J. Noah Hagey, Esq. (SBN: 262331)
hagey@braunhagey.com
Matthew Borden, Esq. (SBN: 214323)
borden@braunhagey.com
Jeffrey M. Theodore, Esq. (SBN: 324823)
theodore@braunhagey.com
Ronald J. Fisher, Esq. (SBN: 298660)
fisher@braunhagey.com
BRAUNHAGEY & BORDEN LLP
351 California Street, Tenth Floor
San Francisco, CA 94104
Telephone: (415) 599-0210
Facsimile: (415) 276-1808

ATTORNEYS FOR PLAINTIFF
OPTRONIC TECHNOLOGIES, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OPTRONIC TECHNOLOGIES, INC., d/b/a Orion Telescopes & Binoculars ®, a California corporation,

Plaintiff,

v.

NINGBO SUNNY ELECTRONIC CO., LTD., SUNNY OPTICS, INC., MEADE INSTRUMENTS CORP., and DOES 1 - 25,

Defendants.

Case No: 5:16-cv-06370-EJD-VKD

PLAINTIFF OPTRONIC TECHNOLOGIES, INC.'S OPPOSITION TO DEFENDANT'S RULE 59 SET-OFF MOTION (DKT. NO. 534)

Date:	February 20, 2020
Time:	9:00 A.M.
Judge:	Hon. Davila
Location:	Crtrm 4 – 5th Fl.
Compl. Filed:	Nov. 1, 2016
First Am. Compl.:	Nov. 3, 2017
Final Pretrial Conf.:	Oct. 10, 2019
Trial Date:	Oct. 15, 2019
Judgment:	Dec. 5, 2019

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Plaintiff Optronic Technologies, Inc. ("Orion") respectfully submits this opposition to Defendant Ningbo Sunny Electronic Co., Ltd.'s Motion to Alter or Amend the Judgment.

INTRODUCTION

Defendant's motion to amend the Judgment based on Orion's settlement with Synta contradicts Defendant's arguments to the Court, seeks to re-litigate issues Defendant lost at trial, and to introduce new, previously undisclosed evidence. It fails as a matter of equity, fact, and law.

After convincing the Court that Orion's Supply Agreement with Synta ***was not*** part of the Synta settlement and therefore admissible under Rule 408, Defendant now argues that the Supply Agreement ***was*** part of the settlement and should be used to take away all profits that Orion earned from its sales of Synta telescopes from 2016 to the end of space-time. This theory is barred by the doctrine of judicial estoppel. It is prohibited by the fact that it would compensate Defendant for the very antitrust violations found by the jury. It is foreclosed by Defendant repeatedly asked the jury to reduce Orion's damages based on the most favored pricing provision in the Supply Agreement. It is based on an undisclosed and inadmissible expert analysis by Defendant's rebuttal expert. The methodology itself makes no sense because it is based on Orion's gross profits, as opposed to whatever marginal benefit (if any) Orion obtained from the Agreement. No court has ever permitted such a set-off, and there is an infinite universe of reasons why this Court should not be the first.

Defendant's set-off theories regarding the Hayneedle Assets fare no better. As with the Supply Agreement, Defendant repeatedly argued to the jury that it should reduce Orion damages because Synta had turned over the assets to Orion in 2016. Thus, Defendant already litigated its set-off theory, and the results of it are already incorporated into the verdict. Moreover, Defendant's valuation of these assets is not supported by any expert opinion and directly contradicts the only admissible opinion on the subject offered at trial.

Under Orion's Settlement Agreement with Synta, Orion was paid $500,000. That is the only amount Defendant is entitled to set off against the Judgment.

BACKGROUND

On November 26, 2019, and after a six-week trial, the jury entered a verdict in Orion's favor on all counts. The jury found that Ningbo Sunny conspired with horizontal and vertical competitors to fix the price of telescopes, allocate the market for telescopes and accessories, and allocate customers. (Dkt. No. 501.) It also found that Ningbo Sunny engaged in anticompetitive activity, attempted to monopolize, and conspired to monopolize the market for telescopes and accessories. (*Id.*) On December 5, 2019, the Court entered a partial judgment on Orion's damages claims awarding Orion $50,400,000. (Dkt. No 518.)

ARGUMENT

Set off is an equitable defense based on the precept that "a plaintiff who has recovered any item of damage from one coconspirator may not again recover the same item from another conspirator." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 348 (1971). To claim an equitable set-off based upon a prior settlement, the judgment debtor bears the burden of proof of showing (1) that a settling co-conspirator's conduct was a legal cause of the judgment creditor's injury; (2) that there was a settlement; (3) that the settlement was for the injuries for which the judgment creditor sued; and (4) that the judgment debtor would otherwise have a valid contribution claim against the settling tortfeasor. Restatement (Third) of Torts: Apportionment of Liability § 16 cmt. f (2000).[1] In the antitrust context, equitable set-offs are imposed after trebling, not before. *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 398 (9th Cir. 1957).

