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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 EQUITABLE RELIEF AND JUDGMENT ON UCL CLAIM

Date:	April 2, 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

Orion respectfully submits this Reply in Support of its Motion for Equitable Relief.

INTRODUCTION

In its moving papers, Orion explained: "Since trial, Defendant has done everything in its power to frustrate the Court's Judgment and to continue its unlawful activities. These activities include submitting false pleadings and a false declaration to the Court, smuggling assets out of the country, and cutting off Meade's supply to ensure that no competitor can make use of the asset. Similar to Defendant's acquisition of Meade, destroying the company eliminates a potential alternative source of supply, and destroys an option for telescope sales not controlled by Defendant and its coconspirators." (Mot. at 1.) In its Opposition, Defendant fails to address these points and instead claims that the Court is powerless to stop the continuing effects of the illegal conduct found by the jury, including Defendant's unlawful acquisition of Meade, and that doing so would be too difficult for the Court. (Opp. at 1.) Just the opposite is true.

Under established law cited in the Motion at 15-19 and ignored by Defendant, the Court has wide equitable powers to redress the ongoing harm caused by Defendant's antitrust violations, including its attempt to destroy Meade to eliminate competition for its co-conspirators. Defendant claims that the Court cannot order a supply agreement. (Opp. at 1.) But the Ninth Circuit has expressly endorsed this remedy. *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997). And none of the cases Defendant relies on concerns permanent injunctive relief.

Nor are the injunctive terms requested by Orion "vague," as Defendant argues. (Opp. at 1.) Defendant claims that "non-discriminatory" pricing is an unenforceable standard. But the Ninth Circuit has expressly approved an injunction using that exact term. *Image Tech. Servs.*, 125 F.3d at 1126. The term "non-discriminatory" is objectively defined, and can be easily verified by checking the prices Defendant offers to others, including Celestron.

Defendant finally asserts that Orion's arguments about Defendant's Judgment avoidance are "based on speculation" or "unsupported allegations" or are not based "in reality." (Opp. at 7.) The Court, however, has ruled otherwise. (Dkt. No. 598.) Defendant committed a fraud on the Court for the very same reasons that it has cut off supply to Meade – it is seeking to vitiate the Judgment and to continue the conduct that gave rise to it.

As the jury found, and Defendant's post-judgment conduct has shown, injunctive relief is necessary to correct Defendant's antitrust violations. Absent such intervention, Defendant will continue to profit from its unlawful conduct, and Orion and the market will suffer.

ARGUMENT

I. DEFENDANT MISSTATES THE LEGAL STANDARD

As explained in the moving papers, "it is the *duty* of the court to prescribe relief which will terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future …. The trial court is charged with *inescapable responsibility* to achieve this objective." (Mot. at 16 (quoting *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 250 (1968) (emphasis added); *id*. at 19 (explaining similar standard under UCL).) Defendant does not address any of these cases and instead cites a number of cases for the generic proposition that permanent injunctions should be issued sparingly. (Opp. at 3.) None of Defendant's cases involved or even discussed antitrust law, where the Court has wide powers and an obligation to "unfetter a market from anticompetitive conduct." *Ford Motor Co. v. United States*, 405 U.S. 562, 577 (1972). And Defendant does not address the Court's even broader powers under the UCL. (Mot. at 14-15.)

II. THE COURT HAS THE POWER TO ISSUE THE REQUESTED RELIEF

As shown in the moving papers at 11-12 and unrefuted by Defendant, there is no evidence that Defendant's unlawful conspiracy with Synta and Celestron ever stopped, and substantial evidence shows that it continued. Defendant also does not dispute that:

> But for Defendant's illegal acts, another competitor or Orion would have acquired Meade when it came up for sale in 2013, and the telescope market would have had an independent manufacturer and brand to compete with the likes of Sunny and Synta. Instead, Defendant's unlawful acts turned Meade into a captive entity dependent on its supply for survival—one that Defendant is now destroying by withdrawing all supply from Meade, despite Orion offering to refrain from collecting receivables incurred by sales to Meade. (Borden Decl. Ex. 6.) Notably, the effect of Defendant's sudden refusal to supply Meade is to reduce Defendant's profits, and the only possible motivation for its behavior is to ensure that Meade is not a viable brand or competitor in the future. That harm to the market is irreparable.

