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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

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 *Assigned to: Honorable Edward J. Davila* **DEFENDANT NINGBO SUNNY ELECTRONIC CO., LTD'S NOTICE OF MOTION AND RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Compl. Filed: November 1, 2016 First Am. Compl. Filed: November 3, 2017 Trial Date: October 22, 2019 Hearing Date: February 20, 2020 Time: 9:00 a.m.

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on February 20, 2020, in Courtroom 4, 5th Floor, 280 South 1st Street, San Jose, California, before the Honorable Edward J. Davila, Defendant Ningbo Sunny Electronic Co., Ltd. ("Ningbo Sunny" or "Defendant") will and hereby does renew its motion pursuant to Federal Rule of Civil Procedure 50(b) for judgment as a matter of law on Plaintiff Optronic Technologies, Inc.'s ("Orion" or "Plaintiff") claims against Defendant. As discussed in the accompanying Memorandum of Points and Authorities, Defendant respectfully requests that judgment as a matter of law be granted in their favor as to Orion's claims under the Sherman Act, Sections 1 and 2; Clayton Act, Section 7; California's Cartwright Act; and California's Unfair Competition Law, on the grounds that there is insufficient evidence for a reasonable juror to have found for Orion on these claims.

This motion for judgment as a matter of law is based on this notice of motion, the accompanying memorandum of points and authorities, the complete files and records in this action, any oral argument of counsel, and such other matters as the Court may consider.

Dated: January 16, 2020

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By /s/ *Leo D. Caseria*

LEO D. CASERIA
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NINGBO SUNNY ELECTRONIC CO., LTD.

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. RELEVANT LEGAL STANDARDS 1

III. ARGUMENT 2

A. The Court Should Grant Ningbo Sunny's Renewed Motion for Judgment as a Matter of Law on Plaintiff's Claims Under Section 2 of the Sherman Act 2

1. To the Extent the Court Upheld Plaintiff's Section 2 Claims Based on Plaintiff's "Joint Monopoly" or "Shared Monopoly" Theory, Such Theory Is Invalid. 2

a. Plaintiff Failed To Introduce Evidence That Ningbo Sunny Had the Specific Intent to Monopolize The Relevant Market. 4

b. Plaintiff Failed To Establish a Conspiracy to Monopolize the Relevant Market. 4

2. Plaintiff Failed To Establish that Ningbo Sunny Had A Dangerous Probability of Achieving Monopoly Power. 5

3. Plaintiff Presented No Evidence That It Suffered Any Injury As a Result of Any of Its Claims Under Section 2 of the Sherman Act 8

4. Plaintiff Failed to Introduce Admissible Evidence Establishing Its Claimed Relevant Market 9

5. Plaintiff's Evidence Did Not Establish That Ningbo Sunny Engaged in "Predatory Conduct." 12

B. The Court Should Grant Ningbo Sunny's Renewed Motion for Judgment as a Matter of Law as to Plaintiff's Section 1 Claims. 12

1. Plaintiff's Evidence Failed to Show That Ningbo Sunny Joined a Conspiracy To Fix The Price of Telescopes or Orion's Credit Terms 12

2. Plaintiff Failed to Produce Sufficient Evidence to Sustain a Finding That Ningbo Sunny Joined a Market Allocation Conspiracy. 15

3. There Is No Evidence of Injury—or Any Conspiracy—After September 2016. 19

C. The Court Should Grant Ningbo Sunny's Renewed Motion for Judgment as a Matter of Law on Plaintiff's Section 7 Claim. 20

D. The Court Should Grant Ningbo Sunny's Renewed Motion for Judgment as a Matter of Law on Plaintiff's State Law Claims 22

IV. CONCLUSION 22

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

TABLE OF AUTHORITIES

Page(s)

Federal Cases

AD/SAT, Div. of Skylight, Inc. v. Associated Press
181 F.3d 216 (2d Cir. 1999) 7

Adaptive Power Solutions, LLC v. Hughes Missile Sys. Co.
141 F.3d 947 (9th Cir. 1998) 18

Alaska Airlines, Inc. v. United Airlines, Inc.
948 F.2d 536 (9th Cir. 1991) 12

Am. Tel. & Tel. Co. v. Delta Commc'ns Corp.
408 F. Supp. 1075 (S.D. Miss. 1976),
aff'd per curiam, 579 F.2d 972 (5th Cir. 1978) 3

Amarel v. Connell
102 F.3d 1494 (9th Cir. 1996) 9

Bordonaro Bros. Theatres v. Paramount Pictures
203 F.2d 676 (2d Cir. 1953) 18

Broadcom Corp. v. Qualcomm, Inc.
501 F.3d 297 (3d Cir. 2007) 13

Brown Shoe Co. v. United States
370 U.S. 294 (1962) 9

Cent. Chem. Corp. v. Agrico Chem. Co.
531 F. Supp. 533 (D. Md. 1982) 6

Cieslikowski v. Chrysler
No. ED CV 17-562 MRW, 2019 WL 978095 (C.D. Cal. Feb. 4, 2019) 1

Cnty. of Tuolumne v. Sonora Cmty. Hosp.
236 F.3d 1148 (9th Cir. 2001) 21

Coalition for ICANN Transparency, Inc. v. Verisign, Inc.
611 F.3d 495 (9th Cir. 2010) 12

Craftsmen Limousine, Inc. v. Ford Motor Co.
491 F.3d 380 (8th Cir. 2007) 14

E. Portland Imaging Ctr., P.C. v. Providence Health Sys.-Oregon
280 F. App'x 584 (9th Cir. 2008) 8

Eastman Kodak Co. v. Image Technical Services, Inc.
504 U.S. 451 (1992) 16

Glenn Holly Entm't, Inc. v. Tektronix, Inc.
352 F.3d 367 (9th Cir. 2003)....17

Great Escape, Inc. v. Union City Body Co.
791 F.2d 532 (7th Cir. 1986)....4

Hammer v. Clear Channel Commc'ns, Inc.
863 F. Supp. 2d 966 (C.D. Cal. 2012)....10

Harkins Amusement Ent. v. General Cinema Corp.
850 F.2d 477 (9th Cir. 1988)....2

Hoffman v. Constr. Protective Serv., Inc.
541 F.3d 1175 (9th Cir. 2008)....8

Horst v. Laidlaw Waste Sys., Inc.
917 F. Supp. 739 (D. Colo. 1996)....6, 7

Inter-Cty. Title Co. v. Data Trace Info. Servs., LLC
105 F. App'x 136 (9th Cir. 2004)....7

JTC Petroleum Co. v. Piasa Motor Fuels, Inc.
190 F.3d 775 (7th Cir. 1999)....3

Lakeside-Scott v. Multnomah Cty.
556 F.3d 797 (9th Cir. 2009)....1

Leegin Creative Leather Prods., Inc. v. PSKS, Inc.
551 U.S. 877 (2007)....14

Lenhoff Enters., Inc. v. United Talent Agency, Inc.
No. 15-01086, 2015 U.S. Dist. LEXIS 150141 (C.D. Cal. Sept. 18, 2015)....3

Midwest Gas Servs., Inc. v. Ind. Gas. Co.
317 F.3d 703 (7th Cir. 2003)....3

Monsanto Co. v. Spray-Rite Service Corp.
465 U.S. 752 (1984)....13

Nifty Foods Corp. v. Great Atl. & Pac. Tea Co.
614 F.2d 832 (2d Cir. 1980)....6

Paladin Assocs., Inc. v. Montana Power Co.
97 F. Supp. 2d 1013 (D. Mont. 2000)....16

Phoenix Elec. Co. v. Nat'l Elec. Contractors Ass'n, Inc.
867 F. Supp. 925 (D. Or. 1994), *aff'd*, 81 F.3d 858 (9th Cir. 1996)....4

R.C. Dick Geothermal Corp. v. Thermogenics, Inc.
890 F.2d 139 (9th Cir. 1989)....14

