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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,

Defendants.

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

PLAINTIFF OPTRONIC TECHNOLOGIES, INC.'S OPPOSITION TO DEFENDANT'S RENEWED MOTION UNDER RULE 50(b)

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

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Orion respectfully submits this Opposition to Defendant's Renewed Motion for Judgment as a Matter of Law under Rule 50(b) (ECF No. 556) (the "Motion").

INTRODUCTION

After the close of evidence, Defendant submitted an expansive motion for a directed verdict under Rule 50(a). On November 26, 2019, the Court issued an Order denying all of Defendant's arguments. (ECF 500.) The Court correctly found that Orion had submitted substantial evidence to support all its claims and that the legal arguments Defendant had raised lacked merit. (*Id*.) Thereafter, the jury found that Orion had proved every element of each of its claims. Defendant's Rule 50(b) motion lacks merit for the same reasons that the Court already gave. Under longstanding Ninth Circuit law, Defendant cannot raise arguments in its Rule 50(b) Motion that it failed to preserve in its Rule 50(a) motion. *OTR Wheel Eng'g, Inc. v. W. Worldwide Servs., Inc.*, 897 F.3d 1008, 1016 (9th Cir. 2018) ("a 'party cannot raise arguments in its post-trial motion for judgment as a matter of law under Rule 50(b) that it did not raise in its pre-verdict Rule 50(a) motion.'") (quoting *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003)). Defendant does not point to any mistakes by the jury in its motion. It does not contend that any jury instructions were erroneous (nor could it, because it assented to each one). Nor does not offer a sufficient basis for judgment notwithstanding the verdict as to any of Orion's claims. The record is replete with evidence from which the jury could, and did, find liability for each claim advanced by Orion. Defendant's motion ignores the legal standard of Rule 50(b) and attempts to impermissibly smuggle in arguments that Defendant waived by failing to raise in its Rule 50(a) Motion – which lack merit in any event. It also raises a number of arguments attacking straw men in the forms of claims that the jury was not instructed on and which Orion did not allege—such as "shared monopoly."

For all these reasons, the Motion should be denied.

LEGAL STANDARD

Federal Rule of Civil Procedure 50(b) governs renewed motions for judgment as a matter of law following the entry of judgment. "The test is whether the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is

contrary to that of the jury." *Dunlap v. Liberty Nat. Prod., Inc.*, 878 F.3d 794, 797 (9th Cir. 2017) (quoting *Estate of Diaz v. City of Anaheim*, 840 F.3d 592, 604 (9th Cir. 2016) (as amended)). "A jury's verdict must be upheld if it is supported by substantial evidence that is adequate to support the jury's findings, even if contrary findings are also possible." *Id.* (quoting *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1242 (9th Cir. 2014)).

"A 'party cannot raise arguments in its post-trial motion for judgment as a matter of law under Rule 50(b) that it did not raise in its pre-verdict Rule 50(a) motion.'" *OTR Wheel Eng'g, Inc. v. W. Worldwide Servs., Inc.*, 897 F.3d 1008, 1016 (9th Cir. 2018) (quoting Freund v. Nycomed Amersham, 347 F.3d 752, 761 (9th Cir. 2003).)

THE EVIDENCE AT TRIAL

Whether viewed by moonlight, starlight, or (as this Court is required to) the light most favorable to Orion, the record evidence introduced at trial supported all of Orion's claims under Sections 1 and 2 of the Sherman Act, as well as the Clayton Act. The evidence, a few pieces of which are briefly noted below, showed that Defendants colluded with the only other significant telescope manufacturer in the market, David Shen and his various companies (the "Synta Entities") to fix prices, divide the market, and ensure that no new market entrant could acquire the most significant manufacturing facility to come up for sale in decades—all to preserve and expand Defendants and the Synta Entities' market share and exclude competitors.

Defendant Ningbo Sunny and its wholly owned subsidiaries are the dominant firm in the highly concentrated telescope and accessories manufacturing market, possessing a market share as high as 63% between 2013 and 2018. (TX 1938 (Zona market share analysis); TX 1939 (Zona HHI calculation showing that the market has been highly concentrated per DOJ/FTC Merger Guidelines from 2012 to 2018).) The relevant market is a global market for telescope and accessory manufacturing. (Trial Tr. 1978:11-1982:9.) Collectively, Defendants and the Synta Entities possess between approximately 70% and 80% of the market share in that market. (TX 1938.) Defendants and the Synta entities have no serious challengers in the market: the remaining 20-30% of market share is spread among *200 other entities*. (*Id.*) The only meaningful minor

competitor in the market is JOC, whose market share has fluctuated between 3% and 11% in the 2012-2018 period. (*Id.*)

In 1991 and again in 2002, the FTC took action to block proposed combinations between the leading American telescope manufacturers, Celestron and Meade, on antitrust grounds. (TX 1400 (1991); TX 1078 (2002).) Then-Celestron CFO and CEO, and subsequent agent for Defendants and CEO of Meade, Joe Lupica, was aware of these FTC actions barring any combination of Meade and Sunny. (Trial Tr. 840:19-841:1; 876:4-877:16.) Despite this knowledge, Mr. Lupica would actively seek to achieve such a combination during Defendants' acquisition of Meade—at least until the Federal Trade Commission investigated. (TX 1301.004.)

David Shen's company, Suzhou Synta bought Celestron in 2005. (Trial Tr. 835:20-25.) David Shen had been involved in Defendant Ningbo Sunny and its principal Peter Ni since at least 2004/2005. David Shen once owned 26% percent of Ningbo Sunny, which is now held by his sister-in-law to this day. (TX 1301.) He was also a director of Ningbo Sunny. (TX 1204.) He resigned from Ningbo Sunny when his Synta Entities acquired Celestron due to what Defendants called "conflicts of interest," *i.e.*, the inherent problem of being an executive and an owner of two horizonal competitors. (*Id.*)

On May 17, 2013, JOC's agreement to purchase Meade was announced. (TX 1076.011.) On May 23, 2013, executives and board members of the Synta Entities (including David Shen, Laurence Huen, Joe Lupica, and Dave Anderson) discussed Ningbo Sunny's potential acquisition of Meade and its manufacturing facility with Defendants, including Peter Ni and James Chiu. (TX 1076 Ex. A.) During that meeting, Defendants and the Synta Entities—horizontal competitors—agreed to a conspiracy whereby "[t]o prevent JOC to buy MEADE," Sunny would purchase Meade with "the financial support to SUNNY" from "CELESTRON / SYNTA." (TX 1378.) The object of the conspiracy was to prevent JOC from acquiring Meade's manufacturing facility and thereby threaten Defendants and the Synta Entities' dominance. (*Id.*)

