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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,

Defendant.

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

PLAINTIFF OPTRONIC TECHNOLOGIES, INC.'S REPLY IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO 15 U.S.C. § 15(a)

Date:	February 20, 2020
Time:	9:00 A.M.
Judge:	Hon. Edward J. Davila
Location:	Courtroom 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES

RULES

Orion respectfully submits this Reply in support of its motion for attorneys' fees and costs.

INTRODUCTION

In its Opposition, Defendant does not assert that any specific category of legal fees sought by Orion is unreasonable or somehow disproportionate to the amount spent by Defendant – which admittedly paid over twice as much as Orion and lost the case. Instead, Defendant has made various procedural objections designed to turn Orion's statutory right to attorneys' fees into needless satellite litigation. Those objections lack merit and are not grounds for denying Orion's motion.

The lead argument advanced by Defendant is that Orion did not sufficiently document its fees. (Opp. at 2-4.) However, Orion provided a detailed accounting of the tasks its lawyers performed, the amount of hours they spent, and their levels of skill and experience. Defendant offers no objection that any of these activities were unreasonable or disproportionate to the way Defendant elected to defend the case. There is no legal requirement that Orion provide the microscopic level of detail demanded by Defendant – especially given the undisputed reasonableness of Orion's billing compared to Defendant's.

Defendant also asserts that the rates charged by the contract attorneys and paralegals Orion used are not supported. To the contrary, the rates submitted by Orion are the actual rates that Orion paid. Defendant does not dispute that these rates have been approved by other courts, and have never been rejected by any court. Defendant also claims that Orion did not meet and confer about fees without explaining that after Orion attempted to do so, Defendant stated that meeting and conferring would be futile. Defendant cannot argue otherwise now.

Finally, Defendant asserts that Orion seeks non-recoverable costs. However, the Clayton Act allows Orion to recover, in addition to taxable costs, out-of-pocket expenses that are typically charged to a fee-paying client and that Orion incurred here (except for expert costs, which Orion inadvertently included and is excising from its request). Defendant also argues that Orion's request for its costs is improper because Orion did not submit a separate bill of costs, but such a needless formality is not required under cost-shifting statutes.

Accordingly, Orion respectfully requests that the Court award **$4,730,371.73**.

ARGUMENT

I. ORION'S REQUESTED FEES ARE REASONABLE

A. Orion Adequately Substantiated Its Request for Attorneys' Fees

Defendant argues that Orion failed to provide sufficient records to show the reasonableness of the hours it expended and should have submitted its time notes along with its motion. (Opp. at 3-4.) This misstates the law. Time records are not necessary if there is other evidence showing that the fees are reasonable under the circumstances of the case. *Frank Music Corp. v. Metro-Goldwyn-Mayer Inc.*, 886 F.2d 1545, 1557 (9th Cir. 1989) ("The lack of contemporaneous records does not justify an automatic reduction in the hours claimed, but such hours should be credited only if reasonable under the circumstances and supported by other evidence such as testimony or secondary documentation."). Defendant does not dispute that Orion has provided testimony and documentation of its fees. Nor does it dispute that Orion's fees are necessarily reasonable given that they are half of the fees paid by Defendant, and were incurred in the context of a complicated antitrust case with substantial documents and depositions. (Mot. at 5-7.)

Nor can Defendant contest that the amount of fees Orion incurred was largely driven by the way Defendant elected to litigate the case. *See Burgess v. Premier Corp.*, 727 F.2d 826, 841 (9th Cir. 1984) ("although [defendants] had the right to play hardball in contesting [plaintiffs'] claims, it is also appropriate that [defendants] bear the cost of their obstructionist strategy"). Defendant argues that it did not obstruct discovery (Opp. at 3-4), but it does not deny that it dumped tens of thousands of pages of documents in Chinese on Orion – which came from the email account of its CEO Peter Ni – long after the Court-ordered fact discovery cut-off, long after they had repeatedly represented to the Court that its production was complete, and after they had blown through all the Court-ordered case-management deadlines. (Mot. at 8.)