Rebel Oil Co., Inc. v. Atl. Richfield Co.
51 F.3d 1421 (9th Cir. 1995) .... *passim*

Reeves v. Sanderson Plumbing Prod., Inc.
530 U.S. 133 (2000) 1

Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.
778 F.3d 775 (9th Cir. 2015) 20

Sambreel Holdings LLC v. Facebook, Inc.
906 F. Supp. 2d 1070 (S.D. Cal. 2012) 12

Schwimmer v. Sony Corp. of Am.
677 F.2d 946 (2d Cir. 1982) 19

Spectrum Sports v. McQuillan
506 U.S. 447 (1993) 5

Standfacts Credit Servs., Inc. v. Experian Info Solutions, Inc.
405 F. Supp. 2d at 1152 3

Stanislaus Food Products Co. v. USS-POSCO Industries
803 F.3d 1084 (9th Cir. 2015) 16, 18

SumoText Corp. v. Zoove, Inc.
No. 16-cv-01370-BLF, 2016 U.S. Dist. LEXIS 152927 (N.D. Cal. Nov. 3, 2016) 14

Syufy Enterprises v. Am. Multicinema, Inc.
793 F.2d 990 (9th Cir. 1986) 4

In re Text Messaging Antitrust Litig.
782 F.3d 867 (7th Cir. 2015) 17

Tops Mkts. v. Quality Mkts.
No. 93-CV-0302E(F), 2000 U.S. Dist. LEXIS 11647 (W.D.N.Y. Aug. 10, 2000) 4

United States v. Cont'l Grp., Inc.
456 F. Supp. 704 (E.D. Pa. 1978), *aff'd*, 603 F.2d 444 (3d Cir. 1979) 19

United States v. Syufy Enters.
903 F.2d 659 (9th Cir.1990) 6

United States v. Therm-All, Inc.
373 F.3d 625 (5th Cir. 2004) 18

Volterra Semiconductor Corp. v. Primarion, Inc.
799 F.Supp.2d 1092 (N.D. Cal. 2011) 11

Weaving v. City of Hillsboro
763 F.3d 1106 (9th Cir. 2014) 1

Williams v. I.B. Fischer Nevada
999 F.2d 445 (9th Cir. 1993) 12

Yeti by Molly, Ltd. v. Deckers Outdoor Corp.
259 F.3d 1101 (9th Cir. 2001) 9

State Cases

Stevens v. Sup. Ct.
75 Cal. App. 4th 594 (1999) 21

Federal: Statutes, Rules, Regulations, Constitutional Provisions

Federal Rules of Civil Procedure
Rule 26 8
Rule 37(c)(1) 9
Rule 50 1
Rule 50(a) 1
Rule 50(a)(2) 1
Rule 50(b) 19
Rule 56 1

Federal Rules of Evidence
Rule 402 17
Rule 602 17
Rule 701 17
Rule 702 17

Title 15 United States Code
§§ 1-7 (Sherman Act) .... *passim*
§§ 12-27 (Clayton Antitrust Act of 1914) 1, 20

State: Statutes, Rules, Regulations, Constitutional Provisions

California Business & Professions Code
§§ 16700-16770 (Cartwright Act) 1, 21
§ 17200 (Unfair Competition Law) 1, 21

I. INTRODUCTION

Defendants initially moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a) on November 18, 2019. ECF No. 464 ("Def.s' JMOL"). Plaintiff filed its opposition on November 22, 2019. ECF No. 497 ("Pl.'s Opp."). The Court denied Defendants' JMOL on November 26, 2019. ECF No. 500 ("Order"). The same day, the jury returned a verdict in favor of Plaintiff. ECF No. 501.

Defendant Ningbo Sunny Electronic Co., Ltd. respectfully now renews the motion for judgment as a matter of law pursuant to Rule 50(b) as to Orion's claims under Sections 1 and 2 of the Sherman Act, Section 7 of the Clayton Act, California's Cartwright Act, and California's Unfair Competition Law.

II. RELEVANT LEGAL STANDARDS

"A renewed motion for judgment as a matter of law 'is properly granted if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict.'" *Cieslikowski v. Chrysler*, No. ED CV 17-562 MRW, 2019 WL 978095, at *3 (C.D. Cal. Feb. 4, 2019) (quoting *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1242 (9th Cir. 2014)). "The standard for judgment as a matter of law under Rule 50 mirrors the standard for summary judgment under Rule 56." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 135 (2000). Under this standard, although the court must draw all reasonable inferences in the non-moving party's favor, "a reasonable inference 'cannot be supported by only threadbare conclusory statements instead of significant probative evidence.'" *Lakeside-Scott v. Multnomah Cty.*, 556 F.3d 797, 802 (9th Cir. 2009) (internal citation omitted). "It is error to deny a judgment as a matter of law when it is clear that the evidence and its inferences cannot reasonably support a judgment in favor of the opposing party." *Weaving v. City of Hillsboro*, 763 F.3d 1106, 1111 (9th Cir. 2014) (internal formatting and citation omitted).

III. ARGUMENT

A. The Court Should Grant Ningbo Sunny's Renewed Motion for Judgment as a Matter of Law on Plaintiff's Claims Under Section 2 of the Sherman Act.

1. To the Extent the Court Upheld Plaintiff's Section 2 Claims Based on Plaintiff's "Joint Monopoly" or "Shared Monopoly" Theory, Such Theory Is Invalid.

The Court upheld Plaintiff's Section 2 claims, in part, "[b]ased on the evidence that Defendants and the Synta Entities allegedly conspired to achieve a monopoly in connection with the Meade acquisition." Order at 3:26-4:4, ECF No. 500. This conclusion seemed to adopt Plaintiff's position at trial that Ningbo Sunny and ***another firm***, Suzhou Synta, ***jointly*** attempted and conspired to achieve a "monopoly." *See, e.g.*, Trial Tr. (10/22/19) at 300:11-13 ("Synta and Sunny and Celestron, through their collusion, were able to do something that the FTC, as you will recall, had long precluded them and prevented them from being able to do."); *id.* (10/23/19) at 630:5-8 (Cross-Examination of Peter Ni) ("Q. ***So together, Sunny and Synta controlled over 80 percent of the astronomical telescope market*** after this acquisition of Meade and its high end facility and its intellectual property that enabled it to make all kinds of telescopes; correct?") (emphasis added); *id.* (10/28/19) at 828:22-24 ("Q. And you knew that by retaliating against small companies like Orion, ***Ningbo Sunny and Synta could dominate the market***; right?") (emphasis added); *see also* Zona Report ¶ 8, ECF No. 276-2 ("I have reached the following conclusions: a. ***Sunny and Synta*** have substantial market power in a properly defined worldwide market for telescope manufacturing; b. The market share of ***Sunny and Synta*** is up to 80% of the relevant market").

However, as set forth in the initial JMOL, there is no such thing as a "shared monopoly" or "joint monopoly," and courts—including the Ninth Circuit—have routinely rejected Section 2 claims based on such theories. *See, e.g.*, *Harkins Amusement Enters. v. General Cinema Corp.*, 850 F.2d 477, 490 (9th Cir. 1988) (internal citation omitted) (rejecting "novel" theory of "shared monopoly": "Professors Areeda and Turner admit that '***no case has held the § 2 monopolization provision applicable to shared monopoly***.' . . . One court directly addressing the issue stated bluntly, 'an oligopoly, or a shared monopoly, does not in itself violate § 2 of the Sherman Act.'")

