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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 NINGBO SUNNY'S RULE 59(a) MOTION FOR NEW TRIAL (DKT. NO. 557)

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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Plaintiff Optronic Technologies, Inc. ("Orion") respectfully submits this Opposition to the Motion for New Trial filed by Defendant Ningbo Sunny Electronic Co., Ltd. (Dkt. No. 557).

INTRODUCTION

Defendant's motion for a new trial raises evidentiary objections that it failed to raise at trial and legal arguments it already lost. Not only are these arguments meritless, they are unseasonable. Trial is supposed to be the final frontier. Defendant cannot wait until after the jury found against it to make its *post hoc* objections. Because new trials are a double imposition on the court system and contravene basic principles of finality, they are only granted when a court has committed egregious, fundamental error. No error occurred here, much less the type that would warrant having to redo a six-week trial.

At trial, Defendant made the strategic choice to present evidence of its own financial condition to the jury. After it opened the door, Orion offered more evidence on the topic – without objection. Orion also presented – also without objection – evidence about the impact Defendant's continuing antitrust violations would have on Orion. Defendant cannot now object that the Court somehow committed reversible error by failing to *sua sponte* prevent Orion from referencing this evidence in closing argument – especially since Defendant did not object during closing argument either. Allowing Orion to comment on the evidence in the record was not error at all, much less the type of pervasive, prejudicial conduct necessary for a mistrial.

Defendant also objects that Orion's damages expert, J. Douglas Zona, Ph.D., did not offer testimony supporting Orion's Clayton Act Section 7 damages. (Mot. at 6-7, Dkt. No. 557.) As Dr. Zona explained, however, the damages Orion suffered as a result of Defendant's unlawful concentration of the market overlap with the damages Orion incurred as a result of Defendant's other antitrust violations. Further, in discussing Orion's presentation of its damages before trial, Defendant expressly stated "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." Thus, in addition to being incorrect, Defendant expressly waived the very argument it is now saying is cause for a "new trial."

As to Defendant's legal argument about Orion's telescope manufacturing expert (Mot. at 7-8), it is a retread of Defendant's unsuccessful *Daubert* motion. It fails for the same reasons the Court already rejected this argument, *i.e.*, the testimony Dr. Jose Sasian, Ph.D. offered about optics and telescope design and manufacturing was within the scope of his report and was the proper subject of expert opinion.

Finally, as part of its strategy, Defendant elected not to offer any affirmative experts on any topic. Defendant's claim that its rebuttal expert Dr. Celeste Saravia, Ph.D. should have been allowed to offer an affirmative opinion on damages (Mot. at 8-10) is specious. Dr. Saravia did not submit an affirmative expert report. She testified at her deposition that she had no affirmative opinions. And Defendant repeatedly represented to the Court that Dr. Saravia would not offer any affirmative opinion on damages. Allowing Dr. Saravia to present an affirmative damages opinion would have violated Rules 26 and 37. Nonetheless, Dr. Saravia repeatedly disregarded the Court's instructions – with which Defendant agreed – to stop testifying about damages. When she refused to do so, the Court issued a curative instruction that Defendant expressly endorsed on the record. To now claim that the Court's instruction somehow warrants a new trial is wholly improper.

For the foregoing reasons, Defendants have not come close to proving that they are entitled to the extraordinary remedy of a new trial.

BACKGROUND

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

ARGUMENT

"[T]he general rule governing motions for a new trial in the district courts is contained in Federal Rule Civil Procedure 61." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984). Rule 61 provides:

> Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

Accordingly, "[t]he trial court may grant a new trial only if the verdict is contrary to the clear weight of the evidence, is based upon false or perjurious evidence, or to prevent a miscarriage of justice." *Shimko v. Guenther*, 505 F.3d 987, 993 (9th Cir. 2007) (quoting *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1035 (9th Cir. 2003)); *see also Probuilders Specialty Ins. Co., RRG v. Valley Corp. B.*, No. 5:10-CV-05533-EJD, 2014 WL 6706129, at *1 (N.D. Cal. Nov. 26, 2014) ("A jury verdict should be set aside only when the evidence permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict.") (Davila, J.) (quoting *DSPT Int'l, Inc. v. Nahum*, 624 F.3d 1213, 1218 (9th Cir. 2010)).