I. DEFENDANT'S CLAIMS FOR SET-OFF OF THE SUPLLY AGREEMENT AND HAYNEEDLE ASSETS ARE BARRED BY BASIC PRINCIPLES OF EQUITY

Defendant's contentions that it is entitled to an equitable set-off of the Supply Agreement and Hayneedle Assets are barred by fundamental principles of equity. First, Defendant is judicially estopped from contending that the Supply Agreement is part of Orion's settlement agreement with Synta after successfully persuading the Court that the Supply Agreement was *not* part of Orion's

[1] This provision replaced Section 885(3) of the Second Restatement of Torts, which both the Motion (Mot. at 2), the Ninth Circuit, and the Supreme Court have cited with respect to equitable set-off. Restatement (Third) of Torts: Apportionment of Liability § 16 cmt. b (2000) ("This Section replaces § 885(3).")

settlement agreement (and thus not barred from admission by Federal Rule of Evidence 408). Second, Defendant cannot seek an equitable set-off relating to the Supply Agreement and Hayneedle Assets because Defendant already tried those issues to the jury, which already accounted for the Supply Agreement and Hayneedle Assets in its verdict. Third, any offset relating to the Supply Agreement would inequitably reward Defendant for its unlawful anticompetitive conduct and is separately barred by the doctrine of unclean hands.

A. Defendant Is Estopped from Contending that the Supply Agreement Was Part of Orion's Settlement with Synta

Defendant seeks to set off $8,665,586.59 as the "Value of Supply Agreement" between Orion and Defendant's co-conspirator Synta. (Mot. at 1.) After successfully convincing the Court that the Supply Agreement was not part of Orion's settlement with Synta and then arguing to the jury that Orion was not entitled to any damages after entering into the Supply Agreement, Defendant is estopped from turning around and arguing that the Supply Agreement was part of Orion's settlement with Synta.

Before trial, Orion moved to bar introduction of Orion's Supply Agreement with Synta under Federal Rule of Evidence 408.[2] (Dkt. No. 329.) Defendant opposed that motion. It expressly argued that:

- The Supply Agreement "is not a settlement, it's not a release of claims. It is a pure business agreement." (Trial Tr. 150:17-19.[3])
- "[T]his document has critical business terms that we want to use to show that there was no price-fixing that happened after the date of this agreement." (*Id.* 146 .)
- "[I]f you look at a series of discussions and some of them relate to settlement and some of them are about a business relationship, the parts that relate to the business

[2] The Motion suggests that the Supply Agreement was entered into by Orion and the "Synta Entities," implying that it was executed by all the entities that settled with Orion before trial. But as the Court noted in its Order denying Orion's motion *in limine* to exclude the Supply Agreement, the Agreement was signed by only two of the 10 settling Synta Entities. (Dkt. 416 at 6:20-25.)

[3] The portions of the trial transcript cited in this Opposition are attached as **Exhibit 1** to the Borden Declaration.

relationship or the business communications, those are not covered by 408 and those can come in and if they're relevant to the case." (*Id*. at 148.)

- "I think the fundamental point that we're trying to make is that 408 does not apply to that supply agreement because you have a separate document. … Somehow magically, because it's attached to the settlement agreement and it's incorporated by reference, we're having this big discussion about whether we can use it …" (*Id*. at 172.)
- "Why should 408 apply to something that is a pure business agreement, pure business relationship and strictly a change in a business relationship without involving any discussion?" (*Id*. at 172-73.)
- "It's expanding 408 far beyond what it should be, and it's protecting and shielding from the jury a huge chunk of this case as to what are the material business terms." (*Id*. at 179.)

In reliance on Defendant's statements, the Court denied Orion's motion, expressly adopting Defendant's position in its Order:

> The Supply Agreement does not fall within the scope of the plain text of Rule 408. The Settlement Agreement and the Supply Agreement are separate documents. The Settlement Agreement was executed by ten separate entities, while the Supply Agreement applies only to Orion, Suzhou Synta Optical Technology Co. Ltd., and Nantong Schmidt Opto-Electrical Technology Co. Ltd. [Citation.] ***The Supply Agreement, standing alone, is only a business document.***"

(Second Order re Motions in Limine and Other Pretrial Motions 6:20-25 (Dkt. No. 416) (emphasis added).) The Court's Order allowed Defendant to introduce the Supply Agreement and its terms into evidence, and as discussed below, the Supply Agreement featured prominently in Defendant's presentation to the jury. (Borden Decl., **Exs. 2**, **3** (slides from Defendant's opening and closing presentations that discuss the Supply Agreement).)

After the jury issued a verdict in Orion's favor, Defendant has now taken the position that the Supply Agreement was actually a "'material term and condition' of Orion's Settlement Agreement" that must be deducted from the Court's judgment. (Mot. at 4:22.)

The law does not countenance the sort of about-face that Defendant is attempting here. "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)). "This rule, known as judicial estoppel, 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *Id*. (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227, n.8 (2000)).