(emphasis added); *Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1443 (9th Cir. 1995) ("To pose a threat of monopolization, ***one firm alone*** must have the power to control market output and exclude competition. An oligopolist lacks this unilateral power.") (internal citation omitted and emphasis added); *Midwest Gas Servs., Inc. v. Ind. Gas. Co., Inc.*, 317 F.3d 703, 713 (7th Cir. 2003) ("a § 2 claim can only accuse ***one firm*** of being a monopolist") (emphasis added); *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.,* 190 F.3d 775, 780 (7th Cir. 1999) (rejecting "joint monopolization" or "attempted joint monopolization" theory, describing the theory as "audacious," explaining that the Second and Ninth Circuits have "rejected" the theory, the Seventh Circuit has "[thrown] some cold water on it," and no case "squarely supports the theory."); *Lenhoff Enters., Inc. v. United Talent Agency, Inc.,* No. 15-01086, 2015 U.S. Dist. LEXIS 150141, at *8-11 (C.D. Cal. Sept. 18, 2015) ("Ninth Circuit case law holds that to sufficiently state a claim under § 2 for conspiracy to monopolize, the plaintiff must allege facts indicating that a conspiracy exists to create a monopoly in a single entity. ***The Ninth Circuit does not recognize a 'shared monopoly' or 'joint monopoly' theory***.") (emphasis added); *Standfacts Credit Servs., Inc. v. Experian Info. Solutions, Inc.*, 405 F. Supp. 2d 1141, 1152 ("***[S]ection 2 prohibits only monopolization by a single entity, as opposed to shared monopolization***") (emphasis added). Instead, alleged anticompetitive joint conduct is properly addressed under Section 1 of the Sherman Act:

> The two most important phrases in the Sherman Act are 'monopoly' and 'conspiracy.' Section 2 regulates one with monopoly market domination; section 1 reaches two or more who conspire and therefore acquire together an anticompetitive influence. To hold that an oligopoly violates § 2 amends the Act to subject to antitrust regulation businesses which lack the § 2 required market control and the § 1 conspiracy.

Am. Tel. & Tel. Co. v. Delta Commc'ns Corp., 408 F. Supp. 1075, 1106 (S.D. Miss. 1976), *aff'd per curiam*, 579 F.2d 972 (5th Cir. 1978) ("The Sherman Act neither mentions nor regulates oligopolies. The parties cite no case which has engrafted this term onto the Act. To do so would be contrary to the basic thrust of the Sherman Act.").

Given the great weight of authority holding a joint monopoly theory is invalid, Plaintiff cannot establish that Ningbo Sunny (1) had the requisite specific intent to monopolize; or (2) joined a conspiracy to monopolize, as discussed in turn.

a. *Plaintiff Failed To Introduce Evidence That Ningbo Sunny Had the Specific Intent to Monopolize The Relevant Market.*

Plaintiff needed to show Ningbo Sunny had the specific intent to ***individually*** acquire monopoly power in the market for telescope and accessory manufacturing services, Instruction No. 39, ECF No. 499, or that Ningbo Sunny and the so-called Synta Entities specifically "intended that ***one*** of the parties to the agreement would obtain or maintain monopoly power" in the relevant market. Instruction No. 41, ECF No. 499 (emphasis added). There is no record evidence that shows Ningbo Sunny or any of the "Synta Entities" had such intent.

In denying Defendants' initial JMOL, the Court noted Defendants' conduct in connection with the Meade acquisition could give rise to an inference of specific intent. *See* Order at 2:13-3:1; 3:9-13, ECF No. 500. But a party's "intention to exclude competition and to expand [its] own business is not sufficient to show a specific intent to monopolize." *Great Escape, Inc. v. Union City Body Co.*, 791 F.2d 532, 541 (7th Cir. 1986) (affirming summary judgment of attempt and conspiracy to monopolize claims; defendants' use of "political pressure" to achieve their aims did not evidence intent to monopolize the market); *Tops Mkts. v. Quality Mkts., Inc.,* No. 93-cv-0302E(F), 2000 U.S. Dist. LEXIS 11647, at *7-8, 11 (W.D.N.Y. Aug. 10, 2000) (intent to block competitor from buying a parcel of land did not establish specific intent to monopolize entire relevant market). Without more, no reasonable jury could find that Ningbo Sunny intended to ***individually*** monopolize the market for telescope and accessory manufacturing services, or entered into an agreement with any of the "Synta Entities" with the intent that ***one*** of the parties would do so.

b. *Plaintiff Failed To Establish a Conspiracy to Monopolize the Relevant Market.*

Because a shared monopoly does not violate Section 2, a conspiracy to create a shared monopoly cannot violate Section 2 either. *Phoenix Elec. Co. v. Nat'l Elec. Contractors Ass'n, Inc.*, 867 F. Supp. 925, 941 (D. Or. 1994), *aff'd*, 81 F.3d 858 (9th Cir. 1996) ("If a monopolization does not offend [Section 2] because it is shared, liability cannot logically be premised on an attempt to create such a monopoly"). Moreover, there is no evidence that Ningbo Sunny or

1 Suzhou Synta shared a common purpose of vesting one firm with monopoly power. *Syufy*
2 *Enterprises v. Am. Multicinema, Inc.*, 793 F.2d 990, 1000 (9th Cir. 1986) (district court should
3 have granted JNOV with regard to plaintiff's Section 2 conspiracy to monopolize claims where
4 there was no showing that the purported co-conspirators shared a common purpose of creating
5 monopoly in the hardtop theater market in the San Jose area). To the contrary, despite the fact that
6 the purported collusion occurred in 2013 and 2014, Plaintiff's own data show that Ningbo Sunny
7 and Suzhou Synta have not taken any steps to concentrate monopoly power in a single entity. TX
8 1938 (Dr. Zona's calculation of Ningbo Sunny's and Synta's market shares from 2012-2018).

9 2. Plaintiff Failed To Establish that Ningbo Sunny Had A Dangerous
10 Probability of Achieving Monopoly Power.

11 To establish its attempted monopolization claim, Plaintiff needed to show a dangerous
12 probability that Ningbo Sunny would achieve monopoly power through the alleged misconduct.
13 *Spectrum Sports v. McQuillan*, 506 U.S. 447, 459 (1993); Instruction No. 40, ECF No. 499.
14 Plaintiff conceded that Dr. Zona never analyzed whether Ningbo Sunny or Suzhou Synta
15 possessed monopoly power or a dangerous probability of achieving it; instead, Plaintiff argued
16 that a jury could infer a dangerous probability of monopoly power based on evidence of
17 "Defendants' market share; the trend in Defendants' market share; whether the barriers to entry
18 into the market made it difficult for competitors to enter the market; and the likely effect of any
19 anticompetitive conduct on Defendants' share of the market." Pl.'s Opp. at 15:24-28, ECF No.
20 497. The evidence shows that no reasonable jury could make such inference.

21 Dr. Zona's own market share calculations demonstrate that neither Ningbo Sunny nor
22 Suzhou Synta individually had a dangerous probability of achieving monopoly power. Indeed,
23 Ningbo Sunny's market share, on average, was below 50 percent, and even dropped as low as
24 33.46% in 2017. TX 1938. The Ninth Circuit has stated that claims for attempted monopolization
25 "involving shares between 30 and 50 percent 'should usually be rejected . . . .'". *Rebel Oil Co.,*
26 *Inc.*, 51 F.3d at 1438 & n.10.

27 Moreover, Dr. Zona's market share calculations for the years 2015-2018 do not show an
28 upward trend in Ningbo Sunny's market share that would support a finding that there was a

dangerous probability it would achieve monopoly power. *See* TX 1938. To the contrary, although Dr. Zona calculated a market share as high as 63.86% in 2013, Dr. Zona's data show this was an aberration, and that Ningbo Sunny's market share was only 46.04% in 2012 and actually ***decreased by over 30%*** between 2013 and 2017 (54.68% in 2014, 47.27% in 2015, 42.10% in 2016, and 33.46% in 2017). *Id. See also United States v. Syufy Enters.*, 903 F.2d 659, 666, 671 & n.21 (9th Cir.1990) (although a firm had a large market share, its inability to maintain it demonstrated a lack of monopoly power, which made the government's claims under the Sherman and Clayton Acts "collapse[] like a house of cards"); *Nifty Foods Corp. v. Great Atl. & Pac. Tea Co.*, 614 F.2d 832, 841 (2d Cir. 1980), *superseded by statute on other grounds as recognized in Rosenfeld v. Basquiat*, 78 F.3d 84, 93 (2d Cir. 1996) ("No reasonable jury could conclude from the rapid and continuous decline of Pet's market share, which reached a high point of 54.5% in March 1969 and fell to 33% by 1974, that there was a probability that Pet would monopolize the waffle market, let alone a dangerous probability."); *Cent. Chem. Corp. v. Agrico Chem. Co.*, 531 F. Supp. 533, 555 (D. Md. 1982) ("Given the size of the market shares alleged in this case and their fluctuation over a several-year period in a highly competitive industry which has many existing competitors and high barriers to internal expansion, the Court must conclude that the evidence of market share and market structure is insufficient as a matter of law to establish Central's attempted monopolization claim."); *Horst v. Laidlaw Waste Sys., Inc.*, 917 F. Supp. 739, 745 (D. Colo. 1996) (no dangerous probability defendant would monopolize the relevant market where defendant's market share fell during the relevant time period).