To the extent the Motion raises claims of error to which Ningbo Sunny did not contemporaneously object at trial, Ningbo Sunny "cannot show now it is entitled to a new trial absent a showing of 'plain or fundamental error.'" *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2014 WL 549324, at *10 (N.D. Cal. Feb. 7, 2014) (quoting *Settlegoode v. Portland Pub. Sch.*, 371 F.3d 503, 517 (9th Cir. 2004)).

To show plain error, Ningbo Sunny must demonstrate that there was (1) an error; (2) that the error be plain or obvious; (3) that the error have been prejudicial or affect substantial rights; and (4) that review be necessary to prevent a miscarriage of justice. *Settlegoode v. Portland Pub. Sch.*, 371 F.3d 503, 517 (9th Cir. 2004). In civil cases, the plain error standard is exceedingly difficult to satisfy. *Apple*, 2014 WL 549324, at *10 (N.D. Cal. Feb. 7, 2014) ("Plain error is a rare species in civil litigation, encompassing only those errors that reach the pinnacle of fault.") (quoting *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1193 (9th Cir. 2002)).

Subject to those limitations, the disposition of a motion for new trial under Rule 59(a) lies within the Court's discretion. *See Jorgensen v. Cassiday*, 320 F.3d 906, 918 (9th Cir. 2003) ("We review the district court's denial of a motion for new trial pursuant to Fed.R.Civ.P. 59(a) for abuse of discretion."); *see also Mueller v. Auker*, 700 F.3d 1180, 1194 (9th Cir. 2012) ("The district court's denial of a motion for a new trial is reversible only if the record contains no evidence in support of the verdict or if the district court made a mistake of law.") (quoting *DSPT*, 624 F.3d at 1218 (9th Cir. 2010)).

I. DEFENDANT CANNOT SHOW PLAIN ERROR ARISING FROM PORTIONS OF ORION'S CLOSING ARGUMENT TO WHICH IT DID NOT OBJECT

Defendant contends that the Court committed fundamental error such that a new trial should be granted based upon a handful of statements in Orion's closing argument to which Defendant failed to raise any contemporaneous objection. The statements Defendant now complains about relate to Sunny Optical Group (Mot. at 3-4), and the harm Orion was going to suffer absent relief (Mot. 4-5). The law does not permit Defendant to wait to see how the jury rules and then raise such objections in the form of seeking a "new trial." Defendant's attack on the Court is all the more improper because Defendant elected to pursue a trial strategy where, beginning with its opening statement, it repeatedly offered testimony and argument about its own financial condition, intentionally placing this issue before the jury – over Orion's objection.

Ordinarily, a new trial based upon attorney argument "should only be granted where the "flavor of misconduct sufficiently permeates an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict." *Settlegoode v. Portland Pub. Sch.*, 371 F.3d 503, 516-17 (9th Cir. 2004) (quoting *Kehr v. Smith Barney*, 736 F.2d 1283, 1286 (9th Cir. 1984)) (alterations omitted). But "[t]here is an even "higher threshold for granting a new trial where, as here, [Ningbo Sunny] failed to object to the alleged misconduct during trial." *Id*. at 517 (original alterations omitted); *see also Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2014 WL 549324, *10 (N.D. Cal. Feb. 7, 2014) ("Without having alerted the Court to Apple's alleged misconduct during trial, Samsung cannot now establish that it is entitled to a new trial absent a showing of "plain or fundamental error.") (quoting *Settlegoode*, 371 F.3d at 517).

