conclude with reasonable certainty, based on an analysis of that testing, that FDA will eventually approve the drug. But Fasudil has never come anywhere near that stage. Until a drug has undergone the rigors of double-blind, placebo-controlled testing during a Phase III trial, there can be only limited assurances that sufficient evidence will be accumulated to convince FDA that the drug is both safe and effective for its intended uses. The appeals court's holding that a jury can nonetheless determine with reasonable certainty that a drug that has not yet entered Phase II testing will be approved by FDA warrants review by the Court.

### D. The Extent of Asahi's Lost Profits Is Also Speculative

Before damages for prospective lost profits can be awarded, *Sargon* requires evidence that the lost profits were reasonably certain with respect both to their occurrence *and* to their extent. Review is warranted not only of the appeals court's determination that Fasudil would have been approved by FDA (and thus was capable of generating profits) but also of its determination that Asahi demonstrated with reasonable certainty that its profits from Fasudil would have amounted to hundreds of millions of dollars. If, as demonstrated above, Asahi did not demonstrate with reasonable certainty that it suffered any lost-profits damages, then it logically follows that Asahi also failed the more exacting task of demonstrating with reasonable certainty the extent of its lost profits.

Review is particularly warranted in light of recent research indicating that most predictions regarding future sales of as-yet-unmarketed drugs have proven to be wildly inaccurate. One recent study concluded that even when studies are undertaken following FDA approval and just as marketing is about to begin, they do a poor job of predicting a drug's future revenue and market share and the price that consumers will be willing to pay for the drug. (*See* M. Cha, B. Rifai, and P. Sarraf, "Pharmaceutical Forecasting: Throwing Darts," 12 *Nature*

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[5] Also cutting against the likelihood of eventual FDA approval are the facts that: (1) following termination of the Licensing Agreement, Asahi was unable (despite persistent efforts) to find a new licensee willing to develop Fasudil for the U.S. market; and (2) CoTherix was unable to negotiate a sale price for itself that reflected profits from the future Fasudil sales that Asahi now projects were "reasonably certain" to occur.

*Review Drug Discovery* 737 (Oct. 2013).) Accordingly, a future-revenues projection prepared by CoTherix even before it completed Phase I testing for Fasudil can hardly be deemed evidence that the projected revenues were reasonably certain to be realized many years in the future. Among the many variables that are impossible to predict with a high level of assurance: would consumers be willing to pay the very high prices projected by CoTherix, given that numerous competing SA products were already being marketed at considerably lower prices, and that those competitors could be expected to compete by lowering their prices still further in response to any significant market penetration by Fasudil?

### E. Damages Should Not Be Awarded Based on CoTherix's Development Costs

Review is also warranted of the appeals court's determination that Asahi was entitled to an award of $18.8 million in damages based on the development costs that CoTherix would have incurred in developing an inhaled formulation of Fasudil but for the termination of the Licensing Agreement between Asahi and CoTherix. Asahi asserted that it would have benefitted from those expenditures because the eventual FDA approval of inhaled Fasudil would have assisted Asahi in obtaining similar approval in other parts of the world. But the likely accrual of any such benefit is even more speculative than Asahi's lost-profits claims. Not only are such benefits contingent on gaining FDA approval for marketing inhaled Fasudil, but there is also only the loosest of connections between the dollar value of CoTherix's forgone expenditures and any losses suffered by Asahi in terms of its allegedly reduced ability to win marketing approval for Fasudil elsewhere in the world. Asahi introduced no evidence that it ever sought to win marketing approval elsewhere in the world for SA and PAH. In the absence of any such effort, the appeals court had no basis for concluding with "reasonable certainty" either that Asahi's ability to market Fasudil outside the United States had been impaired or that CoTherix's forgone expenditures properly measured the extent of that impairment.

Review of the development-costs award is particularly warranted because Asahi asserted in its brief that, should its lost-profits award be overturned in whole or in part, it will seek reinstatement of the full amount of the jury's development cost verdict. (Asahi Br. 39.) That verdict was for $187 million; review of that huge award is necessary to ensure that future plaintiffs do not use such claims as a means of obtaining lost-profits awards in disguised form.

**Conclusion**

The Washington Legal Foundation respectfully requests that the Court grant the Petition for Review.

Respectfully submitted,

/s/ Richard A. Samp
Richard A. Samp, Chief Counsel
Cory L. Andrews, Senior Litigation Counsel

cc: See attached Proof of Service

**PROOF OF SERVICE**

I am employed in Washington, District of Columbia. I am over the age of 18 and not a party to the within action; my business address is 2009 Mass. Ave, NW, Washington, DC 20036.

On February 24, 2014, I served true copies of the attached document, described as **AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action as follows:

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**BY MAIL**: I am "readily familiar" with the practices of the Washington Legal Foundation for collecting and processing correspondence for mailing with the U.S. Postal Service. Under that practice, it would be deposited with the U.S. Postal Service that same day in the ordinary course of business. I enclosed the foregoing in sealed envelopes as shown above, and such envelopes were placed for collection and mailing with postage thereon fully prepaid at Washington, DC on

that same day, following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 24, 2014, at Washington, DC.

/s/ Richard A. Samp
Richard A. Samp