At the Synta Entities' recommendation, Defendants engaged the Synta Entities' lawyers to handle the Meade transaction, and expressly directed them in the engagement letter to take direction from the Synta Entities' executives, including David Shen, Laurence Huen, Dave

Anderson, and Joe Lupica. (TX 1787; TX 1209.) David Shen utilized this authority to ensure that there was no "loss of control." (TX 1172.) Celestron employee Dave Anderson shepherded through Ningbo Sunny's letter of intent to purchase Meade (TX 1172), which Ningbo Sunny's Chairman Ni claimed he never read before signing. Mr. Anderson also helped Ningbo Sunny's lawyers design the deal structure. (TX 1341.004.) Mr. Anderson's sworn testimony was that he had nothing to do with the Meade acquisition. (Trial Tr. at 1960:15-1962:3:16.) Mr. Ni offered similar sworn testimony. He testified: "Celestron did not participate in any forms in the acquisition of Meade." (Ni 30(b)(6) Deposition at 32, *see also id*. ["Q. And when you say did not participate in any form, you mean that they did not offer any assistance related to the Meade acquisition; correct? THE WITNESS: They did not participate in the process of work of acquiring Meade."], read into record at Trial Tr. 535:16-17.) This testimony was obviously false.

Because they knew that the FTC would eventually begin scrutinizing the transaction, the executives of the Synta Entities and Defendants agreed that Celestron CEO Joe Lupica (who was already working to help Ningbo Sunny purchase Meade) would quit his role at Celestron on June 18, 2013, and "officially begin" as Peter Ni's agent for the transaction on June 19, 2013. (TX 1303.002.)

Funds to purchase Meade were sent from Sky Rainbow, a company jointly owned by David Shen and Peter Ni. (TX 1779.007; Trial Tr. 581:23-582:4.) Mr. Ni bought Meade in his personal capacity to avoid FTC inquiry. (Trial Tr. 613:16-614:2.) After avoiding U.S. regulatory inquiry, he transferred Meade to Ningbo Sunny for a dollar. (Trial Tr. 410:2-20.)

David Shen's company, Celestron made $7.2 million in "prepayments" to Ningbo Sunny for telescopes before they were shipped, if ever. Mr. Ni denied that this ever occurred under oath, even though he was sent an accounting from Celestron's CFO, entitled "Summary of Pre-Payments to Ningbo Sunny," which documented the $7.2 million in prepayments. (TX 1157.) A payment from Celestron for supposed telescopes was used to make up the final amount of money Ningbo Sunny needed to fund the acquisition. (Trial Tr. at 8:18:4-821:15.) After the payment was made, Ningbo Sunny's Vice Chairman, James Chiu wrote to Celestron to request "invoices" from its

customers to document the supposed purchases. (TX 1428.) Defendants' business records reflect that Celestron was given equity in Meade for this payment. (TX 1323.)

Celestron also provided interest-free loans to Defendants to fund Meade's operations and to finance the acquisition. (TX 1305.015; Trial Tr. 997:3 [playing Lupica Dep. 378:18-379:13].) Because Defendants knew it would be wrong to have Synta, a horizontal competitor, to lend money to Ningbo Sunny, the way the loans worked were that Celestron would advance the money to Ningbo Sunny, and then Synta would delay collecting from Celestron for telescopes that Celestron bought from Synta. (TX 1181.) These loans totaled over $10 million. (TX 1378.) Celestron CEO Dave Anderson admitted in writing that "the majority of [these] payments . . . were made in anticipation with no discernable benefit to Celestron (ie no early payment discount)," and were raising red flags with Celestron's auditors. (TX 1378.)

Former Celestron CEO, Joe Lupica admitted in his emails and on the witness stand that Defendants could not have acquired Meade but for the collusive assistance Defendants received from their horizontal competitor Synta. (TX 1317; Trial Tr. 956:23-958:2.) Defendants' books show that the Synta Entities, specifically Celestron, received debt and equity interests in Defendant Sunny Optics in exchange for this financing. (TX 1323.14.) The entries reflected in Defendants' book correspond, to the cent, to payments Celestron was making to Defendants. (*Compare* TX 1323.14 *with* TX 1428.003 (reflecting $301,505.88 payment).)

The Federal Trade Commission opened an inquiry into the Meade transaction after receiving a tip that David Shen and Celestron may be involved with Defendants' acquisition of Meade. (TX 1301.002.) Defendants and their lawyers understood that "the FTC is trying to see whether Celestron is behind the acquisition and are looking for any ties between Sunny and Celestron that would concern the FTC." (TX 1301.002.)

In response, Defendants directed their lawyers to make multiple material misrepresentations to the FTC regarding the Synta Entities and Ningbo Sunny's involvement in the Meade acquisition, including that "David Shen has no role in the proposed acquisition of Meade by Sunny." (TX 1393.) This was obviously not true because Sky Rainbow, which was owned in part by Mr. Shen

(and his horizontal competitor, Mr. Ni) funded the transaction – except for the payment that came from Mr. Shen's company, Celestron.

Defendants ultimately acquired Meade. Defendants' acquisition of Meade caused the relevant market's HHI, which already showed that the market was overconcentrated, to increase by over 1,000 points. (TX 1939.)

Mr. Ni testified under oath as follows:

> "Question: when did Mr. Shen stop consulting with Ningbo Sunny about Meade's products, technology and advantages?
>
> "Answer: I don't recall exactly. Maybe around July or August.
>
> "Question: July or August 2013?
>
> "Answer: Yes.
>
> "Question: Shortly before the deal closed?
>
> "Answer: It was before the decision to acquire Meade."

(Ni Deposition at 73:2-11, read into record at Trial Tr. 618:19-619:5.)

Mr. Ni's sworn testimony was false. Once the acquisition closed, Peter Ni sent virtually all of Meade's sensitive pricing, cost and confidential business information and strategies to David Shen. (TX 1017, TX 1286, TX 1660.) Mr. Ni confirmed that he sent all of Meade's prices to Shen. (Trial Tr. 680:11-16.) Peter Ni directed Meade executives, including Mr. Lupica and Victor Aniceto, not to disrupt Synta or Celestron business when pricing their products. (TX 1085.) David Shen and Peter Ni repeatedly met at Meade and Celestron's respective headquarters to discuss sales strategies and other sensitive business information. (TX 1306 (2013 Peter Ni, David Shen, and Joe Lupica meeting agenda re Meade strategy); TX 1533; TX 1082 (2013 visit); TX 1313 (2014 visit); TX 1208 (2016 visit).)