Dr. Zona also counted "***over 200 entities*** in the [Panjiva] data" as manufacturers of telescopes that collectively control between ***20 to 30 percent*** of the market. Trial Tr. (11/14/19) at 1989:9-23 (emphasis added). Dr. Zona's own reported market shares thus show that Ningbo Sunny and Suzhou Synta individually face substantial competition. *See* Trial Tr. (11/15/19) at 2181:7-2182:15 (Dr. Saravia summarizing Dr. Zona's reported market shares showing that there are "other telescope manufacturers" and that Sunny and Synta "face competition"). Dr. Zona's HHI calculations also show ***decreased concentration*** in the four years following Ningbo Sunny's acquisition of Meade. *See* TX 1939 (HHI of 4375.69 in 2013, 3315.32 in 2014, 3004.69 in 2015,

2742.81 in 2016, and 2527.41 in 2017). Plaintiff's own evidence thus militates against a finding of market or monopoly power. *See AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 229 (2d Cir. 1999) (summary judgment proper where competition in market was substantial, market was characterized by low concentration, and new entrants posed threat to defendant as plaintiff could not show dangerous probability defendant would achieve monopoly power); *see also Horst*, 917 F. Supp. at 745 (granting summary judgment of attempted monopolization claim where "the underlying record in this case indicates that competition in the [relevant market] . . . was fierce and that entry barriers, though real, have not precluded new entrants from entering the [relevant market]").

The significant number of telescope manufacturers that Dr. Zona claims compete in the market, in tandem with the percentage of the market these firms control, also precludes a finding of barriers to market entry or expansion. *See Inter-Cty. Title Co. v. Data Trace Info. Servs., LLC*, 105 F. App'x 136, 139 (9th Cir. 2004) ("[N]either monopoly power nor a dangerous probability of achieving monopoly power can exist absent evidence of barriers to new entry or expansion."). The record evidence reinforces this conclusion. Mr. Espinosa testified that in addition to Ningbo Sunny and Suzhou Synta, there are several manufacturers from which Plaintiff purchases telescopes, including Kunming United, Long Perng, Barride Optics, and Guan Sheng Optical—and that the number of manufacturers Plaintiff purchases from ***has increased over time***. Trial Tr. (11/6/19) 1322:18-1325:7. Mr. Moreo testified that there were "another 10 to potentially 20 vendors" that could have fulfilled a major portion of Orion's orders, including GSO and Burris out of China. Trial Tr. (11/13/19) at 1835:5-1836:4, 1837:2-17; *see also* TX 2100 at 40. Mr. Chiu further testified that firms such as Bosma, Chang Jiang, Jinghua Optical ("JOC"), and Idun also compete directly with Ningbo Sunny. *See*, *e.g.*, Trial Tr. (11/8/19) at 1507:15-25; *see also* Trial Tr. (11/15/19) at 2181:7-2182:15 (Dr. Saravia summarizing Dr. Zona's reported market shares showing that there are "other telescope manufacturers" and that Sunny and Synta "face competition"). Plaintiff offered no evidence that Ningbo Sunny's competitors lacked the ability to expand their output. Nor did Dr. Zona examine whether manufacturers of related optical products, like rifle scopes, spotting scopes, or binoculars, could expand or switch to making telescopes and

take market share from Ningbo Sunny and/or Suzhou Synta. *See, e.g.*, Trial Tr. (11/15/19) at 2083:16-2084:4, 2103:14-18 (Dr. Zona admitting that he did not study whether telescopes and binoculars should be in the same relevant manufacturing market even though he is also aware that Ningbo Sunny makes and sells both products).

Given the downward trend in Ningbo Sunny's actual market share, including in the four to five years after the alleged misconduct, and because there is no evidence of barriers to entry or expansion, a reasonable jury could not have found that there was a dangerous probability that Ningbo Sunny would achieve monopoly power. *E. Portland Imaging Ctr., P.C. v. Providence Health Sys.-Oregon*, 280 F. App'x 584, 586 (9th Cir. 2008) (summary judgment properly granted where plaintiff failed to create a genuine issue of material fact as to whether there are barriers to entry and expansion in the relevant market).

3. Plaintiff Presented No Evidence That It Suffered Any Injury As a Result of Any of Its Claims Under Section 2 of the Sherman Act.

The Court denied Defendants' initial JMOL on the issue of Section 2 damages because "Dr. Zona testified that his overcharge analysis was based on both the alleged conspiracy and the alleged monopolization." Order at 3:2-5, ECF No. 500 (citing Trial Tr. 2057:17-23). But Plaintiff abandoned its monopolization theory.[1]

In any event, Dr. Zona's trial testimony contradicted his expert report, which provided that his overcharge calculation stemmed solely from Plaintiff's alleged Section 1 claims: "***As a result of Defendants' collusion to fix prices and divide the market for telescope manufacturing***, Orion's [sic] has suffered damages in the form of lost profits from price overcharges on telescopes purchased from Defendants and their co-conspirators . . . ." Zona Report ¶ 8(c), ECF No. 276-2

[1] Plaintiff did not include a monopolization claim in the Jury Instructions or Verdict Form, *see* ECF Nos. 499, 501, respectively, nor did Plaintiff oppose Defendants motion for judgment as a matter of law as to Plaintiff's actual monopolization theory, *compare* Def.s' JMOL at 1:28-2:1, ECF No. 464, *with* Pl.'s Opp. at 13-17, ECF No. 497. Accordingly, any actual monopolization theory has been abandoned, including any damages purportedly arising from such claim.

(emphasis added).

Rule 26 required Plaintiff to provide a timely report containing a complete statement of Dr. Zona's opinions, and to provide a timely supplement if needed. Fed. R. Civ. Proc. 26; *Hoffman v. Constr. Protective Servs., Inc.,* 541 F.3d 1175, 1179 (9th Cir. 2008). Plaintiff supplemented Dr. Zona's overcharge analysis on September 24, 2019 but never presented the opinion that Dr. Zona's price overcharge analysis applied to both Plaintiff's Section 1 and Section 2 claims.

Accordingly, Dr. Zona was barred from providing testimony at trial that altered the conclusions in his report. Fed. R. Civ. P. 37(c)(1). This sanction is "self-executing" and "automatic" to provide strong inducement for proper disclosure. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.,* 259 F.3d 1101, 1106 (9th Cir. 2001) (quoting Fed. R. Civ. P. 37(c) advisory committee's notes to 1993 amendment). In any event, Dr. Zona's own testimony belied his assertion that his overcharge analysis applied to both Plaintiff's Section 1 and 2 claims. *See* Trial Tr. (11/14/19) at 1995:18-23 ("I've assumed that the particular conspiracy as alleged was true . . . . if it [the alleged conspiracy] did [occur], I've calculated overcharges."); *id.* at 1976:3-24 (listing "allegations" important to an economist for calculating price overcharges as "the agreement on pricing" and the "allegations that Sunny and Synta agreed to avoid conflict"); *id.* at 1996:14-23 (admitting the overcharge damages quantify "the impact of the conspiracy"); *id*. at 1997:14-16 (Dr. Zona's formulas "allow me to determine what the effect of the conspiracy was, or the damages"); *id*. at 1996:2-11 (Dr. Zona's damages methodology consists of calculating what "Orion [would] have earned if Sunny and Synta had not conspired," in other words, Dr. Zona's but-for world is one in which "a conspiracy never occurred"). Accordingly, there is no evidence in the trial record that Plaintiff suffered any injury as a result of any violation of Section 2. *See Rebel Oil*, 51 F.3d at 1433 (plaintiff must prove "causal antitrust injury" to recover under Section 2).