Courts look to three factors to determine whether judicial estoppel applies: (1) whether the party's later position is "clearly inconsistent with its earlier position;" (2) "whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled;" and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Gil v. Wells Fargo Bank, N.A.*, No. 5:15-CV-01793-EJD, 2016 WL 3742372, *3 (N.D. Cal. July 13, 2016) (Davila, J.) (citing *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782-83 (9th Cir. 2001)).

Each element of judicial estoppel applies here. First, the position Defendant is now taking is the polar opposite of the one it took at trial. Defendant's position at trial was that the Supply Agreement "is not a settlement, it's not a release of claims. It is a pure business agreement." (Trial Tr. 150:17-19.) Defendant now contends just the opposite: that the Supply Agreement was a material part of the Settlement Agreement (Mot. at 4:22-24), and that it is therefore entitled to deduct from the Judgment ***all of Orion's profits from sales of products supplied by Synta over the past three years and extending indefinitely into the future***. (Mot. at 5:5-10 and n.2.)

Second, Defendant prevailed in its position at trial. The Court expressly adopted Defendant's prior argument, holding that "[t]he Supply Agreement, standing alone, is only a business document." (Dkt. No. 416 6:25.)

Third, it would be inequitable to permit Defendant to change its position at this stage because the jury considered the Supply Agreement in assessing damages. Defendant explained that it wanted to use the Supply Agreement to reduce the amount of damages Orion could recover:

> That's what we want to use the supply agreement between Synta -- Suzhou Synta and Orion to show is that they entered into a brand new agreement that fundamentally changed the nature of the relationships between the parties in this case and guaranteed to Orion a consistent supply of telescopes at most favored customer Pricing.
>
> So if we're in a case where we're talking about price-fixing and market allocation and alleging -- plaintiff's expert is alleging damages and damages that go on forever, this is a critical piece of information that the jury needs to hear about.

(Trial Tr. at 148.)

> This would be hamstringing our defense of the case to not be able to get out of Mr. Moreo did you enjoy most favored customer pricing status with Suzhou Synta after this date? That is an absolutely critical piece of our defense.

(Trial Tr. at 166.)

At trial, Defendant repeatedly emphasized the Supply Agreement to the jury in an effort to reduce the damages the jury awarded:

> In 2016, in September of 2016, Orion entered into an agreement with Suzhou Synta that gave it most favored customer pricing status, meaning that Suzhou Synta was obligated to give Orion the very best prices for the products that Orion was selling than it gave to any other customer. It was called most favored customer pricing status. In that agreement, Orion had audit rights to indeed make sure it was getting those very best prices from Suzhou Synta. You didn't hear anything at all about that from counsel for Orion.

(Trial Tr. 380:21-381:5 (Ningbo Sunny Opening Argument).)

> As I mentioned before, in September of 2016, they entered into a supply agreement with Suzhou Synta that guaranteed them prices at Suzhou Synta's most favored customer pricing, and that has been in effect through the end of 2016, through 2017, 2018, and 2019.

(Trial Tr. 383:12-16 (Ningbo Sunny Opening Argument).)

> Now, this supply agreement, you haven't heard Orion talk about it at all, but it's a big deal, it's a very big deal, and it fundamentally changed the relationships in the market. What it does is that it legally guarantees Orion most favored customer status such as that Orion gets Suzhou Synta's very best customer pricing, even as compared to Celestron. This is very critical. They're getting the very best prices on anything that Suzhou Synta sells.

(Trial Tr. 2641:5-12 (Ningbo Sunny Closing Argument).)

Defendant made a strategic choice to admit and argue the Supply Agreement to the jury in an attempt to undermine Orion's claimed damages. Defendant was likely successful in that regard, as the jury awarded Orion less than the damages than it requested. Having made its strategic decision to use the Supply Agreement with the jury, Defendant cannot now go back to that well a second time for an equitable offset. Defendant using the Supply Agreement to reduce its damages twice would be just as unfair as permitting Orion a double recovery. (*See* Section I.B *infra*.)

For this reason alone, Defendant's attempt to use the Supply Agreement as a basis for an offset should be denied.

B. There Can Be No Offset for the Supply Agreement or Hayneedle Assets Because Those Issues Were Tried to the Jury

Defendant's request to use the Supply Agreement and Hayneedle Assets as an offset separately fails because it already argued those issues to the jury. Defendant argued that the jury should reduce the amount of damages Orion received because Orion got most favored customer pricing under the Supply Agreement and had received the Hayneedle Assets. Accordingly, Defendant cannot ask for a set off based on either.

Orion sought $38.5 million in damages for overcharges that occurred from 2012 to 2019. In its closing argument, Defendant argued that the most favored customer clause in the Supply Agreement cut off Orion's damages in 2016. Defendant expressly argued:

> The second reason why overcharges make no sense after September of 2016 is that Orion entered into its long-term agreement with Suzhou Synta.
>
> Now, this supply agreement, you haven't heard Orion talk about it at all, but it's a big deal, it's a very big deal, and it fundamentally changed the relationships in the market.
>
> What it does is that it legally guarantees Orion most favored customer status such as that Orion gets Suzhou Synta's very best customer pricing, even as compared to Celestron.
>
> This is very critical. They're getting the very best prices on anything that Suzhou Synta sells.