Defendant also quotes the Court's comments as requiring Orion to submit "appropriate documentation for the Court to review." (Opp. at 3 (quoting 11/26/2019 Tr. at 2830:11-14).) But Defendant omits that the Court went on in its very next sentence to specifically instruct that for Orion's billings, it "should at a minimum *have those available should the Court wish to inspect them*, or if the Court decides that it's appropriate, the Court could appoint a special master to

review the billings and those types of things….you are going to have to *collect and have available* any documentation, supporting documentation with the fees." (11/26/2019 Tr. at 2830:18-2831:1 (emphasis added).) As shown in its moving papers, that is exactly what Orion did. (Mot. at 9.) Orion explained that its actual time entries contain significant amounts of attorney work product and potentially privileged materials, and that it would make those billings available "should the Court determine that is necessary." (*Id*.) Because Orion complied with the Court's instruction, Defendant cannot argue that Orion failed to meet its burden. Their citations to numerous cases where the courts did not provide such instructions are therefore unavailing.

The cases on which Defendant relies do not provide any basis for denying Orion's fee request. For example, *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1306 (9th Cir. 1994) (cited by Opp. at 2), was a common fund case where plaintiffs were seeking $103 million in fees. The Court found that the District Court did not abuse its discretion in requiring more detail from one firm but that it did abuse its discretion in denying that firm its fees after it submitted more detailed records. It is unclear what the plaintiff's firm submitted in that case, but it does not undermine the Ninth Circuit's rule in *Frank Music* that a district court may assess fees without resort to time notes if they are supported by declarations and the circumstances show the fees to be reasonable – which is indisputably the case here. 886 F.2d at 1557.

The few challenges Defendant makes to specific items in Orion's fee request underscores that its objections are makeweight. Defendant argues that Orion should not be able to recover for pre-suit investigation. (Opp. at 3-4.) In a complicated antitrust case such as this one, substantial pre-suit investigation is obviously necessary before filing the case (and to comport with counsel's obligations in signing a pleading). The pretrial investigation activities by Ms. Schueller to which Defendant objects included talking to potential witnesses to gather facts, research on Defendants and co-conspirators so Orion knew which actual entities to sue, research on the legal substance and requirements of Orion's claims and which claims Orion could and could not bring, research on service of process issues for the foreign parties and co-conspirators, research on Defendants' and their co-conspirators' market shares and market power, and many other legal and factual issues that any responsible lawyer would look into prior to filing suit. (Borden Decl. ¶¶ 2-3.) Defendant does

not object to Ms. Schueller's rate, which is far less than former Ninth Circuit clerks of her vintage charge. Its demand for more detail about her time entries – which amount to $63,735 during her entire involvement in the case – is preposterous. Ms. Schueller helped work up the case, was the only associate on this case for Orion for almost a year and was directly communicating with Defendant's team of lawyers about discovery issues for many months. (*Id*.) During her entire tenure, she billed a mere fraction of what Defendant likely spent on its motion to dismiss, alone. Defendant's objection to her time simply underscores that it is trying to turn this fee petition into intergalactic combat. That is wholly unnecessary.[1]

Referencing settlement communications in another matter, Defendant argues that Orion's counsel investigated a potential class action against Defendant (not involving Orion), that Orion investigated potential claims against Defendant's coconspirators for failing to comply with their Settlement Agreement, and speculates that Orion's billing might include such activities. (Opp. at 3-4.) Leaving aside the impropriety of bringing up settlement communications, Orion has not included any fees for such activities. The Declaration submitted in support of this motion states that Orion is seeking fees for the pre-suit investigation work done in *this* case, not in other matters. (Hagey Decl. ¶¶ 34-35 (discussing research and investigation of "Orion's claims" and in support of "Orion's pleadings"); Borden Decl. ¶ 4.) Defendant's speculation is not a basis for denying Orion's motion.

Defendant finally objects that Orion cannot seek fees for paralegals and legal assistants for such tasks as managing documents in the e-discovery system, categorizing and tracking documents, assisting with court filings, and preparing and organizing voluminous documents for trial, hearings, and depositions. (Opp. at 4 (citing *LaToya A. v. San Francisco Unified Sch. Dist.*, No. 3:15-CV-04311-LB, 2016 WL 344558, (N.D. Cal. Jan. 28, 2016).) *LaToya A.*, however, does not support their argument. In that case, the court explained that *purely clerical* tasks, such as mailing copies

[1] Notably, the case on which Defendant relies upon, *Sierra Club v. U.S. E.P.A.*, 625 F. Supp. 2d 863 (N.D. Cal. 2007), expressly confirms that a prevailing party can recover fees for pre-suit investigative work, noting that "this sort of background research is often vital in ascertaining the scope of the issues presented and determining whether there is non-compliance, and, therefore, justification for the litigation." *Id.* at 871.