The plain error standard serves two purposes. "First, raising an objection after the closing argument and before the jury begins deliberations 'permit[s] the judge to examine the alleged prejudice and to admonish . . . counsel or issue a curative instruction, if warranted.'" *Settlegoode*, 371 F.3d at 517 (quoting *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1193 (9th Cir. 2002). "Second, 'allowing a party to wait to raise the error until after the negative verdict encourages that party to sit silent in the face of claimed error.'" *Id*.

Here, Defendant cannot show that the Court committed any error at all, much less one so flagrant as to prejudice the entire case against Defendant such that a new trial is warranted.

A. Orion's Argument Regarding Sunny Optical Group was Not Plain Error

Defendant cannot show plain error arising from Orion's closing argument relating to Sunny Optical Group. Defendant's Chairman Peter Ni testified about Sunny Optical Group without objection from Defendant. By the time Mr. Ni offered this testimony, Defendant had already chosen to place its financial condition at issue by making claims about Defendants' net worth and profits in its opening statement. It was not error, much less plain error, for Orion to touch on this evidence during closing argument.

1. Defendants Put Their Financial Condition at Issue by Voluntarily Telling the Jury about Their Supposed Profits and Net Worth

Before trial began, Orion objected to two slides in Defendants' opening statement deck that made an irrelevant and improper visual comparison of Orion's claimed damages over a period of six years against Ningbo Sunny's supposed average annual net profit (*i.e.*, the supposed average profit in a single year). (Declaration of Matthew Borden ("Borden Decl.") Ex. 1.) Orion specifically objected that in addition to being misleading, Defendants should not be placing their financial condition at issue:

> You have Meade's annual net profit, and then you have Ningbo Sunny's net profit. We believe both of those items are irrelevant, and in conjunction with the statement on slide 3, which we have tabbed regarding the profitability of the defense, it simply is asking or wanting to place in the mind of the jury that Ningbo Sunny is somehow unprofitable or small and doesn't make a whole lot of money. That's not at issue in the case, Your Honor.

(Trial Tr. 264-65.)[1]

Over Orion's objection, Defendants went on to parade their financial condition before the jury. (*E.g.* Trial Tr. 631:4 (Peter Ni testifying that Sunny's "profit was very low"); *id.* 750:14-15 (Ni testifying that "[w]e are in the low-end product market and our profit margin is also low").) In convincing the Court to allow them to do so, they strenuously argued that they had made the strategic choice to place their financial condition at issue to try to reduce the amount of damages the jury would award, and that this choice was critical to their defense:

> We are entitled to provide some context to what Orion's damages claims by benchmarking it against here is the revenue for these companies, here are the purchase prices for these companies, here are why these damages claims don't make any sense in the context of this business in the overall market for telescopes.
>
> This is not Apple versus Samsung in smartphones where you have billions of dollars in the market. The damages claim are out of whack with the underlying business fundamentals, which is something that our expert will testify to.
>
> These are evidentiary facts that are part of the expert's testimony. We're entitled to get in this very basic information about the realities. …
>
> You will hear that each of these paragraphs, each of these things that says here's Meade's average yearly net profit, here is Orion's average yearly purchases of Ningbo Meade telescopes of about a million dollars. That is fundamental critical information to the case. …
>
> Each of these numbers, these will come in from different people. You will hear some that will come in from plaintiff's witnesses, you will hear others that will come in from defense side witnesses, and collectively you may see this entire slide used with this expert.

(*Id.* 267-69.)

Defendants went on to argue their own net worth in opening:

> If you look at what Meade's average profit was, you look at the past five years, it's losing about $2.2 million and compare that to the $40.3 million that Orion is asking for. . . . Ningbo Sunny's average yearly net profit is only about 3 and a half million dollars.

(Trial Tr. 395:22-396:9.)

Defendants' argument was irrelevant and improper.[2] But making it opened the door for Orion to challenge Defendants' assertions. *See Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1130

[1] For the court's convenience, the trial transcripts cited in this brief are filed herewith as Exhibit 1 to the accompanying Declaration of Matthew Borden.