(Tr. at 2641.) Defendant further argued:

> And Orion, they don't just have to trust Suzhou Synta about getting those lowest prices. Orion, as we see here on the screen, is legally entitled to audit Suzhou Synta's prices to make sure it's really getting that most favored customer pricing, to make sure that it's -- those prices are really getting delivered to it. It has a contractual provision to enforce it.

> And make no mistake, Orion is taking full advantage of the supply agreement. Since the supply agreement went into effect, Orion has been purchasing 75 to 80 percent of their telescopes from Suzhou Synta.

(*Id*. at 2641-42.) Ultimately, the jury awarded Orion $16.8 million in damages.

A district court's power to equitably impose a set-off of its judgment against a non-settling defendant based upon prior settlements by settling joint tortfeasors is premised upon preventing a plaintiff from obtaining a double recovery. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 348 (1971) (purpose of doctrine is to ensure that "a plaintiff who has recovered any item of damage from one coconspirator may not again recover the same item from another conspirator."); *see also* Restatement (Third) of Torts: Apportionment of Liability § 16 cmt. f (2000) (judgment debtor bears burden of showing that prior settlement was for the injuries for which the judgment creditor sued).

The inverse is also true, *i.e.*, a defendant cannot use issues actually tried before the jury to reduce a judgment a second time via a motion for an equitable offset. If equity demands that plaintiffs be barred from double recovery, equity must *a fortiori* demand that defendants be equally barred from double recovery.

As shown above, Defendant argued to the jury that the Supply Agreement and its most-favored-customer clause reduced Orion's damages claim because after 2016, Orion was not overpaying for telescopes from Synta. Defendant's expert attempts to base her valuation of the Supply Agreement exclusively on Orion's purchases from Synta under the most favored customer clause – the very provision that Defendants argued to the jury. (Dkt. No. 535.) As a result, the Supply Agreement is already "priced in" to the jury's verdict, and Defendant cannot meet its burden of proving otherwise. Granting a further offset would result in an inequitable double recovery for Defendant.

Similarly, the amount of Orion's actual damages arising from Defendant's interference with the Hayneedle transaction was fully litigated at trial.[4] Orion's damages expert Dr. Zona presented

[4] After Orion entered into an agreement to purchase certain assets (including the URL Telescopes.com) from a third-party entity called Hayneedle, Defendant and the Synta Entities conspired to jointly withdraw credit terms to prevent Orion from acquiring the assets. (TX 1773; TX 1775; Trial Tr. 1466:15-22.) Orion later obtained the assets in its settlement with Synta.

his analysis that the loss of the Hayneedle assets caused $1.8 million in damages to Orion. (Trial Tr. (2049:24-2051:4.) Defendant cross-examined Dr. Zona on that topic, (Trial Tr. 2092:14-2094:7), and also presented its rebuttal expert's response to Dr. Zona's analysis. (Trial Tr. 2180:1-24.) Defendant also elicited testimony from Orion's president Peter Moreo informing the jury of the fact that Orion had received the Hayneedle assets:

> Q. And today Orion, in fact, owns those URL's, including telescopes.com, doesn't it?
>
> A. Yes.
>
> Q. And that's why if I go to the internet today and I type in telescopes.com with an "s," I get redirected to Orion's website; right?
>
> A. Yes.
>
> Q. And, indeed, Orion has owned these URL's, the ones it was trying to purchase from Hayneedle, since September of 2016; right?
>
> A. When we received the domains, they had been greatly diminished in value. And, yes, we received them in September of 2016.
>
> Q. September of 2016. So just a little bit more than two years after you tried to buy them from Hayneedle in the first place; right? That was September 2014. You got them in September of 2016?
>
> A. Roughly, yes.

(Trial Tr. 1820:15-1821:7.) Thus, just as with the Supply Agreement, the jury verdict already reflects the fact that Orion received the Hayneedle assets. Granting Ningbo Sunny's request to offset the judgment based upon Orion's subsequent receipt of the Hayneedle assets would grant Ningbo Sunny an inequitable windfall.

In sum, the jury's verdict already reflects the Supply Agreement and receipt of the Hayneedle Assets, and any offset of the judgment relating to these issues would therefore create an inequitable double recovery windfall for Ningbo Sunny. This is a separate and independent reason why Defendant's request for an offset relating to the Supply Agreement and the Hayneedle Assets should be denied.

C. Any Offset for the Supply Agreement Would Inequitably Reward Ningbo Sunny for Its Illegal Conduct

The Supply Agreement with Synta was designed to ensure that Orion did not pay more than its peers for telescopes. (Settlement Agreement § 4.) Defendant takes the position that all the profits Orion gained through the agreement should be set off against the harm Defendant caused

Orion. (Mot. at 5:5-10 & n.2.) This position lacks any basis in equity because it is based on the premise that Orion should be overpaying for telescopes.