(Mot. at 13.) Under these circumstances, forcing Defendant to continue to supply Meade under nondiscriminatory terms is the only remedy that will preserve the viability of Meade until it can regain its independence and resuscitate the manufacturing capabilities that Defendant mothballed.

A. The Court Can Order a Supply Agreement

Under controlling Ninth Circuit law, the Court has the power to require a defendant to sell its products to others when doing so is necessary to restore competition. (Mot. at 17 (discussing *Kodak*, 125 F.3d 1195).) Defendant tries to distinguish *Kodak* on the ground that unlike in *Kodak*, the antitrust violations here do not involve a refusal to deal. But *Kodak* was not limited to refusal to deal. The point of the injunction in *Kodak* was to do what was necessary to remedy the market dysfunction while protecting Kodak's legitimate rights. *Id*. at 1225 ("requiring nondiscriminatory pricing will both end Kodak's service monopoly and protect Kodak's intellectual property rights"). This is consistent with Section 16 of the Clayton Act, 15 U.S.C. § 26, which expansively provides that "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief ..., against threatened loss or damage by a violation of the antitrust laws."

Under these broad powers, courts can fashion relief necessary to stop ongoing harm or to restore the market to the position it would have been in, but for the antitrust violations. As one Court explained:

> [T]he Supreme Court has also made clear that affirmative acts may be required of defendants whenever necessary, not only to proscribe future conduct but also "to redress the antitrust violation proved", *United States v. du Pont & Co.*, 366 U.S. 316, 323 (1961); "to undo what could have been prevented ...". *Schine Theatres v. United States*, 334 U.S. 110, 128 (1948); or to "cure the ill effects of the illegal conduct", *United States v. United States Gypsum*, 340 U.S. 76, 88 (1950); *reiterated in United States v. Glaxo Group Ltd.*, 410 U.S. 52, 64 (1973).

In re Multidistrict Vehicle Air Pollution, 367 F. Supp. 1298, 1302 (C.D. Cal. 1973).

For this reason, it is "entirely appropriate" for a Court to order an injunction "*beyond* a simple proscription against the precise conduct previously pursued" where necessary to fix the market that the defendant harmed. (Mot. at 16 (citing *Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679, 698 (1978) (emphasis added); *Id*. at 17-18 (collecting additional cases where courts issued injunctions requiring antitrust violators to sell to the plaintiffs).). Defendant simply ignores these cases altogether.[1]

Defendant nonetheless argues that a court cannot "forc[e] a company to do business with a competitor," and thus it cannot be compelled to supply its wholly-owned subsidiary Meade at market prices. (Opp. at 4.) But its authorities do not support this conclusion. In the main case it relies on, *Verizon Comms. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), plaintiff alleged that Verizon had denied competitors adequate access to its network in violation of the Sherman Act, Clayton Act and Telecommunications Act. The case was dismissed at the pleading stage. Thus, the issue was whether plaintiff had *stated a claim* based on defendant's refusal to deal with competitors. *Id*. at 401. The Court had no occasion to consider whether, after a jury found the defendant liable under Sherman Act § 1 and § 2, Clayton Act § 7 and the UCL, requiring it to sell to another party would be an appropriate equitable remedy. *Trinko* is doubly inapplicable as to Meade because Meade is not a competitor of Ningbo Sunny; it is an asset that Ningbo Sunny acquired, which it is now trying to destroy to further control the market.