of documents, forwarding documents to attorneys, preparing proofs of service, processing records, and calendaring documents, as well as photocopying, three-hole punching, filing documents, calendaring, and preparing the summons and complaint for filing, are not compensable under a fee-shifting statute. *Id*. at *9 (citing *Yates v. Vishal Corp.*, No. 11-cv-643-JCS, 2014 WL 572528 (N.D. Cal. Feb. 4, 2014)). The *LaToya A.* court noted that, by contrast, work that is more paralegal in nature – including the specific example of preparing binders of exhibits for hearings – are compensable. The paralegal work Defendant challenges here – managing the production of nearly 6.5 million pages of documents and preparing and organizing those documents for use at trial, hearings, and depositions – meets the definition of work that is "legal in nature" and compensable as set forth in *LaToya A.*

B. The Rates Orion Actually Paid for Contract Attorneys and Legal Assistants Were Reasonable

Defendant does not object to the rates charged by BHB. It argues, however, that Orion "has submitted no evidence" to support its requested rates for contract attorneys, paralegals, and legal assistants. (Opp. at 5.) As explained in the motion and undisputed by Defendant, Orion employed four contract lawyers to save money, and these lawyers were billed at among the lowest rates of any attorney who worked on the matter, ranging from $225-$450/hr. (Hagey Decl. ¶ 45.) Their rates – which apply to just under 172 hours of time during the more than three years of this litigation (*id*. ¶¶ 47-50) – are more than reasonable. (Borden Decl. ¶¶ 6-8.)

With respect to its paralegals and legal assistants, Orion submitted unrefuted evidence that courts have approved BHB's paralegal rates. (Hagey Decl. ¶ 8.) Further, the United States Attorney's Office for the District of Columbia prepares a matrix of hourly rates for attorneys and paralegals for use in civil cases in District of Columbia courts where a fee-shifting statute permits recovery of "reasonable attorney's fees." This government index shows that for 2019-20, the "reasonable" rate for paralegals in D.C. courts is $173/hour. (Borden Decl. Ex. 1) The paralegal rate disclosed in the index is higher on average than Orion's per-hour fee paid for paralegals in the Bay Area, where courts have recognized the higher cost of living justifies increased attorney rates. *See Theme Promotions, Inc. v. News America Marketing FSI, Inc*., 731 F. Supp. 2d 937, 948-49

(N.D. Cal. 2010) (increasing rates by 10% because cost of living index is higher in San Francisco than in Washington, D.C.). That further demonstrates the reasonableness of Orion's request.

C. Orion Met and Conferred with Defendant Prior to Filing this Motion

Defendant also contends that Orion failed to meet and confer before filing its motion. (Opp. at 5.) This is untrue. Orion's counsel specifically requested to meet and confer with Defendant regarding this motion on December 11, 2019. (Declaration of Ronald J. Fisher ("Fisher Decl.") ¶ 3 and Ex. 1.) Orion then conferred via telephone with counsel for Defendant, Mr. Caseria and Mr. Dillickrath, on December 12, 2019. (Declaration of Ronald J. Fisher ("Fisher Decl.") ¶ 4.) During that call, Orion raised the issue of attorneys' fees and costs and asked to set up a subsequent call to further discuss Orion's forthcoming motion. (*Id*. ¶ 4.) Defendant stated that such a call would be duplicative and not productive, and that there was therefore "no point" in meeting and conferring further regarding that motion. (*Id*.) In sum, Orion did meet and confer with Defendant regarding this motion, and requested a further conference – one which Defendant refused. Defendant cannot now be heard to complain about the sufficiency of Orion's good faith efforts. *See Loop AI Labs Inc v. Gatti*, No. 15-cv-00798-HSG (DMR), 2016 WL 4474584, at *2 (N.D. Cal. Aug. 25, 2016) ("Plaintiff cannot refuse to engage in mandatory substantive, good faith meet and confer sessions . . . and then object to a motion . . . based on a purported failure to meet and confer").

II. BHB'S REQUESTED COSTS ARE REASONABLE

Exhibit 1 to the Hagey Declaration is a detailed spreadsheet that lists each cost for which Orion seeks reimbursement pursuant to 15 U.S.C. § 15(a), Fed. R. Civ. P. 54(d), and Civil Local Rules 54-1 and 54-5.[2] For each such expense, the spreadsheet details the date it was incurred, the type of expense, a description of the expense (such as "Westlaw expense," "mailing/postage," "translations," etc.), and the cost requested. Defendant challenges Orion's costs on three grounds. None of its arguments have merit.