4. Plaintiff Failed to Introduce Admissible Evidence Establishing Its Claimed Relevant Market.

Plaintiff's Section 2 claims require Plaintiff to define and prove a relevant market. *Amarel v. Connell*, 102 F.3d 1494, 1521 (9th Cir. 1996). "The outer boundaries of a product

1 market are [to be] determined by the reasonable interchangeability of use or the cross-elasticity of
2 demand between the product itself and substitutes for it." *Brown Shoe Co. v. U.S.*, 370 U.S. 294,
3 325 (1962). "Calculating the cross-elasticity of demand is often an economist's first step in
4 defining the relevant product market." *Hammer v. Clear Channel Commc'ns, Inc. (In re Live*
5 *Concert Antitrust Litig.)*, 863 F. Supp. 2d 966, 984 (C.D. Cal. 2012) (citation omitted). To test the
6 definition of a market, courts often look to "whether a hypothetical monopolist could impose a
7 'small but significant nontransitory increase in price' ('SSNIP') in the proposed market," or
8 whether consumers would respond to such an increase by substituting other products, suggesting
9 that the correct market definition must be broad enough to include such products." *Saint*
10 *Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 784 (9th Cir. 2015).
11 The Court held that "Dr. Zona's testimony on market definition was sufficient for a jury to
12 find for Orion on this issue." Order at 3:5-8, ECF No. 500. It was not.
13 Dr. Zona admitted at trial that he did not conduct a SSNIP test, calculate cross-price
14 elasticities to try and find the best substitute product to evaluate, or study consumer preferences
15 regarding potential substitutes. Trial Tr. (11/15/19) at 2082:17-2083:11. In addition to these
16 shortcomings, Dr. Zona's market definition is fundamentally unsupported for two more reasons.
17 *First*, Dr. Zona conducted no independent analysis or research to determine whether
18 manufacturers that mass-produce low-end telescopes (e.g., ones that cost less than $200) are
19 reasonably capable of making high-end telescopes as well (e.g., ones that cost over $4,000 and
20 potentially significantly more). Instead, Dr. Zona claimed that he "understands" that low-end and
21 high-end telescopes can be manufactured in the same factories using the same machines and
22 processes. But this assumption is based solely on an interview with Mr. Moreo, who lacks
23 experience with telescope manufacturing. Indeed, there is no fact evidence in this case that high-
24 end and low-end telescopes are in the same market. Meade's "production was limited in the U.S.
25 and Mexico of the high-end product." Trial Tr. (11/5/19) at 1078:12-14. Ningbo Sunny had the
26 "ability to produce low-end telescopes in large quantities." Trial Tr. (11/5/19) at 905:17-19. Mr.
27 Chiu testified that Ningbo Sunny "does not have technologies or the technicians who has the
28 proper skills to produce high-end product, and also we do not have the manufacturing capability

mainly in equipment to produce any high-end products." Trial Tr. (11/8/19) at 1504:19-25. Testimony showed that Ningbo Sunny has a competitive advantage in manufacturing low-end products, and getting into higher-end products "is going to take a long time." Trial Tr. (11/8/19) at 1506:2-14). On the other hand, Suzhou Synta is in the market for the middle to the high-end product. Trial Tr. (11/8/19) at 1508:4-12.

Second, Dr. Zona ignored and failed to analyze possible substitutes in the alleged telescope manufacturing market. Specifically, Dr. Zona did not evaluate whether manufacturers of other optical products like binoculars and rifle scopes could switch to making telescopes, even though he was aware that Ningbo Sunny made and sold each of these products. Trial Tr. (11/15/19) at 2083:16-2084:13; 2103:14-18. The evidence adduced at trial showed that such considerations were relevant to defining the relevant market as manufacturers of telescopes can and do manufacture other optical products. *See, e.g.*, Trial Tr. (11/5/2019) at 908:24-909:23 (prior to Ningbo Sunny's acquisition, Meade owned three different rifle scope brands, a German optical company, and produced binoculars in addition to manufacturing telescopes); Trial Tr. (10/25/19) at 765:9-766:1. Indeed, Mr. Moreo offhandedly acknowledged the existence of a "telescope and binocular business." *See* Trial Tr. (11/13/19) 1676:21-25. Despite these facts, and although Dr. Zona acknowledged that Ningbo Sunny makes binoculars and rifle scopes, among other products, he admitted he did no independent analysis to determine whether such manufacturers should be excluded from the relevant market. Trial Tr. (11/15/19) at 2083:16-24; 2103:14-18.

Plaintiff did not respond to any of these arguments; instead, it summarily asserted that "Dr. Zona defined the relevant market." *See* Pl.'s Opp. at 14:7-8, ECF No. 497. But Dr. Zona's definition alone does not carry Plaintiff's burden to prove a relevant market, particularly where such opinion is unreasonable in light of the record facts. *See Rebel Oil Co., Inc.*, 51 F.3d at 1436 (disregarding expert's definition of relevant market where it was unreasonable in light of plaintiff's claims). Because Dr. Zona's market definition "is not supported by sufficient facts to validate it in the eyes of the law . . . it cannot support" the jury's verdict. *Volterra Semiconductor Corp. v. Primarion, Inc.*, 799 F.Supp.2d 1092, 1098-99 (N.D. Cal. 2011).

5. Plaintiff's Evidence Did Not Establish That Ningbo Sunny Engaged in "Predatory Conduct."

Finally, an attempted monopolization claim under Sherman Act § 2 requires a showing of "predatory" conduct. *See Coalition for ICANN Transparency, Inc. v. Verisign, Inc.*, 611 F.3d 495, 506 (9th Cir. 2010); *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 549 (9th Cir. 1991). The Court concluded that a reasonable jury could infer that Defendants' alleged conduct in connection with the Meade acquisition and alleged interference with Orion's attempt to purchase the Hayneedle assets was predatory. Order at 3:14-19, ECF No. 500. This is the same conspiratorial conduct that underpins Plaintiff's Section 1 claims. Accordingly, Plaintiff's Section 2 claim based on this conduct should fail for the same reasons discussed below. *See, e.g.*, *Williams v. I.B. Fischer Nevada*, 999 F.2d 445, 448 (9th Cir. 1993) ("[A] § 1 claim insufficient to withstand summary judgment cannot be used as the sole basis for a § 2 claim.") (quoting *Thomsen v. Western Elec. Co., Inc.,* 680 F. 2d 1263, 1267 (9th Cir. 1982)); *Sambreel Holdings LLC v. Facebook, Inc.*, 906 F. Supp. 2d 1070, 1082 (S.D. Cal. 2012) (dismissing Section 2 claim based on alleged Section 1 violations because the "alleged actions do not constitute exclusionary conduct under Sherman Act § 2. Indeed, the Court has already found that the Complaint fails to state a [Sherman Act § 1] claim.").

B. The Court Should Grant Ningbo Sunny's Renewed Motion for Judgment as a Matter of Law as to Plaintiff's Section 1 Claims.

1. Plaintiff's Evidence Failed to Show That Ningbo Sunny Joined a Conspiracy To Fix The Price of Telescopes or Orion's Credit Terms.