The jury found that Ningbo Sunny attempted to monopolize the telescope market and conspired with the Synta entities to do so. (Dkt. No. 501.) One consequence of Ningbo Sunny's unlawful conduct was that the telescope market was highly concentrated, as that term is defined by the Department of Justice and Federal Trade Commission. *See* U.S. Horizontal Merger Guidelines § 5.3 (defining a market with a Herfindahl-Hirschman Index ("HHI") of 2500 or greater as a highly concentrated market; (TX 1939 (reflecting that the telescope market's HHI exceeded 2500 from 2012 through 2018).) Indeed, Ningbo Sunny and Synta's anticompetitive conduct resulted in the two companies controlling over 80% of the telescope market in 2018. (TX 1938.) The jury expressly found that as a result of Defendant's unlawful market concentration, Orion overpaid for telescopes.

The evidence and the jury's findings make clear that after Defendant cut off Orion's supply, Orion was forced to purchase as much as 75% of all its telescopes from Synta. (Trial Tr. 1770:15-17.) Thus, awarding Ningbo Sunny its requested relief in connection with the Supply Agreement—*i.e.*, all of Orion's profits from its sales of products supplied by Synta over the last three years and indefinitely into the future—is in effect a request that the Court reward Ningbo Sunny for its illegal (and successful) concentration of the telescope market.

As the cases cited by the Motion make clear, a motion for a set-off is a request for the court to exercise its equitable jurisdiction to prevent a double recovery by a plaintiff. *See Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp.*, 995 F.2d 425, 435 (3d Cir. 1993) (noting that the foundation of a set-off is "the equitable principle that one who has recovered from one coconspirator may not recover the same item of damage from another conspirator.")

Equity does not contemplate this Court exercising its equitable discretion to reward Ningbo Sunny for its illegal acts. Under these circumstances—where the volume of business Orion does with Synta was directly caused by and correlated to Ningbo Sunny's and Synta's unlawful and anticompetitive concentration of the market—the doctrine of unclean hands bars relief. *See Henderson v. United States*, 575 U.S. 622, 135 S. Ct. 1780, 1783 (2015) ("The unclean hands

doctrine proscribes equitable relief when, but only when, an individual's misconduct has 'immediate and necessary relation to the equity that he seeks.'"). This is a separate and independent reason why Defendant's request for an equitable offset based upon the Supply Agreement should be denied.

II. DEFENDANT HAS NOT PROVEN IT IS ENTITLED TO ANY SET-OFF BEYOND THE $500,000 SETTLEMENT PAYMENT ORION RECEIVED FROM SYNTA

In addition to being inequitable, Defendant's set-off motion fails as a matter of fact because Defendant has not proven that it is entitled to any set-off beyond the $500,000 that Synta paid Orion pursuant to the Settlement Agreement (an amount Orion does not contest). As the party asserting the equitable defense of set-off, Defendant bears the burden of proof. It has not met this burden because the evidence it seeks to rely on is inadmissible under Federal Rules of Civil Procedure 26, 37 and Federal Rule of Evidence 702.[5]

A. Defendant's Entire Argument about the Supply Agreement Is Premised on an Inadmissible, Undisclosed Expert Opinion

The only valuation of the Supply Agreement Defendant has put into the record is the Declaration of Celeste Saravia, Ph.D. (Dkt. No. 535). Defendant cannot rely on this declaration because it is an undisclosed expert opinion.

Despite multiple entreaties from Orion, Defendant insisted that it would not present any affirmative expert testimony in defense of this case and would only offer rebuttal testimony. (*E.g.*, Borden Decl. **Ex. 6** (5-2-19 Tr. at 9-10) ("It's not true that we're going to do anything that is not properly within the scope of rebuttal testimony. Under the federal rules you're allowed to contradict or rebut evidence on the same subject matter identified by another party. That's exactly what we're

[5] Defendant could have submitted these fact questions to the jury, as noted in the authorities it cites. (Mot. at 4, 5.) *Bal Theatre Corp. v. Paramount Film Distrib. Corp.*, 206 F. Supp. 708, 714 (N.D. Cal. 1962) ("This intangible right [of setoff], though unliquidated in amount, was capable of being evaluated, and when submitted to the jury via special interrogatory, the jury could find and did find and assess a value on this intangible right."); *see also Winchester Drive-In Theatre, Inc. v. Twentieth Century-Fox Film Co.*, 232 F. Supp. 556, 563 (N.D. Cal. 1964), *reversed on other grounds by Twentieth Century-Fox Film Corp. v. Winchester Drive-In Theater, Inc.*, 351 F.2d 925 (9th Cir. 1965) ("The problem of determining the value of non-monetary consideration paid for the release is no more difficult than the commonplace difficulties encountered in determining damages in any antitrust case. The problem can be handled by a special interrogatory to the jury as was done in this district in *Bal Theatre Corp. v. Paramount Film Distributing Corp., D.C.*").

going to do.").) The declaration Defendant relies on for this motion purports to be an affirmative opinion about the value of the Supply Agreement. (Saravia Decl. ¶¶ 2-5 (Dkt. No. 535.) Such an opinion was not disclosed in Dr. Saravia's rebuttal report. (Borden Decl. **Ex. 4** (Dr. Saravia's Rebuttal Report).) It does not rebut any opinion offered by Orion's damages expert J. Douglas Zona, Ph.D. (Borden Decl. **Ex. 5** (Dr. Zona's Report).) As such, it is plainly barred by Rule 26(a)(2) and Rule 37, *see Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001) (exclusion under Rule 37 is "self-executing, automatic sanction") (quoting Rule 37 Ad. Comm. Notes) (internal quotes omitted), and this Court's prior order that, given her failure to disclose any affirmative opinions, Dr. Saravia was prohibited from offering any affirmative expert testimony on damages. (Trial Tran. 2126:4-15.)