Communications between Peter Ni and David Shen show that they were dividing customers between them. (TX 1769.001 ("Bidding with Costco between May and June (compete with Celestron for the price). This is a very important issue. This needs Director Ni to communicate face-to-face with DAVE [Anderson] when he goes to the United States. Don't bid. If you let the thing go by doing this, how would you deal with everything in the future? . . . Following a conflict, celestron would not trust sunny any longer."); *id*. at -001 (Mr. Shen writing that Dave Anderson

"understands that Director Ni will not be a competitor and is trustworthy when it comes to business.").)

Defendants' internal contemporaneous emails reflect Defendants' anticompetitive intent. Meade CEO, Joe Lupica wrote that he understood Peter Ni and David Shen's vision "of how the four companies are to cooperate for the benefit of the entire group of companies (Sunny, Synta, Meade, and Celestron)." (TX 1311.) Mr. Lupica also described how "the four companies can dominate the telescope industry." (TX 1805.)

Defendants shared the volume and prices paid by Orion and other Celestron competitors directly with Orion, despite understanding that these were "trade secrets." (TX 1762 (Celestron asking for and receiving Orion's "order statistics"); TX 1180.)

Defendants colluded with the Synta Entities to coordinate the weaponization of intellectual property held by Defendants against potential competitors. (TX 1792.) These discussions describe "subduing our opponent without a weapon" as "[t]he optimal solution." (*Id.*)

Defendants' emails with David Shen's employee, Joyce Huang[1] show that Sunny and the Synta Entities communicated regarding "avoiding conflict with Celestron products" and "considering the strategy of . . . adopting different product prices to protect Celestron." (TX 1347.) Defendants and the Synta Entities fixed prices and advantaged Celestron by forcing Orion and other non-Celestron distributors to purchase all Sunny goods through Joyce Huang. (TX 1864 (Ms. Huang directs Mr. Chiu to raise prices offered to a customer because "Suzhou's price" was higher; Mr. Chiu complies).) The object of this conspiracy was to ensure that Celestron paid significantly lower prices to advantage it in the market over Orion and other competitors. (TX 1935.) The affected products were among Celestron's most successful products, including the AstroMaster. (*Compare* TX 1935 *with* TX 1307.003.) Defendants and the Synta Entities knew that this conduct

[1] Peter Ni admitted David Shen controlled "Good Advance" and that Joyce Huang was Shen's employee. (Trial Tr. 432:13-433-23.) And Good Advance's address is the same as David Shen's business address. (*Compare* TX 1779.007 (noting addresses of Sky Rainbow equity holders, including David Shen) *with* TX 2091.002 (noting Good Advance's address) *and* TX 1402 (Joyce Huang business card noting the same address).)

was unlawful; when Orion first gave notice of potential claims, Joyce Huang wrote James Chiu to say that "Mr. Shen is afraid that Orion may check Good Advance account." (TX 1265.)

Defendants' communications with the Synta Entities show that Defendants had agreed to divide the market for telescopes and accessories. (TX 1193 (David Shen to Peter Ni, James Chiu, Dave Anderson, Laurence Huen, and David Shen's sister, Sylvia Shen: "The best way in the future is to divide the products and sell them into different markets to reduce conflicts . . . . No company can replace CELESTRON…SKYWATCHER…MEADE."); TX 1765 ("We will take prompt action to avoid conflict in the astronomical market.").) Defendants and Synta could make competing lines of telescopes. (Trial Tr. 1856:11-1857:2; TX 1927 (describing Ningbo Sunny factory capabilities); TX 1438 (same).) Defendants, however, did not make lines of telescopes that were made by Synta at the same time. (*E.g.*, Trial Tr. 1864:11-21.)

Defendants' communications with the Synta Entities show that Defendants jointly withdrew credit terms to prevent Orion from acquiring Telescopes.com and other assets from Hayneedle. On June 4, 2014, Synta sent an email to Orion withdrawing credit terms. (TX 1773.002.) David Shen and Joyce Huang directed Defendants to do the same. *Id*. at -001 ("Hence, the payment terms should be the same as Suzhou."). James Chiu complied, and admitted he did so because he was told to do so by David Shen. (TX 1775; Trial Tr. 1466:15-22.)

After Orion signed a settlement agreement with Synta in September 2016, Defendants cut off Orion's supply. As a result, Synta now provides roughly 75% of Orion's products. After a brief price reset, Synta began raising Orion's prices to the point that it now pays more for telescopes than it ever did. (Trial Tr. 1738:11-21, 1767:1768:15, 1769:23-1770:14.)

Orion suffered millions of dollars in injury and damages as a result of Defendants' unlawful collusion, attempted monopolization, and conspiracy to monopolize the market. (*E.g.*, Trial Tr. 2056:17-23 ("Q. Sure. And I'm referring to the damages that you summarized in your table at page 59, the overcharge damages that resulted from the alleged conduct of the conspiracy and the monopolization here; right? A. The one that comes to 38.5 million? Q. Yes. A. Yes.").)

ARGUMENT

Defendants[2] attempt to isolate each aspect of their misconduct in a vacuum in order to explain away their liability, a technique they attempted in their Motion to Dismiss, continued in their Motion for Summary Judgment and repeated in their Rule 50(a) Motion for Judgment as a matter of law. But the law—like nature—abhors a vacuum. "In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Russell v. Nat'l Collegiate Athletic Ass'n*, 2012 WL 1747496, at *3 (N.D. Cal. May 16, 2012) (quoting *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)); *see also Church & Dwight Co. v. Mayer Labs., Inc.*, 2011 WL 1225912, at *16 (N.D. Cal. Apr. 1, 2011) (collecting cases and stating, "the Court considers the effects of [the defendant's] conduct in the aggregate, including, as appropriate, cumulative or synergistic effects.").

I. THE EVIDENCE SUPPORTS THE JURY'S FINDING ON LIABILITY ON ALL OF ORION'S SECTION 1 CLAIMS

A. Price-Fixing

The Court correctly rejected Defendant's argument that Orion had submitted insufficient evidence to support its price-fixing claim. (ECF 500.) The jury was instructed that Orion had to prove the following elements to prevail on its price-fixing claim under Sherman Act § 1:

> (1) that an agreement to fix the prices of telescopes and accessories existed;
>
> (2) that defendant knowingly—that is, voluntarily and intentionally—became a party to that agreement;
>
> (3) that such agreement occurred in or affected interstate or foreign commerce; and
>
> (4) that the agreement caused plaintiff to suffer an injury to its business or property.