The Court denied Defendants' initial JMOL on Plaintiff's price fixing claims, stating that Orion had (1) "presented evidence that the Synta Entities and Defendants conspired through Joyce Huang, an employee of Mr. Shen, to set prices" and that Mr. Shen also "controls Good Advance"; and (2) "set forth evidence that the Synta entities withdrew Orion's credit on account of its attempt

to purchase the [Hayneedle] assets[2] and then instructed Defendants to do the same." Order at 4:8-18, ECF No. 500. However, this evidence—and the record evidence as a whole—is insufficient as a matter of law to support a finding that Ningbo Sunny entered into a conspiracy to fix prices or Orion's credit terms, under either the per se standard or rule of reason.

First, even assuming that Ms. Huang and Good Advance are under the control of David Shen, it does not follow that Ningbo Sunny and its horizontal competitor ***Suzhou Synta*** entered into an agreement to fix the prices of telescopes and accessories. Indeed, the evidence reveals that Joyce Huang worked for Good Advance, a middleman distribution company, which operated as a distinct entity from manufacturer Suzhou Synta. Trial Tr. (11/08/19) at 1578:1-12, 1579:3-20

[2] The jury did not specify whether any of the damages it awarded on Plaintiff's Section 1 claim were based on Plaintiff's failure to acquire the Hayneedle assets. *See* Verdict Form at 1, ECF No. 501. However, no reasonable jury could have found that Ningbo Sunny or Suzhou Synta's conduct caused the Hayneedle deal to fall through. The evidence shows Plaintiff's deal with Hayneedle ultimately fell apart because Plaintiff insisted that Hayneedle acquiesce to a non-compete clause—not because of any financing concerns due to withdrawn credit. Trial Tr. (11/13/19) at 1810:23-1820:5; TX 2161 (Sept. 9, 2014 email from Moreo stating: "Essentially, we could not agree on the final terms of the transaction–from Orion's perspective we insisted on legal protections in the contract re non-compete provisions that the Seller found unacceptable."); TX 2218 (Sept. 13, 2014 board presentation explaining deal fell apart because Hayneedle intended to continue to compete); Trial Tr. (11/13/19) at 1810:9-22 (Orion had money to complete acquisition); TX 2212 at 5 (Sept. 2014 presentation to Imaginova's Board of Directors stating financing to complete acquisition in place despite Ningbo Sunny's June 4 email). Nor could a reasonable jury find that Plaintiff's failure to acquire the Hayneedle assets resulted in harm to competition. *Broadcom Corp. v. Qualcomm, Inc.,* 501 F.3d 297, 308 (3d Cir. 2007) ("Conduct that merely harms competitors, however, while not harming the competitive process itself, is not anticompetitive."). Accordingly, to the extent the jury premised its damages award on Plaintiff's failure to acquire the Hayneedle assets, such finding was in error.

(Mr. Espinosa saying he had heard that Ms. Huang did not work for Suzhou Synta); Trial Tr. (11/06/19) at 1331:25-1335:19 (Orion negotiated separately with Good Advance and Suzhou Synta and Mr. Espinosa believed them to be different companies); TX 2106 (showing Joyce was the contact for Ningbo Sunny/Good Advance, while Nancy was the contact for Suzhou Synta); Trial Tr. (11/08/19) at 1513:5-1514:20 (Mr. Chiu's explanation that Good Advance is a trading company that operates as a middleman distributor that connects manufacturers with customers for a commission). At best, this establishes a vertical relationship between Ningbo Sunny and its distributor Good Advance, with which it has "legitimate reasons to exchange information about the prices and the reception of their products in the market." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 762 (1984).

Second, the record evidence shows that it was not possible for Ningbo Sunny to reach an agreement with its horizontal competitor—Suzhou Synta—to withdraw Orion's credit because Ningbo Sunny never extended Orion any credit for it to withdraw. *See* Trial Tr. (11/08/19) at 1539:24-1540:5. Even so, Mr. Chiu confirmed that he did not discuss Orion's credit with anyone at Suzhou Synta, and that his communication with Orion regarding credit terms was solely out of his concern for the collectability of Ningbo Sunny's receivables. *Id.* at 1540:4-24; *see also id.* (10/25/19) at 739:19-740:14, 744:19-22 (Mr. Ni confirming only concern was to protect Ningbo Sunny's AR).

The record evidence thus does not support a finding that Ningbo Sunny entered into a horizontal agreement with its competitor, Suzhou Synta, to fix prices or Plaintiff's credit terms. This precludes a finding of per se price or credit fixing as a matter of law. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 893 (2007) (only horizontal price fixing agreements subject to per se treatment; vertical restraints analyzed under rule of reason).

Nor could a reasonable jury have found that Ningbo Sunny's communications with Joyce Huang regarding product prices and/or credit terms unreasonably restrained trade under the rule of reason in light of Plaintiff's failure to establish a relevant market or Ningbo Sunny's market power in same, as discussed above. *See SumoText Corp. v. Zoove, Inc.*, No. 16-cv-01370-BLF, 2016 U.S. Dist. LEXIS 152927, at *9-10 (N.D. Cal. Nov. 3, 2016) (under both Section 1 and Section 2

1 of the Sherman Act, plaintiff must establish the existence of a relevant market and that the
2 defendant has power within that market). This is particularly true where, as here, the record
3 evidence does not show that there were any substantial, actual anticompetitive effects on the
4 relevant market stemming from Ms. Huang's and Good Advance's role as an intermediary
5 between Ningbo Sunny and Plaintiff. *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 491 F.3d
6 380, 390 (8th Cir. 2007) (finding no evidence of actual anticompetitive effects where plaintiff
7 failed to show a price increase, output reduction, or any detrimental effect on the alleged market as
8 a whole); *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 151-52 (9th Cir.
9 1989) (no anticompetitive effect where price and output not impacted). Indeed, despite Ningbo
10 Sunny's communications with Ms. Huang, the evidence shows that Ningbo Sunny continued to
11 compete with Suzhou Synta on the overlapping products the companies sold, and consistently
12 undercut Suzhou Synta's prices. *See, e.g.*, TX 2041, 2096, 2098 (showing Suzhou Synta sold the
13 StarBlast telescope to Orion for $99, while Orion paid Good Advance $90 for the same SKU, and
14 Good Advance paid Ningbo Sunny $88); TX 2404, 2405, 2406 (for the Astroview: Suzhou Synta:
15 $114; Good Advance: $108; Ningbo Sunny: $99.20); TX 2399, 2041, 2096 (for the FunScope:
16 Suzhou Synta: $34; Good Advance: $29; Ningbo Sunny: $27).

17 2. <u>Plaintiff Failed to Produce Sufficient Evidence to Sustain a Finding That</u>
18 <u>Ningbo Sunny Joined a Market Allocation Conspiracy.</u>

19 The Court denied Defendants' initial JMOL, explaining that "Orion ha[d] cited evidence
20 that [Defendants] conspired to divide potential customers in the distribution market" and
21 "presented sufficient evidence that the Synta Entities and Defendants conspired to allocate
22 products in the manufacturing market as well." Order at 4:19-25, ECF No. 500. As discussed in
23 turn, however, the record evidence was insufficient to sustain a finding of liability on either of
24 these claims.

25 *First*, there was insufficient evidence to show that Ningbo Sunny conspired to divide
26 potential customers in the distribution market. In fact, the evidence shows just the opposite.
27 Ningbo Sunny's wholly-owned subsidiary distribution company, Meade, has been competing
28 aggressively with Suzhou Synta's distributor Celestron. Trial Tr. (11/06/19) 1222:24-1252:8 &

TX 2014, 2036, 2038 (Mr. Aniceto describing using former sales contacts from Celestron to increase Meade's sales and reducing Meade's product prices to be competitive with Celestron); Trial Tr. at 1258:25-1267:14 & TX 2061 (Mr. Aniceto describing Meade's goal to "definitely be a competitor to Celestron"); Trial Tr. at 1176:5-22 (Meade was focused on selling all products and gaining customers at all levels).