[2] As noted above, Orion included expert costs in its motion, but agrees that they are not recoverable and has removed them from the total costs it seeks. For the sake of avoiding needless litigation, Orion has also removed its costs associated with additional consultants Bonora Roundtree and Strategix. Orion accordingly now seeks **$525,706.88** in costs, a reduction of $252,410.14.

First, Defendant claims that various listed costs show the need for further documentation. (Opp. at 6-7.) The objections Defendant raises to support this argument lack merit. For example, Defendant takes issue with Orion hiring Winthrop & Weinstine, a Minneapolis law firm. (Opp. at 7.) As Defendant is aware, Orion was forced to hire this firm as local counsel in Minnesota to help secure and host the deposition of Dave Anderson. (Borden Decl. ¶¶ 9-10 and Ex. 2.) This deposition was reopened by Judge DeMarchi, who ordered Defendant to pay all the attorneys' fees and costs associated with this deposition because Defendant had withheld critical documents prior to Mr. Anderson's first deposition. (Dkt. No. 189 at 7-8.) Defendant has, to date, failed to pay Orion anything, despite Orion's demands for payment.[3] The "Airbnb" charge (Opp. at 7) is for the house in San Jose, where Orion's counsel lived during trial. (Borden Decl. ¶ 11.) The filing fee in the Meade Bankruptcy in Santa Ana (Opp. at 7) is recoverable, as Orion was required to appear in that action to protect the jury verdict it obtained against Meade and Sunny Optics. Similarly, the Court Call appearance was for Meade's first day motions in the bankruptcy proceeding it filed to prevent the Court from entering judgment against it. Orion is entitled to its collection-related costs. *See, e.g.*, *Zinder v. Garlo Corp.*, 2018 WL 7395163, at *2 (C.D. Cal. Dec. 11, 2018) (citing *Free v. Briody*, 793 F.2d 807, 808 (7th Cir. 1986)) (prevailing plaintiff who obtained an award of fees and costs under fee-shifting statute also entitled to costs incurred in collecting on judgment).

Second, Defendant argues that the Court should deny Orion its costs because Orion did not submit a separate bill of costs under Civil Local Rule 54-1. (Opp. at 8-9.) As Orion also explained in its opening brief, Orion did not submit a bill of costs for its taxable costs under 28 U.S.C. § 1920 because it is seeking additional costs under the Clayton Act's fee-shifting provision, 15 U.S.C. § 15(a). (Mot. at 7 n.3.) When a plaintiff is entitled to attorneys' fees and costs under a fee-shifting statute, a court can award all of its recoverable costs and expenses without requiring it to submit a separate bill of costs. *See, e.g.*, *McCollough v. Johnson, Rodenburg & Lauinger*, 2009 WL 2476543, at *5 (D. Mont. June 3, 2009) (awarding attorneys' fees and costs under the Fair Debt Collection Practices Act and stating that "[t]he Court cannot determine from McCollough's

[3] Defendant also object to Richard Mooney of RJM Litigation. He is a lawyer specializing in antitrust, who consulted on discrete case issues. (Borden Decl. ¶ 12.)

submitted costs which costs could be taxed by the Clerk. In the interest of efficiency, and because it makes no pecuniary difference to the parties, the Court will include all McCollough's awardable costs in his attorney's fee and costs award set forth above.").[4]

Here, the Hagey Declaration provides the information requested in the Northern District's bill of costs form, including a declaration under penalty of perjury that the costs are correct and were necessarily incurred, and that the fees and expenses Orion seeks are those that it actually incurred in prosecuting this case. (Hagey Decl. ¶¶ 60-62.) Defendant should not be able to avoid its liability for costs on this basis.[5]

Third, Defendant argues that Orion is not entitled to recover for particular items, including, *inter alia*, transcript costs, counsel's expenses in attending depositions, courier fees, and travel fees, because these requests "are barred either by Local Rule or by applicable law." (Opp. at 9-11.) In support, Defendant cites to Civil Local Rule 54-3, which describes the standards for taxable costs under 28 U.S.C. § 1920, and to cases in which courts found that parties were not entitled to tax such costs under § 1920. (Opp. at 9-11.) These decisions are not applicable because they only involve taxable costs under § 1920. See *Linex Techs., Inc. v. Hewlett-Packard Co.*, No. 13-CV-00159-CW (MEJ), 2014 WL 5494906, at *4 (N.D. Cal. Oct. 30, 2014) (prevailing defendant not entitled to e-discovery hosting expenses under 28 U.S.C. § 1920); *Ancora Techs., Inc. v. Apple, Inc.*, No. 11-CV-06357 YGR, 2013 WL 4532927, at *1 (N.D. Cal. Aug. 26, 2013) (same); *City of*