There is overwhelming evidence to support the jury's finding in Orion's favor on the first and second elements based on either a credit-fixing or price fixing theory. Orion presented

[2] For purposes of this motion, Defendant is considered a single entity with its subsidiaries Meade and Sunny Optics because the jury found them to have engaged in coordinated activity. *See* Jury Instr. No. 19 (ECF No. 499 at 21.)

evidence that the Synta Entities and Defendants conspired through Joyce Huang, an employee of Mr. Shen, to set prices. TX 1347; TX 1864; TX 1935; TX 1307.003; TX 1265; Trial Tr. 432:13-433-23. Orion also submitted evidence that Mr. Shen controls Good Advance, the entity from which Orion purchased telescopes. Trial Tr. 432:13-433-23; TX 1779.007; TX 2091.002; TX 1402. Orion also submitted evidence that the Synta Entities and Defendants colluded to provide the Synta Entities more favorable pricing than Orion and other distributors on substantially identical telescopes. TX 1935.

Orion also presented evidence that the Synta Entities withdrew Orion's credit on account of its attempt to purchase the assets and then instructed Defendants to do the same. TX 1773.002; TX 1775; Trial Tr. 1466:15-22. These examples are sufficient to support the jury's price-fixing verdict.

The third element (interstate commerce) was not disputed.

There was evidence to support a jury finding that Orion suffered injury and damages. (*E.g.*, Trial Tr. 2056:17-23 ("Q. Sure. And I'm referring to the damages that you summarized in your table at page 59, the overcharge damages that resulted from the alleged conduct of the conspiracy and the monopolization here; right? A. The one that comes to 38.5 million? Q. Yes. A. Yes.").) The jury was also instructed on a vertical restraint theory and the rule of reason.[3] The totality of evidence introduced at trial was more than sufficient for the jury to find that the anticompetitive effects of the challenged restraint outweighed the procompetitive effects. That is a quintessential jury determination in which "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977). Because of the fact-

[3] The Motion contends that there was insufficient evidence to support Orion's claims as analyzed under the rule of reason. (Mot. 14:26-27.) Defendant's Rule 50(a) motion did not advance this argument—to the contrary, it insisted that Orion did not have a Section 1 rule of reason claim. (ECF No. 464 at 12 n.2, 14:9-10.) The Motion's arguments about Orion's Section 1 rule of reason claims are accordingly waived. *OTR Wheel Eng'g, Inc. v. W. Worldwide Servs., Inc.*, 897 F.3d 1008, 1016 (9th Cir. 2018) ("A 'party cannot raise arguments in its post-trial motion for judgment as a matter of law under Rule 50(b) that it did not raise in its pre-verdict Rule 50(a) motion.'") (quoting *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003)).

and intent-sensitive nature of the rule of reason analysis, "[t]he law clearly envisions that the balancing test is normally reserved for the jury." *American Ad Management, Inc. v. GTE Corp.*, 92 F.3d 781, 791 (9th Cir. 1996).

In sum, there was substantial evidence in the record to support a verdict in Orion's favor on this claim. Defendant's argument depends on viewing the evidence in the light most favorable to Defendant, including crediting Defendant's witnesses' testimony (which the jury was entitled to give no weight in light of the fact that that testimony frequently contradicted documentary evidence or prior testimony). That is not the standard on a Rule 50(b) motion. *Dunlap v. Liberty Nat. Prod., Inc.*, 878 F.3d 794, 797 (9th Cir. 2017) ("The test is whether the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to that of the jury.").

B. Allocation of Customers

The Court correctly rejected Defendant's argument that Orion had submitted insufficient evidence to support its customer allocation claim. (ECF 500.) The jury was instructed that Orion had to prove each of the following elements of its customer allocation claim under Section 1 of the Sherman Act:

> (1) Defendants agreed with a competitor or potential competitor to divide business between them or refrain from bidding on business from potential customers;
>
> (2) the agreement occurred in or affected interstate or foreign commerce; and
>
> (3) plaintiff was injured in its business or property because of the agreement.
>
> If you find that the evidence is insufficient to prove any one or more of these elements as to Defendants, then you must find for Defendants and against Orion on Orion's customer allocation claim.

There was evidence in the record to support a jury finding in Orion's favor on the first element. The record showed that Defendant engaged in bid-rigging. (*E.g.*, TX 1769.001 ("Bidding with Costco between May and June (compete with Celestron for the price). This is a very important issue. This needs Director Ni to communicate face-to-face with DAVE [Anderson] when he goes to the United States. Don't bid. If you let the thing go by doing this, how would you

deal with everything in the future? . . . Following a conflict, celestron would not trust sunny any longer."); TX 1193; TX 1765 ("We will take prompt action to avoid conflict in the astronomical market.").)

Defendant's Motion tries to explain away this evidence in the light most favorable to Defendant, but that is not the standard on a Rule 50(b) motion. The evidence cited above is more than sufficient to support the jury's verdict. *Dunlap v. Liberty Nat. Prod., Inc.*, 878 F.3d 794, 797 (9th Cir. 2017) ("The test is whether the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to that of the jury."). And the jury was entitled to discredit the testimony of Defendant's witnesses.

Defendant contends that Orion cannot show injury after September 2016 as to its Section 1 claims. As an initial matter, Defendant bears the burden of showing the end of any conspiracy, not Orion. *Smith v. United States*, 568 U.S. 106, 110 (2013). And "proof merely that [a conspirator] ceased conspiratorial activity is not enough." *United States v. Eppolito*, 543 F.3d 25, 49 (2d Cir. 2008). Rather, the conspirator must "undert[ake] affirmative steps, inconsistent with the objects of the conspiracy, to disavow or to defeat the conspiratorial objectives, and either communicated those acts in a manner reasonably calculated to reach his co-conspirators." *United States v. Westry*, 524 F.3d 1198, 1216 (11th Cir. 2008) (emphasis in original). The Motion identifies no evidence sufficient to meet Defendant's burden of production nor persuasion on this issue.

Second, this issue is not the proper subject of a Rule 50(b) motion because it would not warrant judgment in Defendant's favor, and in any case the jury had ample evidence to find injury after September 2016. (Relatedly, the jury did not award Orion all of its requested damages.) After Orion signed a settlement agreement with Synta in September 2016, Defendant cut off Orion's supply. As a result, Synta now provides roughly 75% of Orion's products. After a brief price reset, Synta began raising Orion's prices to the point that it now pays more for telescopes than it ever did. (Trial Tr. 1738:11-21, 1767:1768:15, 1769:23-1770:14.)[4]

[4] The Motion contends that there was insufficient evidence to support Orion's claims because Dr. Sasian's testimony should not have been admitted. (Mot. 17:21-24.) Defendant's Rule 50(a) motion did not advance this argument. The Motion's arguments about Dr. Sasian are accordingly

Third, there is additional evidence of post-filing collusion that Orion was barred from admitting at trial that would have shown collusion after September 2016. Orion continues to maintain that Defendant opened the door to this issue, and that Orion should have been afforded the opportunity to introduce this evidence.[5]

The second element (interstate commerce) is not in dispute.