Defendant also cites *Authenticom, Inc. v. CDK Global, LLC*, 874 F.3d 1019 (7th Cir. 2017). That case, too, had nothing to do with this one. In *Authenticom*, two companies that provided data management systems entered into agreements designed to prevent third parties from gaining access to the data. An entity that collected and sold such data claimed that the agreements violated Sherman Act § 1. The Seventh Circuit vacated a preliminary injunction requiring defendants to provide plaintiff access to the data on the grounds that it went "far beyond a measure that restores what the market would look like in the absence of the alleged violation." *Id*. at 1026. The court reasoned that because plaintiff had brought a § 1 case based on agreements that restricted its access, the proper relief was merely to set aside those agreements. *Id.* at 1026 ("The proper remedy for a section 1 violation based on an agreement to restrain trade is to set the offending agreement

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[1] While its brief is not entirely clear on this point, Defendant also appears to argue that *Kodak* is inapplicable because that case involved actual monopolization, and the present case involves attempted monopolization, conspiracy to monopolize and unlawful acquisition. (Opp. at 4.) There is no such distinction in *Kodak*. The point of the injunctive relief there, and in all antitrust cases, is to correct the market.

aside.”). The decision dealt with a preliminary injunction, *id*. at 1024 (“The merits of this lawsuit have yet to be tried, and so nothing we say should be taken as presaging the eventual outcome of the case”) and had nothing to do with the Court’s duty to enjoin antitrust violations found by a jury, especially under Clayton Act § 7, Sherman Act § 2 and the UCL – none of which was at issue.[2]

The other decisions cited by Defendant (Opp. at 4-5) do not help it. Defendant miscites *Trabert & Hoeffer, Inc. v. Piaget Watch Corp.*, 633 F.2d 477 (7th Cir. 1980), as prohibiting an injunction requiring most favored customer pricing. (Opp. at 5.) In *Trabert*, the court expressly *affirmed* an “injunction which prohibits the defendants from refusing to deal with plaintiff on the same terms (e.g., price, service, availability, inclusion in advertising) available to other Chicago area retailers carrying the defendants’ watch lines.” *Id*. at 485. In doing so, *Trabert* distinguished *Loew’s, Inc. v. Milwaukee Towne Corp*., 201 F.2d 19 (7th Cir. 1952), which denied an injunction that gave plaintiff a leg up on its competitors. The court in *Traubert* explained that leveling the playing field through most favored customer pricing was proper, whereas creating a preferential pricing structure was not. *Trabert*, 633 F.2d at 485. It is even less clear why Defendant cites *MetroNet Services Corp. v. Qwest Corp*., 383 F.3d 1124, 1130 (9th Cir. 2004), which did not involve injunctive relief at all.

Here, Defendant does not, and cannot, dispute that the jury found that its acquisition of Meade was illegal. By virtue of the acquisition, Defendant took a critical source of competing supply out of the market. Thereafter, Defendant required Meade to purchase 85% of its imported finished product from Defendant. (Ex. 7 to Borden Declaration submitted with Orion’s Motion, Dkt. No. 583-8, at 3.) As a result of this dependency, which never would have occurred but for the unlawful conduct found by the jury, Meade will crater absent continued sales from Defendant while Meade regains independence, thereby permanently achieving Defendant’s goal of destroying competition. Under such circumstances, the injunctive relief sought is warranted.

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[2] The panel in the Seventh Circuit stated that such relief could be proper in a Sherman Act § 2 case. *Id*. Here, the jury found that Defendant violated Section 2.

B. The Requested Relief Is Not "Unworkable"

Orion seeks an injunction requiring Defendant to supply Meade and Orion "on non-discriminatory terms, *i.e.*, the same terms it offers to Celestron or any other most favored customer." (Mot. at 20.) Defendant argues that the "non-discriminatory" requirement would be unworkable because it would require the Court to "oversee" each price, term and condition of each of Defendant's customer agreements. (Opp. at 2.) The Ninth Circuit's decision in *Kodak* forecloses this argument because "nondiscriminatory" is the exact term that the Ninth Circuit not only approved of, but *required* the district court to use in its injunction in that case. 125 F.3d at 1225-26 (requiring "nondiscriminatory pricing" and explaining that Kodak "should be permitted to charge all of its customers … any nondiscriminatory price that the market will bear").