[4] Even if Orion were required to file a separate bill of costs to list the subset of its costs that are taxable under § 1920, this would not warrant denying Orion's motion. Courts have accepted cost submissions that provide the required information and sworn testimony, even if the requests do not strictly comply with the applicable local rule. *See, e.g.*, *Mickealson v. Cummins, Inc.*, 2018 WL 6046470, at *1 (D. Mont. Nov. 19, 2018) (rejecting defendant's challenge to bill of costs where plaintiff did not attach separate affidavit confirming that costs were necessarily incurred, as required by 28 U.S.C. § 1924, where plaintiff's form contained declaration to that effect); *Murguia v. Palmer*, 2016 WL 54669, at *2 (D. Nev. Jan. 5, 2016) (motion for fees and costs "substantially complied" with requirements of D. Nevada's Local Rule 54-1, despite not using the court's form, because the motion itemized the requested costs and supported the request with documentation).

[5] Pages 8-9 of the Opposition cite cases in which courts denied cost requests where the moving party did not file a separate bill of costs. Those cases do not, however, require a court to do so. Indeed, "district courts have 'wide discretion' in determining whether and to what extent prevailing parties may be awarded costs pursuant to Rule 54(d)." *Jones v. City of Oakland*, No. 11-CV-4725 YGR, 2013 WL 3793893, *2 (N.D. Cal. July 18, 2013) (citation omitted).

Alameda, Cal. v. Nuveen Mun. High Income Opportunity Fund, No. C 08-4575 SI, 2012 WL 177566, at *3 (N.D. Cal. Jan. 23, 2012) (defendant not entitled to particular costs under § 1920); *Makreas v. Moore Law Grp., A.P.C.*, No. C-11-2406 MMC, 2012 WL 1458191, at *3 (N.D. Cal. Apr. 26, 2012) (plaintiff not entitled to tax particular costs under § 1920 and not entitled to statutory attorney's fees where he proceeded *pro se*); *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 572, 132 S. Ct. 1997, 2000, 182 L. Ed. 2d 903 (2012) (translation of written documents not taxable under § 1920).

As stated in its opening brief, Orion is not seeking only those costs that are taxable under § 1920. As Defendant concedes, the prevailing plaintiff in a Clayton Act case is entitled to its costs, "including a reasonable attorney's fee," under 15 U.S.C. § 15(a). The Ninth Circuit has held that when a fee-shifting statute provides for a "reasonable attorney's fee," the plaintiff may recover other litigation expenses *beyond taxable costs* "when it is 'the prevailing practice in a given community' for lawyers to bill those costs separate from their hourly rates." *Grove v. Wells Fargo Fin. California, Inc.*, 606 F.3d 577, 580 (9th Cir. 2010) (citing *Trs. of the Constr. Indus. and Laborers Health and Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253, 1258 (9th Cir. 2006)). Attorneys' fees awards under fee-shifting statutes can therefore include reimbursement for out-of-pocket expenses that are typically charged to paying clients by private attorneys. *Grove*, 606 F.3d at 580 (citing *Davis v. San Francisco*, 976 F.2d 1536, 1556 (9th Cir. 1992), *vacated in part on other grounds*, 984 F.2d 345 (9th Cir. 1993)).[6]

Courts awarding attorneys' fees under the Clayton Act therefore routinely include the attorneys' out-of-pocket expenses of the types Orion seeks here in the fee award. *See, e.g.*, *O'Bannon v. NCAA*, 114 F. Supp. 3d 819, 839-40 (N.D. Cal. 2015), *adopted in O'Bannon v. NCAA*, No. C 09-3329 CW, 2016 WL 1255454, at *13 (N.D. Cal. Mar. 31, 2016) (awarding