As stated above, there is sufficient evidence to support a jury finding of injury and damages. (*E.g.*, Trial Tr. 2056:17-23.)

The jury was also instructed on a vertical restraint theory and the rule of reason, and there was sufficient evidence to support a jury finding on that theory as well. *See Am. Ad Mgmt.*, 92 F.3d at 791.

In sum, there was substantial evidence to support a verdict in Orion's favor on this claim. Defendants' argument depends on viewing the evidence in the light most favorable to Defendants, including crediting Defendants' witnesses' testimony (which the jury is entitled to give no weight in light of the fact that their testimony frequently contradicted documentary evidence or prior testimony). That is not the standard on a Rule 50(b) motion. *Dunlap v. Liberty Nat. Prod., Inc.*, 878 F.3d 794, 797 (9th Cir. 2017) ("The test is whether the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to that of the jury.").

C. Allocation of Products

The Court correctly rejected Defendant's argument that Orion had submitted insufficient evidence to support its product allocation claim. (ECF 500.) The jury was instructed that Orion had to prove the following elements to prevail on its product allocation claim under Section 1 of the Sherman Act:

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waived. *OTR Wheel Eng'g, Inc. v. W. Worldwide Servs., Inc.*, 897 F.3d 1008, 1016 (9th Cir. 2018). In any event, this argument is incorrect for the reasons stated in Orion's Opposition to Defendant's motion for a new trial, which is being filed concurrently with this brief, and is incorporated by reference.

[5] Orion respectfully maintains its objections stated on the record to the introduction of evidence that should have been barred by Fed. R. Evid. 408, which is the only record evidence relied upon by Defendants on this point.

> (1) Defendants are-or were competitors or potential competitors with another person;
>
> (2) Defendants and a competitor or potential competitor entered into an agreement;
>
> (3) Defendants and a competitor or potential competitor agreed they would not compete with each other in the manufacture or sale of a product by refraining from manufacturing competing telescopes and accessories;
>
> (4) the agreement occurred in or affected interstate or foreign commerce; and
>
> (5) Orion was injured in its business or property because of the agreement.

There was substantial evidence to support the jury's verdict on the first, second, and third elements. For example, Defendants' communications with the Synta Entities show that Defendants had agreed to divide the market for telescopes and accessories. (TX 1193 (David Shen to Peter Ni, James Chiu, Dave Anderson, Laurence Huen, and David Shen's sister, Sylvia Shen: "The best way in the future is to divide the products and sell them into different markets to reduce conflicts . . . . No company can replace CELESTRON…SKYWATCHER…MEADE."); TX 1765 ("We will take prompt action to avoid conflict in the astronomical market.").) And Defendants and Synta could make competing lines of telescopes. (Trial Tr. 1856:11-1857:2; TX 1927 (describing Ningbo Sunny factory capabilities); TX 1438 (same).) Defendants, however, did not make lines of telescopes that were made by Synta at the same time. (*E.g.*, Trial Tr. 1864:11-21.) These examples are sufficient for a jury to find in Orion's favor, and the jury was not required to find that the evidence cited by Defendant in the Motion outweighed this evidence.

The fourth element (interstate commerce) was not in dispute.

As stated above, there was also substantial evidence to support the jury's damages award. (*E.g.*, Trial Tr. 2056:17-23.)

In sum, there was substantial evidence to support the jury's verdict in Orion's favor on this claim. Defendant's Motion asks the Court to viewing the evidence in the light most favorable to Defendant, including crediting Defendant's witnesses' testimony (which the jury was entitled to give no weight in light of the fact that their testimony frequently contradicted documentary evidence or prior testimony). *Dunlap v. Liberty Nat. Prod., Inc.*, 878 F.3d 794, 797 (9th Cir. 2017)

("The test is whether the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to that of the jury.").

II. SUBSTANIAL EVIDENCE SUPPORTS THE JURY'S VERDICT FOR ORION ON THE SECTION 2 CLAIMS

The Court correctly rejected Defendant's argument that Orion had submitted insufficient evidence to support its Sherman Act § 2 claims. (ECF 500.)

A. Attempted Monopolization

The Court correctly rejected Defendant's argument that Orion had submitted insufficient evidence to support its attempted monopolization claim. (ECF 500.) The jury was instructed that Orion had to prove each of the following elements[6] to prevail on its attempted monopolization claim:

> To prevail on its claim of attempted monopolization, plaintiff must prove each of the following elements by a preponderance of the evidence:
>
> (1) Defendants engaged in anticompetitive conduct;
>
> (2) Defendants had a specific intent to achieve monopoly power in a relevant market;
>
> (3) there was a dangerous probability that defendant would achieve its goal of monopoly power in the relevant market;
>
> (4) Defendants' conduct occurred in or affected interstate or foreign commerce; and
>
> (5) Orion was injured in its business or property by Defendants' anticompetitive conduct.

(Jury Instruction No. 35.) Substantial evidence supported the jury's findings for these elements.

[6] The Motion contends that Orion did not establish a "predatory conduct" element of this claim. (Mot. at 12.) The jury was not instructed on predatory conduct, and Defendant never asked for the jury to be instructed on this purported element. This argument is accordingly waived. But in any event, the Court's Rule 50(a) motion correctly held that Defendants' conduct in connection with the Meade acquisition was sufficient to establish that Defendants engaged in predatory behavior. See TX 1779; TX 1377; TX 2153; TX 1077; TX 1928; Trial Tr. at 581-583; Trial Tr. at 722-725. And the jury was entitled to find that Defendants' alleged interference with Orion's attempt to purchase the Hayneedle assets amounts to predatory behavior. TX 1775; TX 1773.002; TX 1775; Trial Tr. 1466:15-22.

1. Anticompetitive Conduct

"Anticompetitive acts are acts, other than competition on the merits, that have the effect of preventing or excluding competition or frustrating the efforts of other companies to compete for customers within the relevant market." (Jury Instruction No. 36.)