The evidence cited by Plaintiff in Opposition to Defendants' initial JMOL on this issue does not support a contrary result. Pl.'s Opp. at 10:19-25, ECF No. 497 (citing TX 1769.001, TX 1193, TX 1765). Both Trial Exhibits 1769.001 and 1193 are emails from Mr. Shen to Mr. Ni, to which Mr. Ni never responded or acted upon. And Trial Exhibit 1765, an email chain between Mr. Chiu and Ms. Huang, actually supports a finding that Ningbo Sunny and the purported "Synta entities" ***acted unilaterally***, as it reflects a disagreement between Mr. Chiu and Ms. Huang about whether Ningbo Sunny would continue to supply Good Advance's customers. Furthermore, given the number of competitors in the distribution market (over 200, according to Dr. Zona, *see* Trial Tr. (11/14/19) at 1989:9-22), an inference that Ningbo Sunny entered into an agreement to allocate customers in the distribution market fails as such agreement would make no economic sense. *Stanislaus Food Products Co. v. USS-POSCO Industries*, 803 F.3d 1084, 1090-91 (9th Cir. 2015) (market allocation scheme not rational unless there is little competition or where payoff is likely to be significant); Trial Tr.(11/6/19) at 1214:1-19 (listing several distributors that compete with Meade). "If [a] plaintiff's theory is economically senseless, no reasonable jury could find in its favor . . . ." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 468-69 (1992); *Paladin Assocs., Inc. v. Montana Power Co.*, 97 F. Supp. 2d 1013, 1034 (D. Mont. 2000) (granting defendant's motion for summary judgment on plaintiff's conspiracy claims, explaining "[c]ourts cannot infer 'economically senseless' conspiracies under circumstances in which the defendants would have no rational motive to conspire.").

Second, there was insufficient evidence to sustain the jury's finding that Ningbo Sunny conspired to divide the manufacturing market. The evidence shows that Ningbo Sunny and Suzhou Synta ***did sell overlapping products***, including the StarBlast, Astroview, and Funscope, to Plaintiff ***at overlapping times***. TX 2041, 2096, 2098 (showing Plaintiff ordered the Starblast

telescope from both Suzhou Synta and Ningbo Sunny through Good Advance in January 2015, which Suzhou Synta sold to Orion for $99, while Orion paid Good Advance $90 for the same SKU, and Good Advance paid Ningbo Sunny $88); TX 2404, 2405, 2406 (for the Astroview: Suzhou Synta: $114; Good Advance: $108; Ningbo Sunny: $99.20); TX 2399, 2041, 2096 (Plaintiff purchased Funscopes from both Ningbo Sunny and Suzhou Synta in early 2015): Suzhou Synta: $34; Good Advance: $29; Ningbo Sunny: $27). More than that, the evidence shows that Ningbo Sunny attempted to undercut Suzhou Synta's pricing to win Plaintiff's business, and that Plaintiff used this as leverage to negotiate better prices. *See* TX 1410 (Mr. Chiu providing quotes on products); TX 2148 (Mr. Espinosa showing that Ningbo Sunny's prices were lower than Suzhou Synta's); TX 2171 (Mr. Moreo: "We know that James [Chiu] can make [these telescopes]. The only question is how to play it with Synta.").

Plaintiff's claim boils down to the argument that Ningbo Sunny should have manufactured more products to compete with Suzhou Synta, and that its failure to do so constitutes proof of unlawful anticompetitive conduct. Not so. The antitrust laws expressly permit companies to make such unilateral decisions about the products that they make and sell. *See Glenn Holly Entm't, Inc. v. Tektronix, Inc.,* 352 F.3d 367, 372 (9th Cir. 2003). The antitrust laws do not, however, force firms to compete aggressively or at all. *See In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 873 (7th Cir. 2015) ("[T]he Sherman Act imposes no duty on firms to compete vigorously, or for that matter at all . . . ."); *id.* at 874 ("It is one thing to prohibit competitors from agreeing not to compete; it is another to order them to compete.").

Plaintiff produced no competent evidence that would support a contrary finding. Dr. Sasian's testimony—which he admitted "you don't need to have a Ph.D." to give—is inadmissible under Federal Rules of Evidence 402, 602, 701, and 702, as it is neither based on "the expert's scientific, technical, or other specialized knowledge[,]" nor Dr. Sasian's personal knowledge. Absent Dr. Sasian's testimony, the "evidence" underlying Plaintiff's market allocation claim shows only that Ningbo Sunny's factory was large and equipped with devices to manufacture to manufacture ***its own product lines***. TX 1927; TX 1938; Trial Tr. (11/06/19) at 1313:1-17 (Mr. Espinosa stating Ningbo Sunny's factory was better than Suzhou Synta's because it was "a lot

1 larger, a lot cleaner, and it looked like they were really efficient with their product building").
2 Naturally, the size of Ningbo Sunny's factory does not establish Ningbo Sunny's ability to
3 manufacture high-end products. And the only competent evidence on this issue shows Ningbo
4 Sunny could not. Anderson Dep. Tr. 43:7-44:4 (Ningbo Sunny "had different capacities[,]" from
5 Suzhou Synta); Trial Tr. (10/25/19) at 771:22-777:9 (Mr. Ni explaining equipment and personnel
6 required to make advanced products, which Ningbo did not have; indeed, Ningbo Sunny has only
7 one in-house designer who only has a high school degree); Trial Tr. (11/5/19) at 1044, 1089 (Mr.
8 Lupica stating that Suzhou Synta focused on larger aperture, higher quality products that had
9 higher margins, but Ningbo Sunny's expertise was in low-end, high volume products); Trial Tr.
10 (11/8/19*)* at 1504-07 (Mr. Chiu explaining that Ningbo Sunny lacks people, equipment, and
11 capabilities to make high-end products and ISO 9001 certification has no bearing on what type of
12 telescopes—or any products—a company can produce).
13 An inference that Ningbo Sunny did not manufacture high-end telescope products pursuant
14 to a market allocation conspiracy is also precluded because it too makes no sense under the
15 circumstances. *Stanislaus*, 803 F.3d at 1087 (affirming summary judgment where plaintiff's
16 market allocation theory was "not rational in light of the circumstances."); *Adaptive Power*
17 *Solutions, LLC v. Hughes Missile Sys. Co.*, 141 F.3d 947, 952 (9th Cir. 1998) ("Antitrust claims
18 must make economic sense."). It is economically implausible that Ningbo Sunny would enter into
19 a market allocation agreement that prohibited it from selling high-end telescopes while
20 simultaneously investing $15 million dollars in Meade, a company that manufactures and sells
21 high-end telescopes that compete with Suzhou Synta's products. Trial Tr. (11/05/19) at 1078:3-
22 1079:11; *id.* (10/25/19) at 728:5-24 (Mr. Ni: "The decision of acquiring Meade came as an overall
23 strategy for Ningbo Sunny because Ningbo Sunny had always been in the low product market and
24 having Meade would give us more"; "Ningbo Sunny wanted to become a great brand, the largest
25 brand in the world by having Meade because it expands its production life [sic] also to high-end
26 products"); *see also id.* (10/28/19) at 804:21-805:4 (Mr. Ni: "After [it] successfully acquired
27 Meade, Ningbo Sunny was able to tap into that high-end product market and Ningbo Sunny then
28 had the manufacturing capability and intellectual properties . . . . I believe in the future this is

going to impact Ningbo Sunny in a more positive way"). Notably, Plaintiff did not challenge this argument in its opposition. *See generally* Pl.'s Opp. at 12:3-13:4, ECF No. 497.