[6] Defendant cites *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190 (9th Cir. 1964), for the proposition that an antitrust plaintiff can only recover taxable costs. (Opp. at 8 n.4.) In that case, however, the court simply held that the plaintiff could not recover accountants' fees as part of its costs under the Clayton Act. *Id*. at 224. The court did not consider whether the plaintiff could recover the out-of-pocket expenses its *attorneys* charged as part of the recoverable attorneys' fees. As discussed above, the Ninth Circuit has since held that such costs are recoverable under fee-shifting statutes in *Grove*, 606 F.3d at 580.

expenses for travel, copying, and computerized research as part of attorneys' fees under Clayton Act); *Auto. Prod. PLC v. Tilton Eng'g, Inc.*, 855 F. Supp. 1101, 1106 (C.D. Cal. 1994) (awarding expenses for Lexis, Federal Express, secretarial overtime, trial supplies, messenger fees, hotel and travel, and parking under Clayton Act attorneys' fees provision); *Washington Alder LLC v. Weyerhaeuser Co.*, No. CV 03-753-PA, 2004 WL 4076675, at *3 (D. Or. Nov. 24, 2004), *vacated and remanded on other grounds*, 233 F. App'x 752 (9th Cir. 2007) (awarding fees under Clayton Act, including out-of-pocket expenses not recoverable as taxable costs); *Seven Gables Corp. v. Sterling Recreation Org. Co.*, 686 F. Supp. 1418, 1420 (W.D. Wash. 1988) (same); *U.S. Football League v. Nat'l Football League*, 887 F.2d 408, 416 (2d Cir. 1989) (attorney's fees under the Clayton Act "include those reasonable out-of-pocket expenses incurred by attorneys and ordinarily charged to their clients"); *New York v. Microsoft Corp.*, 297 F.Supp.2d 15, 47 (D.D.C. 2003) (same); *Brown v. Pro Football, Inc.*, 839 F. Supp. 905, 916 (D.D.C.1993), *rev'd on other grounds*, 50 F.3d 1041 (D.C. Cir.1995) ("telephone, telecopier, air and local couriers, postage, photocopying, WESTLAW research, secretarial overtime, and counsels' travel expenses are routinely billed to fee-paying clients, and thus are all compensable as part of a reasonable attorney's fee" under Clayton Act); *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, No. 90 C 6247, 1992 WL 398398, at *7 (N.D. Ill. Dec. 21, 1992) (similar expenses recoverable as part of Clayton Act attorneys' fees); *Pitchford Sci. Instruments Corp. v. PEPI, Inc.*, 440 F. Supp. 1175, 1178 (W.D. Pa. 1977).[7]

[7] Other fee-shifting statutes similarly entitle prevailing plaintiffs to recover their attorney's out-of-pocket expenses as part of their attorneys' fees. *See, e.g.*, *McCollough*, 2009 WL 2476543 at *4 (rejecting defendant's argument that plaintiff could only recover taxable costs, because "[u]nder fee shifting statues such as the FDCPA and 42 U.S.C. § 1988(b), a plaintiff 'may recover as part of the award of attorney's fees those out-of-pocket expenses that would normally be charged to a fee paying client) (citing *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir.1994)); *Giovannoni v. Bidna & Keys*, 255 Fed. App'x 124, 126 (9th Cir. 2007) (district court abused its discretion in failing to award plaintiff its attorney's out-of-pocket expenses that would normally be charged to fee paying client as costs under FDCPA); *Yeager v. Bowlin*, 2010 WL 2303273, at *10 (E.D. Cal. June 7, 2010), *aff'd*, 495 F. App'x 780 (9th Cir. 2012) ("Out-of-pocket costs and expenses incurred by an attorney that would normally be charged to a fee-paying client are recoverable as attorney's fees") (citation omitted).

The costs and expenses Orion seeks here are of the type "ordinarily incurred and paid by clients in litigation," and which "Orion actually incurred in the prosecution of this case[.]" (Hagey Decl., ¶¶ 60, 62.) Under the above authorities, Orion is therefore entitled to recover them as part of its attorneys' fees under the Clayton Act.

CONCLUSION

For the foregoing reasons, Orion respectfully requests that the Court grant this Motion and award Orion **$4,730,371.73**, reflecting Orion's reasonable attorneys' fees of **$4,204,664.85**, and its adjusted request for costs totaling **$525,706.88**, in accordance with the revised [Proposed] Order filed herewith.

Dated: February 6, 2020

BRAUNHAGEY & BORDEN LLP

By: /s/ *J. Noah Hagey*
J. Noah Hagey

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