Ningbo Sunny acquired Meade for the express purpose "To prevent JOC to buy Meade." (TX 1378.) That, alone, was sufficient for the jury to find anticompetitive conduct. As the Court previously ruled on summary judgment, the Meade acquisition decreased competition by increasing market concentration. (Dkt. No. 338 at 5-6 [discussing the increased market concentration caused by Ningbo Sunny's acquisition of Meade].) So, too, is Defendants' cutting off Orion's supply and credit in retaliation for Orion seeking to purchase the Hayneedle Assets. (*E.g.*, TX 1775.) The record is also replete with other express statements of anticompetitive intent, *e.g.*, "we do not need to wage a price war with Orion head-on. Suspension of supply does not need any price wars." (TX. 1194.)

2. Specific Intent to Achieve Monopoly Power in the Relevant Market

Defendants' stated purpose of the Meade acquisition was to achieve monopoly power in the market for telescope manufacturing services. (TX 1378.) Dr. Zona amply defined the relevant market. (*E.g.*, Trial Tr. at 1978-1983, 2079-2086, 2052-2053, 2100-2101.) The jury was entitled to infer specific intent to monopolize that market from Defendants' § 1 violations discussed above. (Jury Instruction No. 39 ["In this case, plaintiff argues that the conduct underlying the claim of attempt to monopolize also constitutes an unreasonable restraint of trade under Section 1 of the Sherman Act. If you find on the basis of this conduct that plaintiff has proven a substantial claim of restraint of trade under the instructions you have received pertaining to Section 1 of the Sherman Act, then you may infer from such conduct that defendant had the specific intent to achieve monopoly power."].)

As the Court's Rule 50(a) Order properly recognized, the jury was entitled to infer intent to achieve monopoly power through Defendants' lies to the FTC regarding the Meade acquisition, such as their representation that Mr. Shen had no involvement, when his company Sky Rainbow was used to fund the transaction. (TX 1779 [Sky Rainbow corporate documents showing Mr. Shen as a

member]; TX 1377 [representation to FTC that Mr. Shen had no involvement in Meade acquisition]; Trial Tr. at 581-583 [testimony about Mr. Shen's ownership of Sky Rainbow].) A jury could also infer intent from Defendants' attempt to evade regulatory scrutiny through, *e.g.*, having Mr. Ni acquire Meade in his personal capacity to avoid regulatory scrutiny and then transfer it to Ningbo Sunny for a dollar after signing representations to the SEC that he otherwise could not have truthfully made. (TX 2153, 1077, 1928; Trial Tr. at 722-725 [testimony about SEC evasion].) A jury was also entitled to infer intent based on the fact that each one of Defendants' witnesses was untruthful about the Meade acquisition. Mr. Ni disclaimed any knowledge or understanding of the email, sent under his name, stating Ningbo Sunny's express anticompetitive purpose for acquiring Meade. (Trial Tr. at 545:7-17.) His explanation: "James Chiu was not participating in the Meade acquisition, so I think this is something that he just thought of on his own." (Trial Tr. at 456:1-8; *see also* Trial Tr. at 456:13-18 ["This is something written by Chiu, who didn't understand the whole process. He probably just made this information up."].) Mr. Chiu, however, testified at his deposition that Mr. Ni wrote the email. (Trial Tr. at 1558:9-15 ["'Q. This is an e-mail that you prepared; correct?' And instead of what you told the jury today, what you said under oath at your deposition, sir, is that you said that you believe it's prepared by director Ni, and by 'Director Ni,' you Meant Peter Ni of Sunny Optics; correct? A. Yes."].) Then, Mr. Chiu came up with an even more far-fetched story, after having no memory of the document at his deposition:

> Q. It says, 'to prevent JOC to buy Meade, we decided to purchase Meade by Sunny after discussion.' Do you see that?
>
> A. That was something that I wrote on my own because I went online, and I saw that the JOC was going to acquire Meade, and they were having an agreement already in place, so I wrote something like that.

(Trial Tr. at 1549:1-7.) There was substantial evidence of Defendant's specific intent.

3. Dangerous Probability of Achieving Monopoly Power

"Monopoly power is the power to control prices, restrict output, and exclude competition in a relevant antitrust market." (Jury Instruction No. 40.) There is ample proof that Defendants could control prices, such as the testimony of Jason Espinosa and Peter Moreo about their inability to negotiate with Ningbo Sunny over prices and credit terms (Trial Tr. at 1310-1311 [Espinosa],

1654:13-1655:25 [Moreo]), or the fact that Defendants charged Orion 30-83% more than they charged their co-conspirator's brand, Celestron. (TX 1771; TX 1935; Trial Tr. at 1725:20-1726:17 [testimony of Peter Moreo].) Their own emails even refer to restricting output. (*E.g.*, TX. 1194 ["Our pricing strategy of sales should not be altered, even when Orion lowers its prices, we would reduce sales volume rather than following suit blindly"].)

Further, in "determining whether there was a dangerous probability that Defendants would acquire the ability to control price in the market, [jurors] should consider such factors as: Defendants' market share; the trend in Defendants' market share; whether the barriers to entry into the market made it difficult for competitors to enter the market; and the likely effect of any anticompetitive conduct on Defendants' share of the market." (Jury Instruction No. 40.)

Substantial evidence supported these factors. Dr. Zona offered unrebutted testimony that Ningbo Sunny's market share hovered around or exceeded 50%. (Trial Tr. at 1983-1989; TX 1938 [slides from Dr. Zona's testimony summarizing market share].) Following the Meade acquisition, Ningbo Sunny was the largest telescope manufacturer in the world. (TX 1295 [communist party press release]; TX 1927 [Yuyao press release specifically endorsed as accurate by Mr. Ni].) Dr. Zona also explained that significant barriers to entry exist in the market for telescope manufacturing, including vertical lockup. (Trial Tr. at 1989-1993.) Dr. Zona further testified that the market was highly concentrated, beyond what DOJ Guidelines find acceptable. (Trial Tr. 1987:20-1989:4.) Peter Moreo testified that there were no significant market entrants for over a decade. (Trial Tr. at 1649:6-1650:19.)

Moreover, contrary to Defendant's arguments, in cases involving joint exercise of market power among a few very powerful people assessing an attempted monopolization claim, "one would naturally aggregate the market shares of the conspirators to gauge any dangerous probability of success." Areeda Hovenkamp, ANTITRUST LAW ¶ 807h, Attempt to Monopolize at 483 (2019) (discussing *United States v. American Airlines*, 743 F.2d 1114 (5th Cir. 1984)).

