

Exhibit C



LEXSTAT CACI 3903N

Judicial Council of California Civil Jury Instructions (CACI)

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Series 3900 DAMAGES

2-3900 CACI 3903N

3903N Lost Profits (Economic Damage)

[*Insert number, e.g., "13."*] **Lost profits.**

To recover damages for lost profits, [*name of plaintiff*] must prove it is reasonably certain [*he/she/it*] would have earned profits but for [*name of defendant*]'s conduct.

To decide the amount of damages for lost profits, you must determine the gross amount [*name of plaintiff*] would have received but for [*name of defendant*]'s conduct and then subtract from that amount the expenses [including the value of the [*specify categories of evidence, such as labor/materials/rents/all expenses/interest of the capital employed*]] [*name of plaintiff*] would have had if [*name of defendant*]'s conduct had not occurred.

The amount of the lost profits need not be calculated with mathematical precision, but there must be a reasonable basis for computing the loss.

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Directions for Use

This instruction is not intended for personal injury cases. Instead, use *CACI No. 3903C, Past and Future Lost Earnings (Economic Damage)*. (See *Pretzer v. California Transit Co. (1930) 211 Cal. 202, 207-208 [294 P. 382]* .)

Insertion of specified types of costs to be deducted from gross earnings is optional, depending on the facts of the case. Other types of costs may be inserted as appropriate.

Sources and Authority

• "The measure of damages in this state for the commission of a tort, as provided by statute, is that amount which will compensate the plaintiff for all detriment sustained by him as the proximate result of the defendant's wrong, regardless of whether or not such detriment could have been anticipated by the defendant. It is well established in California, moreover, that such damages may include loss of anticipated profits where an established business has been injured." (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO* (1964) 227 Cal.App.2d 675, 702 [39 Cal.Rptr. 64] , internal citations omitted.)

• "[E]vidence of lost profits must be unspeculative and in order to support a lost profits award the evidence must show 'with reasonable certainty both their occurrence and the extent thereof.' " (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 907 [215 Cal.Rptr. 679, 701 P.2d 826] , internal citation omitted.)

• "It is enough to demonstrate a reasonable probability that profits would have been earned except for the defendant's conduct. The plaintiff has the burden to produce the best evidence available in the circumstances to attempt to establish a claim for loss of profits." (*S. C. Anderson, Inc. v. Bank of America N.T. & S.A.* (1994) 24 Cal.App.4th 529, 536 [30 Cal.Rptr.2d 286] , internal citations omitted.)

• "Damages for loss of profits may be denied to an 'unestablished' or new business as being too uncertain and speculative if they cannot be calculated with reasonable certainty. 'The ultimate test is whether there has been "operating experience sufficient to permit a reasonable estimate of probable income and expense" ... or, ... "anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability." ' " (*Maggio, Inc. v. United Farm Workers of America, AFL-CIO* (1991) 227 Cal.App.3d 847, 870 [278 Cal.Rptr. 250] , internal citations omitted.)

• The rule denying profits to an unestablished business "is, however, 'not a hard and fast one.' The issue is, rather, whether the damages can be calculated with reasonable certainty." (*S. Jon Kreedman & Co. v. Meyers Bros. Parking-Western Corp.* (1976) 58 Cal.App.3d 173, 184-185 [130 Cal.Rptr. 41] , internal citations omitted.)

• "Lost profits to an established business may be recovered if their extent and occurrence can be ascertained with reasonable certainty; once their existence has been so established, recovery will not be denied because the amount cannot be shown with mathematical precision. Historical data, such as past business volume, supply an acceptable basis for ascertaining lost future profits. In some instances, lost profits may be recovered where plaintiff introduces evidence of the profits lost by similar businesses operating under similar conditions. In either case, recovery is limited to net profits." (*Berge v. International Harvester Co.* (1983) 142 Cal.App.3d 152, 161-162 [190 Cal.Rptr. 815] , internal citations omitted.)

• "If the occurrence and extent of anticipated profits is shown by evidence of reasonable reliability damages are recoverable; uncertainty as to the amount of damages is not fatal; uncertainties are to be resolved against [defendant]." (*Aronowicz v. Nalley's, Inc.* (1972) 30 Cal.App.3d 27, 40, fn. 11 [106 Cal.Rptr. 424] , internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1729

4 Levy et al., *California Torts, Ch. 52, Medical Expenses and Economic Loss*, §§ 52.12, 52.37 (Matthew Bender)

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15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)