As *Kodak* shows, requiring nondiscriminatory pricing would not require undue oversight. "Most favored customer" or "most favored nation" provisions are commonplace in supply agreements; they provide that if the seller offers another customer a better price or terms, then it must offer the beneficiary of the clause the same price or terms. *See, e.g.*, *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995), *as amended on denial of reh'g* (Oct. 13, 1995) ("'Most favored nations' clauses are standard devices by which buyers try to bargain for low prices, by getting the seller to agree to treat them as favorably as any of their other customers."). This provision is objective and can be enforced (if necessary) by a simple price comparison. That is why the Ninth Circuit found that, unlike a "reasonableness" requirement, an objective "nondiscriminatory" provision would not involve the court in price administration. *Kodak*, 125 F.3d at 1225-26.

C. The Requested Injunction Is Not "Overbroad"

Defendant asserts that the requested injunction would be overbroad and would impair Defendant's relationship with its co-conspirator Celestron. (Opp. at 5-6.) None of these arguments has merit.[3]

[3] Defendant cites a number of cases which hold that an injunction must not be impermissibly vague. (Opp. at 5.) Orion does not disagree with that general proposition. Defendant failed to show, however, that such an issue arises here.

First, Defendant claims that it does not understand what the phrase "non-discriminatory" prices means. That argument is addressed above; it means that Defendant should only be able to charge Meade and Orion the same price it charges to Celestron and its other customers.

Second, Defendant objects to the requested provisions that would prevent it from discussing prices and product manufacturing plans with its horizontal competitor and co-conspirator Synta, which is the parent company of Defendant's customer Celestron, or attending any internal meetings where a competitor is present. (Opp. at 6.) According to Defendant, these provisions would make it impossible or extremely difficult for it to conduct business with Celestron. This is a red herring.

As stated in the Motion, Orion requests that the injunction prohibit Defendant from communicating with *Synta* about the prices of telescopes and accessories, and about which products Defendant and Synta will manufacture. (Mot. at 22.) Orion also requests that the injunction prohibit Defendant from participating in any internal meetings or strategy sessions in which any representative from *a competitor*, including David Shen or any employee of *Synta*, is in attendance. (*Id*.) This is entirely consistent with antitrust law, which provides that it is *per se* illegal for Defendant to discuss pricing or product development with its competitor. *See Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 986 (9th Cir. 2000) ("Foremost in the category of *per se* violations is horizontal price-fixing among competitors."); *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991) ("A market allocation agreement between competitors at the same market level is a classic *per se* antitrust violation."). The requested injunction is therefore not overbroad, because it is expressly limited to prohibiting conduct that is illegal under the antitrust laws.

D. Orion Established a Likelihood of Irreparable Harm

Defendant's last argument is that Orion did not show irreparable harm. Its contention, however, mostly ignores the moving papers (Mot. at 12-13)[4] and is largely based on its inaccurate assertion that Orion's evidence that Defendants have sought to avoid the Court's Judgment is merely "speculation." (Opp. at 7-8.) Defendant also claims that Orion's argument regarding the

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[4] Defendant does not dispute that its conspiracy is ongoing and that it is attempting to drive Meade out of business. That concession alone warrants granting the injunction.

potential loss of its business is "conclusory" and thus insufficient. This argument is inaccurate because the very nature of the structural harm Defendant caused to the market (overconcentration and lack of supply), and the injury the jury found, demonstrate the threat Defendant's conduct caused and is still causing to Orion's existence.

1. The Court's Order Sanctioning Defendant Confirms That Orion Is Likely to Suffer Irreparable Harm

Defendant claims that "the majority of Plaintiff's arguments are based on speculation or unsupported allegations that Defendant has evaded paying the judgment entered in this case." (Opp. at 7.) Defendant then suggests that Orion's allegations are false by claiming that "Plaintiff's burden here was to provide argument based … in reality," and that Orion failed to "turn its allegations into facts." (*Id.*)