[2] As the leading antitrust treatise explains, in markets where a few dominant firms collude but smaller competitors do not, all firms will raise their prices, such that "all buyers pay the same price,

(9th Cir. 2010) (quoting *United States v. Chavez*, 229 F.3d 946, 952 (10th Cir. 2000) ("'It is widely recognized that a party who raises a subject in an opening statement 'opens the door' to admission of evidence on that same subject by the opposing party.'").

2. The Record Shows that Ningbo Sunny is Affiliated with Sunny Optical Group

Once Defendants opened the door, Orion was obliged to rebut Defendants' improper argument. On cross-examination, Ningbo Sunny CEO Peter Ni testified to numerous facts showing ongoing affiliation between Ningbo Sunny and Sunny Optical Group:

- Mr. Ni admitted that Sunny Optical Group invested in Ningbo Sunny. (Trial Tr. 522:25-523:8 (. . . THE WITNESS: It was Sunny Optical Group who invested in Ningbo Sunny.").)
- Mr. Ni admitted that his uncle, Wang Wenjian, was the Chairman of Sunny Optical Group. (Trial Tr. 533:21-25.)
- After Mr. Ni was impeached with Sunny Optical Group's public securities filings disclosing Ningbo Sunny as a "related party" to Sunny Optical Group, (TX 1926 at p. 63), Mr. Ni admitted that Sunny Optical Group had to disclose Mr. Ni's relationship with Mr. Wang in its filings. (Trial Tr. 526:10-16.)
- Mr. Ni admitted that he himself uses a Sunny Optical Group email address, and that Ningbo Sunny and Sunny Optical Group share an email server to this day. (Trial Tr. 520:25-521:2; 521:22-522:6.)
- Mr. Ni admitted that Sunny Optical Group and Ningbo Sunny participate in the same Communist Party Committee to this day, even though typically "in China companies there is the Party, the Communist Party Committee *in each company*." (Trial Tr. 522:12-18 (emphasis added).)
- Mr. Ni did not dispute the veracity of record evidence showing that he was a member of the Sunny Group Party Committee. (Trial Tr. 430:14-20 (testifying regarding TX 1185.001 (email showing Mr. Ni participating in the selection of "the leadership group of the Sunny Group Party Committee.")).)
- Mr. Ni admitted that Ningbo Sunny's press releases were edited by the editor-in-chief of the "Sunny newspaper," who had a Sunny Optical Group email address and wrote Mr. Ni emails relating to the selection of leadership of the Sunny Group Communist Party Committee. (Trial Tr. 428:24-431:1; TX 1185.001.)

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and therefore all buyers suffer the same overcharge . . . . It does not matter whether the buyer purchased from a colluder or a noncolluder – the overcharge is precisely the same." 2A Areeda & Hovenkamp, Antitrust Law ¶ 395, at 448 (4th ed. 2014). The literature emphasizes that "th[is] economic analysis is uncontroversial." *Id*. at 447. Accordingly, the profits that Ningbo Sunny or Meade made in a given year was totally irrelevant to the quantum of Orion's damages; rather, the issue was the extent to which the taint of their anticompetitive behavior infected the entire market.

- When Orion asked Mr. Ni whether Sunny Optic Group was worth over $10 billion, Mr. Ni testified that it was worth over $100 billion Hong Kong dollars. (Trial Tr. 520:15-18.)

Defendants objected to none of this testimony or evidence.

3. The Court Properly Overruled Defendants' Objections to Orion's Slides

Just before closing arguments, Defendants objected to one slide in Orion's presentation that referenced Sunny Optical Group, alleging that its summary of record evidence would cause undue prejudice. (Trial Tr. 2546:1-2 ("This is our objection to Orion's slide deck.")) These slides were substantially similar to the damages slides that Ningbo Sunny had used in its opening. (Borden Decl. Ex. 3.) Orion rebutted Defendants' objections by pointing out that Defendants had opened the door on the issue at opening argument. (Trial Tr. 2550:2-22.) The Court pointed out that "testimony about Big Sunny was in the case. Certainly there was some testimony about that" (Trial Tr. 2554:5-7), and observed that Orion was entitled to make "fair comment" on the evidence, just as Defendants were entitled to rebut Orion's argument. (Trial Tr. 2556:6-13.). The Court accordingly allowed the slides to be shown to the jury.