3. There Is No Evidence of Injury—or Any Conspiracy—After September 2016.

Finally, it is Plaintiff's burden to prove the existence of a conspiracy, *see* Instruction No. 21, ECF No. 499: including the period in which it existed. *Bordonaro Bros. Theatres v. Paramount Pictures*, 203 F.2d 676, 678 (2d Cir. 1953) ("But the judge properly—we might say inevitably—ruled that the plaintiff must prove that the conspiracy continued from 1946 to 1948, and so charged."); *United States v. Therm-All, Inc.*, 373 F.3d 625, 636 (5th Cir. 2004) ("Supreme Court precedent, this Court's precedent, and persuasive authority of the Ninth Circuit lead us to conclude that the government must produce evidence that the conspiracy continued during th[e] time [alleged]."); *United States v. Cont'l Grp., Inc.*, 456 F. Supp. 704, 715–16 (E.D. Pa. 1978), *aff'd*, 603 F.2d 444 (3d Cir. 1979) ("[B]ecause the indictment in this case charged the defendants with having engaged in a continuing conspiracy, the Government was required to prove that the conspiracy which existed was a single, continuing conspiracy rather than a series of separate conspiracies or isolated episodes."). Thus, even assuming Plaintiff adduced sufficient evidence to show Ningbo Sunny entered into a conspiracy—and the facts only hold to the contrary—there is absolutely no evidence in the record that shows a conspiracy existed after September 2016.[3]

The Court previously rejected this argument, holding that "Orion has presented evidence that in September 2016, Defendants ceased doing business with Orion and the Synta Entities have continually raised the prices they quote to Orion." Order at 4:26-5:1, ECF No. 500. However, there is no evidence that would support a finding that Ningbo Sunny or Suzhou Synta engaged in such conduct ***pursuant to an agreement***. *See Schwimmer v. Sony Corp. of Am.*, 677 F.2d 946, 952, 957 (2d Cir. 1982) (in case involving allegations of a "general conspiracy" that resulted in defendant terminating its relationship with plaintiff, defendant's Rule 50(b) motion should have

[3] In fact, Plaintiff provided no evidence of communications even referencing Mr. Shen or Suzhou Synta after December 2015. *See* TX 1208.

been granted because there was insufficient evidence from which a jury could find that defendant acted pursuant to a conspiracy). Moreover, the evidence does not support a finding that Plaintiff sustained overcharge damages—the only damages claimed by Plaintiff as a result of Defendants' alleged price fixing and market allocation (Zona Report ¶¶ 8(c), 132, ECF No. 276-2)—after September of 2016, when Ningbo Sunny ended its relationship with Plaintiff and Plaintiff entered into a Supply Agreement with Suzhou Synta that guaranteed Plaintiff most favored customer status. Trial Tr. (11/13/19) at 1642:3-5 (Mr. Moreo stating Ningbo Sunny stopped supplying Orion in late 2016); TX 2420 ¶ 4.2.1 ("Seller will make and sell Products to Buyer on a 'Most Favored Customer' or 'MFC' status" with audit rights). Although Dr. Zona calculated damages beyond September 2016, such calculations were based on his assumption that there was an ongoing conspiracy. Trial Tr. (11/16/19) 2168:1-22 (Dr. Saravia explaining Dr. Zona assumed continuing conspiracy); Zona Report ¶ 35, ECF No. 276-2 ("I assume the allegations in the Complaint as to liability to be correct"). No reasonable jury could have awarded damages based on such guesswork and speculation. *See* Instruction No. 53, ECF No. 499.

C. The Court Should Grant Ningbo Sunny's Renewed Motion for Judgment as a Matter of Law on Plaintiff's Section 7 Claim.

As discussed above regarding Orion's Section 2 claims, Plaintiff failed to produce sufficient evidence upon which a jury could find a relevant market. This alone bars Plaintiff's Section 7 claim. *See* Instruction No. 46, ECF No. 499. Regardless, the Court allowed this claim to go to the jury based on Plaintiff's HHI evidence, which showed that the relevant market was highly concentrated, and that concentration increased after the acquisition. Order at 5:6-12, ECF No. 500.[4]

While a high HHI on its own may satisfy a Plaintiff's prima facie showing that a merger is

[4] While Dr. Zona's calculations showed in increase in concentration in 2013, his calculations also show ***substantial decreases*** in market concentration in the four years following Ningbo Sunny's acquisition of Meade. *See* TX 1939 (HHI of 4375.69 in 2013, 3315.32 in 2014, 3004.69 in 2015, 2742.81 in 2016, and 2527.41 in 2017).

anticompetitive, "statistics concerning market share and concentration, while of great significance, are not conclusive indicators of anticompetitive effects" and "a defendant can rebut a prima facie case with evidence that the proposed merger will create a more efficient combined entity and thus increase competition." *Saint Alphonsus Med. Ctr.-Nampa Inc.*, 778 F.3d at 785, 790 (internal quotation marks, formatting, and citation omitted in first quote). As explained in the initial JMOL, Ningbo Sunny's acquisition of Meade was ***procompetitive*** and ***increased competition*** because Ningbo Sunny's substantial investment in Meade pulled it back from the brink of bankruptcy and allowed it to once again compete for business against companies like Suzhou Synta and Celestron. *See* Def.s' JMOL at 22:22-24:11, ECF No. 464. Plaintiff offered no rebuttal to this in its Opposition. *See generally* Pl.'s Opp. at 17:10-20:17, ECF No. 497. Nor did Plaintiff dispute that the evidence at trial did not establish that Plaintiff had suffered an antitrust injury as a result of Defendants' alleged Section 7 violation because the injury it claimed flowed from Defendants' procompetitive conduct. *See* Def.s' JMOL at 24:12-23, ECF No. 464; *see generally* Pl.'s Opp. at 17:10-20:17, ECF No. 497.

Finally, as discussed in Ningbo Sunny's Motion for New Trial filed concurrently herewith, even assuming Plaintiff had established liability, Plaintiff proffered no evidence at trial of damages flowing from its Section 7 claim. Accordingly, no reasonable jury could have awarded such damages.[5]

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[5] Plaintiff claimed in its Opposition to the initial JMOL that this issue has been waived. Pl.'s Opp. at 20 n.5, ECF No .497. Not so. Defendants have lodged their objections to Plaintiff's novel claim for damages under Section 7 from the outset. *See, e.g.*, Joint Pretrial Conf. Statement at 11:12-18, ECF No. 335-1 (Sept. 27, 2019); Joint Proposed Jury Instructions at 243-244, ECF No. 371 (Oct. 4, 2019). The Court did not hear argument on this issue until November 19, 2019—the day after Defendants were required to, and did, file their initial JMOL, *see* ECF No. 464—at which point the Court decided that the jury would be instructed on Plaintiff's Section claims. *See* Trial Tr. (11/19/19) at 2442:24-2469: 20. The Court subsequently invited the parties to preserve

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D. The Court Should Grant Ningbo Sunny's Renewed Motion for Judgment as a Matter of Law on Plaintiff's State Law Claims.

3 Because Plaintiff's remaining claims under California's Unfair Competition Law ("UCL")
4 and Cartwright Act are based on the same conduct and legal theories as its federal claims,
5 Plaintiff's state law claims fail for the same reasons discussed above. *See Cnty. of Tuolumne v.*
6 *Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001) ("The analysis under California's
7 antitrust law mirrors the analysis under federal law because the Cartwright Act was modeled after
8 the Sherman Act") (citation omitted); *Stevens v. Sup. Ct.*, 75 Cal. App. 4th 594, 602 (1999) ("The
9 UCL works by borrowing violations of other laws and treating those transgressions, when
10 committed as a business activity, as unlawful business practices.") (citation, quotations, and
11 alterations omitted).

12
IV. CONCLUSION

13 For the foregoing reasons, Ningbo Sunny respectfully requests that the Court grant its
14 renewed motion for judgment as a matter of law as to each of Plaintiff's claims.

15 Dated: January 16, 2020

16 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

17 By /s/ Leo D. Caseria

LEO D. CASERIA

18 Attorneys for Defendant
19 NINGBO SUNNY ELECTRONIC CO., LTD.

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27 their objections on the record on November 20, 2019. Trial Tr. (11/20/19) at 2482:17-2485:4.
28 Ningbo Sunny's counsel reasserted its objections for the record at both hearings.