4. Injury to Orion

Dr. Zona testified that his damages analysis applied to Orion's Section 1, Section 2, and Section 7 claims. (Trial Tr. 2057:1723.) Defendant's attempt to recast this testimony as relating solely to an actual monopolization claim that Orion never even alleged in the first instance is specious, (Mot. at 8 n.1), and cannot carry Defendant's heavy burden on a Rule 50(b) motion. The Motion contends that Dr. Zona's testimony regarding the Section 2 claims was unsupported. That argument was not advanced in Defendant's Rule 50(a) motion and is accordingly waived. *OTR Wheel Eng'g, Inc. v. W. Worldwide Servs., Inc.*, 897 F.3d 1008, 1016 (9th Cir. 2018). But in any case, Defendant expressly waived this issue on the record, stating explicitly that Dr. Zona's overcharge applies to Orion's Section 2 and Section 7 claims:

> MR. SCARBOROUGH: So, look, I think we might actually be zeroing in on a resolution. ***I think what I hear Counsel saying is, look, their claims are all related and they want to be able to argue that the 38.5 and the $1.8 million that are discussed specifically in Zona's report are the result of Section 1 violations, Section 2 violations, and Section 7 violations. I don't have a problem with that.***

(Borden Decl. **Ex. 1**, 10/11/19 Hrg. Tr. 31:13-19.)

B. Defendants Conspired to Monopolize the Market

The Court correctly rejected Defendant's argument that Orion had submitted insufficient evidence to support its conspiracy to monopolize claim. (ECF 500.) The jury was instructed that Orion had to prove the following elements to prevail on its conspiracy to monopolize claim.

> To prevail against a defendant on its claim of conspiracy to monopolize, plaintiff must prove, by a preponderance of the evidence as to that defendant, each of the following elements:
>
> (1) two or more persons knowingly enter into an agreement or mutual understanding to obtain or maintain monopoly power in the telescope and accessory manufacturing market;
>
> (2) Defendants specifically intended that one of the parties to the agreement would obtain or maintain monopoly power in the telescope and accessory manufacturing market;
>
> (3) Defendants committed an overt act in furtherance of the conspiracy;
>
> (4) Defendants' activities occurred in or affected interstate or foreign commerce; and
>
> (5) Orion was injured in its business or property because of the conspiracy to monopolize.

The only element that differs from attempted monopolization is the first one, conspiracy. However, that element was supported by the evidence for the same reasons discussed above with regard to Orion's § 1 claims, *i.e.*, because Ningbo Sunny and Synta worked together to dominate the supply market, and prevent entry and/or expansion by others for their own mutual benefit. (Jury Instruction No. 42.)

In any event, there was substantial evidence supporting the jury's verdict in favor of Orion on its conspiracy to monopolize claim. The evidence showed that Defendants and the Synta Entities conspired to achieve a monopoly in connection with the Meade acquisition. *See* TX 1393; TX 1301.002; TX 1301.002; TX 1317; TX 1323.14; TX 1305.015; Trial Tr. 956:23-958:2; Trial Tr. 997:3.

C. Defendant's "Shared Monopoly" Arguments Merely Tilt at Windmills

The Motion reiterates Defendant's straw man arguments regarding the unviability of "shared monopoly" as a Section 2 theory of liability. But as much as Defendants might wish otherwise, Orion did not allege or argue—and the jury was not instructed on—a shared monopoly theory as to any of its Section 2 claims. This argument is therefore irrelevant.

III. SUBSTANTIAL EVIDENCE SUPPORTS ORION'S CLAYTON ACT SECTION 7 CLAIM

The Court correctly rejected Defendant's argument that Orion had submitted insufficient evidence to support its Clayton Act § 7 claim. (ECF 500.) As detailed below, there was sufficient evidence to support the jury's Section 7 verdict. For example, Orion presented evidence that the HHI index for the market increased 1,000 points following the Meade acquisition. TX 1939. Orion presented evidence that even before the acquisition, the HHI index indicated that it was a highly concentrated market and the further acquisition increased that concentration. *Id.*; *see also* TX 1938. This evidence was sufficient to support the jury's verdict.[7]

[7] The Motion contends that there was insufficient evidence to support the jury's Clayton Act verdict because there was insufficient evidence of damages. (Mot. 17:21-24.) Defendant's Rule 50(a) motion did not advance this argument. The Motion's arguments about Clayton Act damages are accordingly waived. *OTR Wheel Eng'g, Inc. v. W. Worldwide Servs., Inc.*, 897 F.3d 1008, 1016 (9th Cir. 2018). Defendant's contention that it could preserve this issue for purposes of this motion and a sufficiency of the evidence challenge on appeal by means other than its Rule 50(a) is

A. Section 7 Legal Standard

Section 7 of the Clayton Act prohibits mergers and acquisitions whose effects "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18; *St. Alphonsus Med. Center-Nampa Inc. v. St. Luke's Health Syst., Ltd.*, 778 F.3d 775, 783 (9th Cir. 2015). This is an "expansive definition of antitrust liability." *See California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990). The Act "does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future." *St. Alphonsus*, 778 F.3d at 788.

Courts analyze Section 7 cases under a three-step burden-shifting framework. *Id.* (citing *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008)). First, the plaintiff must establish a *prima facie* case that the acquisition is anticompetitive, *i.e.*, that the transaction will "significantly increase market concentration, thereby creating a presumption that [it] is likely to substantially lessen competition." *Chicago Bridge*, 534 F.3d at 423. If the plaintiff makes this showing, then the transaction is presumed anticompetitive, and the burden shifts to the defendant to rebut the *prima facie* case by casting "doubt on the accuracy of the [plaintiff's] evidence as predictive of future anticompetitive effects." *Id.* The strength of this presumption increases with the strength of plaintiff's evidence. *See United States v. Anthem, Inc.*, 855 F.3d 345, 350-51 (D.C. Cir. 2017) ("The more compelling the *prima facie* case, the more evidence the defendant must present to rebut it successfully."). If the defendant rebuts the *prima facie* case, then "the burden of producing additional evidence of anticompetitive effect shifts" back to the plaintiff "and merges with the ultimate burden of persuasion." *Anthem*, 855 F.3d at 350.[8]

To make its *prima facie* showing, the plaintiff must "(1) propose the proper relevant market and (2) show that the effect of the merger in that market is likely to be anticompetitive." *FTC v.*

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incorrect. The law is clear that "party cannot properly 'raise arguments in its post-trial motion for judgment as a matter of law under Rule 50(b) that it did not raise in its preverdict Rule 50(a) motion.'" *E.E.O.C. v. Go Daddy Software, Inc.*, 581 F.3d 951, 961 (9th Cir. 2009).

[8] The burden-shifting applies equally to mergers that have already been consummated. *See, e.g., St. Alphonsus*, 778 F.3d at 783 (consummated merger). It similarly applies where the Section 7 challenge is brought by a private party (rather than the government). *See, e.g., AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 574 (7th Cir. 1999).