On March 9, 2020, however, the Court issued an Order sanctioning Defendant under its inherent authority for the very conduct Orion described, *i.e.*, improperly smuggling its assets out of the country and making false representations to the Court regarding its intention to do so. (ECF 598.) The Court noted that Defendant had stated, both orally at the TRO hearings and in a sworn declaration from its Chairman Ni, that it would not move assets out of the country, other than in the ordinary course of business, while post-trial motions and appeals were pending. (*Id*. at 2-3.) The Court expressly noted that it had denied the TROs after Defendant made those representations. (*Id.*) The Court also noted that in direct violation of its promises and declaration, Defendant moved more than $4 million out of the country on January 2, 2020 – just before the automatic 30-day stay on enforcement expired – by demanding that Celestron remit a payment that was not yet due. (*Id.*)

The Court's Order included a number of findings regarding Defendant's actions. The Court found that (1) the $4 million overseas transfer was *not* in the ordinary course of business; (2) Defendant improperly withheld evidence of this transaction from its responses to Orion's post-judgment discovery, which "is evidence of consciousness of guilt;" and (3) Defendant "made the Ni Declaration in bad faith." (*Id*. at 4-5.) The Court's findings demonstrate why an injunction is crucial here: Defendant is making every effort to avoid paying the judgment. Money damages alone will not make Orion whole, because Defendant does not intend to have assets in the United

States sufficient to pay the damages the jury awarded it. Indeed, it has engaged in a Judgment avoidance plan, where it is destroying Meade – its own subsidiary and one of its customers – to prevent any economic recovery and to continue dominating the market for the benefit of its co-conspirator Celestron. The requested injunction is therefore critical to Orion's recovery for its injury.

2. The Threatened Loss of Orion's Business Independently Establishes Irreparable Harm

Defendant finally contends that Orion's threatened loss of its 45-year old, employee-owned business is "conclusory" and fails to establish that a money judgment alone is inadequate. (Opp. at 8.) As Orion showed in its motion, the jury found that Defendant caused harm to the telescope market, and that Orion thereby suffered substantial damages. (Mot. at 3.) As long as Defendant is refusing to supply Orion, destroying Meade, and continuing to conspire with its horizontal competitor, the market will remain tainted, and Orion will continue to accrue losses. As Orion explained in its motion, this creates a strong likelihood that Defendant will succeed in its goal of driving Orion out of business.

Defendant argues that Orion has not shown a sufficient likelihood of losing its business. (Opp. at 8.) But the lone case it cites for this proposition, *Ramtin Massoudi MD Inc. v. Azar*, 2018 WL 1940398 (C.D. Cal. Apr. 23, 2018), does not involve antitrust law and does not support Defendant in any event. *Massoudi* involved a federal statute that allowed the government to recoup payment for improperly billed Medicare services during the plaintiff's administrative appeals. The plaintiff sought to enjoin the government from doing so, contending that it could lose its business if it had to repay $1 million during its appeal. The court noted that Congress had anticipated such hardship when it drafted the statute, and that the loss of a business in that circumstance therefore did not constitute irreparable harm. 2018 WL 1940398 at *7. Moreover, the plaintiff had not shown that the recoupment was what threatened its business, as opposed to other factors. *Id.* *Massoudi* has no application here, where the Clayton Act expressly provides for injunctive relief, and a jury has already found that Defendant's conduct *is* what caused over $16 million in damage to Orion's business. Because Orion showed that it faces a substantial risk of the company failing due to Defendant's antitrust violations, Orion has met its burden to show irreparable injury.

Further, as noted in Orion's Motion and undisputed by Defendant, Orion need not show irreparable injury to obtain injunctive relief under the UCL. *See Haas Automation, Inc. v. Denny*, 2014 WL 2966989, at *7-9 (C.D. Cal. Jul 1, 2014) (denying injunction under the Lanham Act for failure to show irreparable injury but granting it under the UCL, which did not require such a showing) (cited in ECF 583 at 14-15). That is a separate and independent reason why the Court may put an end to Defendant's illegal conduct.

CONCLUSION

For the foregoing reasons, Orion respectfully submits that its Motion should be granted.

Dated: March 12, 2020

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