As the party seeking a set-off, Defendant bears the burden of proof. Restatement (Third) of Torts: Apportionment of Liability § 16 cmt. f (2000). Defendant's failure to offer any admissible proof as to the value of the Supply Agreement is a separate and independent reason why its set-off motion fails.

B. Defendant's Valuations of the Supply Agreement and Hayneedle Assets Are Separately Unsupported

Defendant separately is not entitled to a set-off relating to the Supply Agreement and Hayneedle Assets because the Motion fails to set forth a cogent methodology for valuation, and fails to provide sufficient evidence sufficient to support the outsized valuations claimed by Defendant.

1. Defendant's Valuation of the Supply Agreement Is Improper Because It Is Based on *Absolute* Profits Rather than *Marginal* Profits

Even if Dr. Saravia were permitted to offer an opinion on value of the Supply Agreement, her four-paragraph theory is entirely improper. Defendant contends that it is entitled to all profits earned by Orion via sales of products supplied by Synta over the last three years—which Defendant values at more than $8.6 million. (Mot. at 5:5-10.) Defendant also lays claim to all *future* profits earned by Orion selling products produced by Synta. (*Id.* n.2.)

As explained below, no court has allowed a non-settling defendant to claim profits tangentially associated with commercial terms in a settlement as an offset. (*See* Section III.B,

infra.) But even if a court were to do so, a non-settling defendant could never assert a colorable claim against ***all*** of a plaintiff's profits. At most, a non-settling defendant could only plausibly claim the ***marginal*** profit attributable to the settlement—that is, the additional profits (if any) that the settling plaintiff earns as a result of the settlement, above and beyond the profit-per-unit that the settling plaintiff earned in the ordinary course of its prior-existing commercial relationship with the settling defendant before any dispute broke out. Defendant has not offered any such calculation here.

The evidence at trial showed that Orion was sourcing telescopes from Synta long before the Supply Agreement was executed in September 2016. (TX 1366.001 (July 28, 2011 email from P. Moreo to Synta regarding holiday orders).) Orion was therefore earning profits by selling Synta products long before the Supply Agreement existed.

Under these circumstances, Defendant cannot simply set off all of Orion's post-settlement profits from selling Synta products. At most, Defendant is entitled only to the *marginal* profit attributable to the Synta settlement. Defendant offered no such calculation, and cannot do so for the first time on reply.[6] *See, e.g.*, *Dragu v. Motion Picture Indus. Health Plan for Active Participants*, 144 F. Supp. 3d 1097, 1113 (N.D. Cal. 2015) ("[I]t is improper for a moving party to introduce new facts or different legal arguments in the reply brief than those presented in the moving papers."); *Stevens v. Davis*, No. C 09-00137 WHA, 2019 WL 249398, at *12 (N.D. Cal. Jan. 17, 2019) (same); *see also State of Nev. v. Watkins*, 914 F.2d 1545, 1560 (9th Cir. 1990) ("[Parties] cannot raise a new issue for the first time in their reply briefs.") (citations omitted).

Dr. Saravia's analysis is flawed and unreliable in numerous other ways. First, it uses a profit margin that Orion's damages expert, Dr. Zona, calculated in a completely different context (all Orion sales from 2012-2018). Second, it uses that margin to calculate a purported figure for Orion's Synta profits, which Dr. Saravia even admits depends on a massive assumption—namely,

[6] To have a cogent argument for recovery, the Motion would need to at least (1) calculate Orion's average pre-settlement per-Synta-unit profit; (2) calculate Orion's average post-settlement per-Synta-unit profit; (3) subtract the pre-settlement per-Synta-unit profit from the post-settlement per-Synta-unit profit; and (4) take the difference from step 3 (if any) and multiply that by the number of Synta units Orion has sold after the settlement to arrive. Even then, a robust analysis would run statistical regressions to ensure that the settlement was the true cause of any profit growth, and to remove any growth caused by other factors (e.g., inflation).

"that Orion had the same margin on products supplied by Suzhou Synta as on products from other suppliers." (Saravia Decl. ¶ 5 n.3 (Dkt. No. 535).) Third, Dr. Saravia did not even attempt to disaggregate profits that attributable to Synta's settlement with Orion from profits that Orion would have earned in the ordinary course of its prior commercial relationship with Synta.