Penn State Hershey Med. Ctr., 838 F.3d 327, 337-38 (3d Cir. 2016). Orion has conclusively established these elements. This case is well in line with numerous decisions in which courts found that plaintiffs easily met their burden to establish a *prima facie* case. Moreover, there is no evidence in the record through which Defendants could rebut Orion's *prima facie* case.

The record shows that the relevant market is a global market for telescope and accessory manufacturing. (Trial Tr. 1978:11-1982:9.) The record also shows that significant barriers to entry exist in the market for telescope manufacturing, including vertical lockup, (Trial Tr. at 1989-1993), and economies of scale/learning by doing (TX 1398.002 (Synta stating that "[a]stronomical product is a technology-intensive industry, and it takes long time period to grow stable on the efficiency and production quantity.")).

Once the relevant market is determined, a plaintiff can establish a prima facie case by showing that the merger "will probably lead to anticompetitive effects in that market." *St. Alphonsus*, 778 F.3d at 785. Plaintiffs typically accomplish this by calculating the Herfindahl-Hirschman Index ("HHI"), which measures concentration in the market, *see Penn State*, 838 F.3d at 346, and which courts and government agencies rely on as an authoritative guide for analyzing mergers and acquisitions. *See, e.g.*, *St. Alphonsus*, 778 F.3d at 787; *Boardman v. Pacific Seafood Group*, 822 F.3d 1011, 1021 (9th Cir. 2016); *Penn State*, 838 F.3d at 347; Merger Guidelines, § 5.3.

Where, as here, the HHI shows a significant increase in concentration in an already highly concentrated market, this evidence alone establishes a prima facie case and satisfies Orion's burden. *St. Alphonsus*, 778 F.3d at 788. In addition, the particular structure of the telescope manufacturing market and the evidence of high barriers to entry establish a second, independent prima face case here.

"The HHI is calculated by totaling the squares of the market shares of every firm in the relevant market," which gives proportionately greater weight to firms with larger market shares. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 n.9 (D.C. Cir. 2001). This is because an HHI increase is more likely to have anticompetitive effects in a concentrated market than in an unconcentrated one. *See* Merger Guidelines § 5.3.

In determining whether the HHI demonstrates a sufficiently high market concentration to establish a prima facie showing of a threat to competition, courts consider both (1) the post-merger HHI, and (2) the increase in HHI resulting from the merger. *Penn State*, 838 F.3d at 346; Merger Guidelines, § 5.3. A post-merger market with an HHI above 2,500 is classified as "highly concentrated," and a merger that increases the HHI by more than 200 points in a highly concentrated market is "presumed to be likely to enhance market power." *St. Alphonsus*, 778 F.3d at 786 (citing Merger Guidelines, § 5.3) (emphasis added).

A sufficiently high HHI figure resulting from a merger is enough to establish a plaintiff's prima facie case and shift the burden to the defendant. *St. Alphonsus*, 778 F.3d at 778 ("The extremely high HHI on its own establishes the prima facie case."). For example, in *ProMedica*, the evidence showed that the merger would raise the HHI by 1,078, to a total number of 4,391. 749 F.3d at 568. The court noted that this increase was "more than five times the increase [of 200] necessary to trigger the presumption of illegality," and that the total number was "almost double the 2,500 threshold for a highly concentrated market." It found that the merger therefore "blew through [the HHI thresholds] in a spectacular fashion" and justified a presumption of illegality. *Id*. Similarly, in *Heinz*, the court found that an increase in HHI of 510 in a market where the HHI premerger was already 4,775 created a presumption of harm to competition "by a wide margin." 246 F.3d at 716. And in *Anthem*, the court found that a post-merger HHI increase of 1,511, to a total of 4,350, raised an "overwhelming presumption of anticompetitive effect." 855 F.3d at 367.

B. There Was Sufficient Evidence to Support the Jury's Clayton Act Verdict

Here, Dr. Zona calculated that the 2012 HHI in the telescope manufacturing market – the year before Sunny acquired Meade – was 3,284.80. (TX 1939.) This was already more than 700 points higher than the threshold for a "highly concentrated" market. Merger Guidelines § 5.3. After the merger, in 2013, the HHI was 4,375.69, or more than 1,800 above the highly concentrated threshold. (*Id*.) This showed an increase of 1,090.89, which is more than five times the threshold for a presumption of likely anticompetitive effects. The HHI in this case is very similar to those in *ProMedica*, *Heinz*, and *Anthem*. As in those cases, this is not a close call. Orion more than met its burden to establish a prima face case. *See Boardman v. Pac. Seafood Grp*. 822 F.3d 1011, 1021

(9th Cir. 2016) (affirming preliminary injunction enjoining a merger pursuant to Section 7 where the plaintiff employed an HHI analysis and adduced expert opinion showing barriers to entry existed).

The Court found that Dr. Zona's unrebutted analysis of the market concentration and Defendants' market share was sufficient to permit the jury to find liability at summary judgment. (Dkt. No. 338 at 6.) It also denied Defendant's Rule 50(a) motion. (ECF No. 500.) Nothing has changed. As noted above, Dr. Zona defined the relevant market, and Defendants failed to offer any contrary expert proof at trial. Dr. Zona's testimony on market definition was more than sufficient to support the jury's verdict.[9] See Trial Tr. at 1978-1983, 2079-2086, 2052-2053, 2100-2101. Defendant's contention that the Meade acquisition was procompetitive is contrary to the great weight of the evidence, and does not approach the showing required to prevail on a Rule 50(b) motion. *Dunlap v. Liberty Nat. Prod., Inc.*, 878 F.3d 794, 797 (9th Cir. 2017) ("The test is whether the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to that of the jury.").

CONCLUSION

For the foregoing reasons, Defendant's motion should be denied.

[9] Indeed, the law does not even require expert testimony to establish a relevant market. *Sidibe v. Sutter Health*, No. 12-cv-04854-LB, 2019 WL 2078788, *26 (N.D. Cal. May 9, 2019) ("Sutter has not identified any court in the Ninth Circuit that has held that a plaintiff must base its market definition on expert testimony to withstand summary judgment.") (citing *AFMS LLC v. United Parcel Serv., Inc.*, 696 F. App'x 293, 294 (9th Cir. 2017) (Nguyen, J., concurring in the result) ("AFMS was not required, as the district court suggested, to provide expert testimony regarding the relevant market"); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000) (noting two ways to prove market power: (1) direct proof of anticompetitive effect and (2) defining relevant market and showing excess market share there); 2A Areeda & Hovenkamp, *Antitrust Law*, ¶ 531a, at 156 (2002) (relevant market definition simply serves as surrogate for market power).

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Respectfully submitted,

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