For all these independent reasons, even if Defendant was allowed to use undisclosed expert testimony in this phase of the trial, the opinion they have submitted is inadmissible. This is another separate reason why Defendant has failed to carry its burden of proof here.

2. Defendant's Unsupported Valuation of the Hayneedle Assets Is Not Based on Any Expert Analysis and Is Contrary to the Evidence at Trial

Defendant separately fails to carry its burden of proof as to the value of the Hayneedle Assets. Instead of offering an inadmissible and speculative expert declaration as it did with the Supply Agreement, Defendant offers virtually no evidence at all – and what it does offer is actually contradicted by the evidence at trial. This fails to carry Defendant's burden.

In its Motion, Defendant seeks a $3-million-dollar offset for the Hayneedle Assets, which *is nearly double the entire amount of Orion's Hayneedle damages estimated by Dr. Zona*. (Borden Decl. **Ex. 5** ¶ 126 (Zona Report) (estimating $1.8 million in total Hayneedle damages.). The Motion offers no expert analysis to support Defendant's valuation; rather, the sole basis for it is a single line in a six-page document that reads simply, "Add $2 to 3M for URLs." (TX 1241.004.)

Defendant attempts to frame its valuation as based upon the revenues (not profits) that the Assets were generating *before* Defendant and Synta conspired to prevent Orion from acquiring them. (Mot. at 3-4.) However, the unrebutted testimony at trial showed that "[w]hen [Orion] received the domains, they had been greatly diminished in value." (Trial Tr. 1820:25-1821:1) (P. Moreo testimony).

Under these circumstances, Defendant has not carried its burden of proving the value of the Hayneedle assets. Its proffered valuation of the Hayneedle Assets is unsupported, speculative, and is predicated on nothing more than six words plucked out of 6.5 million pages of documents exchanged in this case. As with the valuation of the Supply Agreement, any serious analysis of the value of the Hayneedle Assets must account for the cost of operating the assets and compare that

figure to the amount of revenue Orion has obtained from owning them. The Motion, however, makes no attempt to do so even though Orion produced every bit of transactional data to Ningbo Sunny in this action. This is yet another separate and independent reason why Defendant has failed to meet its burden here.

III. DEFENDANT'S MOTION IS LEGALLY DEFICIENT

In addition to the reasons discussed above, Defendant's Motion suffers from other fatal legal deficiencies that bar any offset relating to the Supply Agreement and Hayneedle Assets. First, Defendant may not seek offset relating to the Supply Agreement because the law only permits offsets where a plaintiff has recovered *the same item of damages* from another party. Given that Defendant successfully moved for summary judgment on Orion's claim that Sunny refused to supply Orion, it cannot seek offset relating to the Supply Agreement. Second, no court has ever awarded profits that are only tangentially related to commercial terms in a settlement as an offset, and the Court should reject Defendant's request to bend the law to do so here.

A. The Supply Agreement Cannot Support Offset Because Orion Did Not Seek Damages for Refusal to Deal

The purpose of the offset doctrine is to ensure that "a plaintiff *who has recovered any item of damage* from one coconspirator may not again recover the *same item* from another conspirator." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 348 (1971) (emphasis added). The law is thus clear that offset is not available unless the money received in the settlement relates to the same item of damages awarded by the judgment. By way of example the Supreme Court in *Zenith* noted that where a settlement only provided recompense for past damages, that settlement could not be used to offset future damages. *Id.*; *see also* Restatement (Third) of Torts: Apportionment of Liability § 16 cmt. f (2000) (defendant/judgment debtor bears burden of showing that prior settlement was for the injuries for which the plaintiff/judgment creditor sued).

Here, Ningbo Sunny is seeking an offset for the profits Orion earned selling telescopes supplied by Synta. But Orion did not seek damages relating to a loss of supply at trial, nor could the jury have awarded any such damages. Accordingly, Ningbo Sunny is not entitled to any reduction of the judgment based upon the Supply Agreement.

Orion alleged a Section 1 refusal to deal claim against Ningbo Sunny based upon Ningbo Sunny's refusal to supply Orion. Orion's damages expert Dr. Douglas Zona calculated that Orion suffered $1.1 million in damages arising from Ningbo Sunny's refusal to deal. (Borden Decl. **Ex. 5** ¶¶ 127-131, 132.)

Defendant moved for summary judgment on Orion's refusal to deal claim, which the Court granted. (Dkt. No. 338 14:9-15:10.) As a result of the Court's Order, Orion and Dr. Zona were precluded from seeking damages at trial relating to Defendant's refusal to deal. (Trial Tr. 2365:3-6 ("MR. HAGEY: . . . We're not asking for refusal to deal damages. We understand that that damages bucket is out.")

Because the judgment does not reflect damages arising from Orion's loss of supply, any profits Orion earned from being supplied by Synta cannot create a risk of double recovery. Accordingly, Ningbo Sunny may not use Orion's Supply Agreement with Synta and profits Orion earned from selling that supply as a basis to offset the judgment.

B. Profits that Are Only Tangentially Related to Commercial Terms in a Settlement Agreement Are Not Subject to Set-Off

Ningbo Sunny cites no authority holding that a non-settling party is entitled to equitable offset for profits tangentially related to commercial terms within a settlement agreement, and there is no reason in law or logic to extend the law of equitable set-off to encompass such profits.

As mentioned above, Ningbo Sunny's Motion seeks a set-off of all of Orion's profits from sales of products supplied by Synta over the past three years and extending indefinitely into the future. (Mot. at 5:5-10 and n.2.) But the profits associated with Orion's purchases of Synta goods under the Supply Agreement are not a transfer of wealth from Synta to Orion to resolve claims. A review of the Supply Agreement shows that it is a 42-page forward-looking document that set forth the terms of the future commercial relationship between Synta and Orion—a relationship that produces profits for both Synta and Orion. (Supply Agreement (Dkt. No. 534-4).)

Parties resolving commercial disputes often set forth the terms upon which their future commercial relationship shall be governed within settlement agreements. Given that both parties to an agreement profit from the commercial relationships governed by these terms, it makes little

sense to understand those profits as a transfer from one party to another in order to settle a claim, as is necessary to entitle a non-settling defendant to an offset.

None of the cases cited by Ningbo Sunny hold that profits tangentially related to commercial terms in a settlement agreement are subject to offset. *Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp.* involved unusual facts where a settling defendant allegedly misrepresented the value of an airplane that the settlement gave plaintiff an option to purchase. 995 F.2d 425, 435 (3d Cir. 1993). The plaintiff threatened to sue the settling defendant for fraudulent inducement, and settling defendant and plaintiff entered a second settlement agreement in which the settling defendant gave more cash to the plaintiff to cover the difference in value. *Id.* The Third Circuit affirmed the district court's holding that value of the second settlement rather than the first was the operative settlement for set-off purposes.[7] *Id.*

Bal Theatre Corp. v. Paramount Film Distrib. Corp. also involved unusual facts where the jury was specifically asked to determine the value of an option right for film exhibition that was part of a prior settlement, and did so. The Court held that the value assigned by the jury should be offset against the verdict against a non-settling defendant. 206 F. Supp. 708, 714 (N.D. Cal. 1962).

At most, then, *Gulfstream* and *Bal Theatre* stands for the proposition that where there is a definite value assigned to an option contract exchanged as part of a settlement, then the non-settling defendant is entitled to an offset for the value of the option.

The rest of the cases cited by the Motion say nothing about whether profits tangentially connected to commercial terms in a settlement agreement are subject to set-off. *Zenith Radio Corp. v. Hazeltine Research, Inc*. merely stated the general rule that a "plaintiff who has recovered any item of damage from one coconspirator may not again recover the same item from another conspirator." 401 U.S. 321, 348 (1971). Both *Flintkote Co. v. Lysfjord*, and *In re Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig.* merely state the rule that equitable offsets are

[7] Significantly, *Gulfstream* did not "hold[] that . . . courts must bring an 'informed economic judgment to bear in assessing [a settlement's] value' for set-off purposes," or that "[i] probative evidence of the monetary value of such a benefit is available, it of course should be used," contrary to the Motion's assertions. (Mot. at 13-16.) Rather, that language is from a parenthetical citation to an entirely different case that addressed the award of attorney's fees in the context of non-monetary settlements. *Gulfstream*, 995 F.3d at 435 (quoting *Merola v. Atlantic Richfield Co.*, 515 F.2d 165, 172 (3d Cir. 1975).)

imposed after trebling rather than before. 246 F.2d 368, 398 (9th Cir. 1957); 636 F. Supp. 1138, 1152 (C.D. Cal. 1986). And the prior settlements in *In re TFT-LCD (Flat Panel) Antitrust Litig.* exceeded the verdict by hundreds of millions of dollars, and so Judge Illston had no occasion to consider commercial terms in a settlement agreement.

Ningbo Sunny is seeking a vast expansion of the law of equitable set off—one wholly untethered to the policy considerations undergirding the doctrine. Indeed, the rule Ningbo Sunny advances would likely stifle parties' creative ability to resolve their disputes on mutually beneficial rather than zero-sum terms. Certainly, commercial litigants will be hesitant to enter into sensible commercial resolutions if they believe non-settling defendants will be entitled to all profits tangentially associated with that agreement from that moment to infinity (and beyond). The Court should decline Ningbo Sunny's invitation to go where no court has gone before.

CONCLUSION

For the foregoing reasons, Orion respectfully requests that the Court deny Ningbo Sunny's Motion to Alter or Amend the Judgment except as to the $500,000 payment from Synta to Orion in the Settlement Agreement, and to issue the accompanying Proposed Order filed by Orion herewith.

Dated: January 30, 2020

Respectfully submitted,

BRAUNHAGEY & BORDEN LLP

By: /s/ *Matthew Borden*
Matthew Borden

Attorneys for Plaintiff OPTRONIC TECHNOLOGIES, INC. d/b/a Orion Telescopes & Binoculars ®