4. Defendant Cannot Show Plain Error

Contrary to Defendant's contention (Mot. at 3:20-22), Defendant did not object to any of the three statements about Sunny Optical Group that the Motion now contends are objectionable—one of which does not even reference Sunny Optical Group. (Mot. at 3.) As a result, Defendant is not entitled to a new trial unless it can demonstrate plain error. *See Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2014 WL 549324, at *10 (N.D. Cal. Feb. 7, 2014).

Defendant does not come close to meeting this standard. The Court's observation that counsel for both parties were entitled to argue the record evidence was correct. *Draper v. Rosario*, 836 F.3d 1072, 1083-84 (9th Cir. 2016) ("During closing argument in a civil case, counsel is permitted to make inferences and advance 'plausible argument[s] in light of the record.'"); *see also Hammonds v. Yeager*, No. EDCV 15-1036 SS, 2017 WL 10560471, at *1 (C.D. Cal. Aug. 9, 2017) ("The right to argue a case to the jury is very broad. Counsel may state his or her views as to what the evidence shows and the conclusions to be drawn therefrom."). This is particularly true given Defendant's strategic choice to tell the jury about its supposed financial condition. *See Bowoto*,

621 F.3d at 1130 (party who raises subject in opening statement "opens the door" to admission of evidence on that same subject by opposing party); *Chavez*, 229 F.3d at 952; *see also Phenix v. Schomig*, 596 F. App'x 578 (9th Cir. 2015) (same).[3] Given the significant record evidence of ongoing affiliation between Defendant and Sunny Optical Group, Orion was not required to accept Defendant's theory of the case on this point, and the jury could decide if the point proved material in its deliberations.

Because Defendant opened the door to discussing its financial condition and did not object to such evidence during trial, the Motion fails to show that "a flavor of misconduct sufficiently permeates an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict," *Settlegoode*, 371 F.3d at 516–17, let alone the higher plain error standard that Defendant must satisfy. Nor could it: as the Court held in its Order denying Ningbo Sunny's Rule 50(a) Motion (Dkt. No. 500), the jury's verdict was supported by substantial evidence, which precludes a finding of plain error as a matter of law. *See Settlegoode*, 371 F.3d at 520 (holding that a district court abused its discretion by finding plain error in part because "there was more than sufficient evidence for the jury to find in [plaintiff's] favor"); *Hemmings*, 285 F.3d at 1195 (finding no plain error where "[i]n the absence of counsel's improper statements, we cannot say that we think a different verdict was likely"); *see also Apple*, 2014 WL 549324, at *11 ("[T]he jury rendered a verdict supported by substantial evidence. In such a situation, a finding of plain error is inappropriate.") (citing *Settlegood*, 371 F.3d at 520; *Hemmings*, 285 F.3d at 1195).

In sum, Defendant is not entitled to a new trial because Orion's closing argument was proper commentary on the record, and Defendant accordingly cannot demonstrate plain error.

B. Argument Regarding the Harm Ningbo Sunny's Illegal Acts Caused Orion Was Fair Commentary on the Record and Does Not Approach Plain Error

Defendant also contends that portions of Orion's closing related to the impact of Ningbo Sunny's anticompetitive conduct warrant a new trial. (Mot. at 4-5.) This is equally untrue. In its closing argument, a party has wide latitude to argue any reasonable inference from the evidence in the record to a jury. "A trial lawyer's job, after all, is to present his client's case in the most

[3] The only cases cited by the Motion are out-of-circuit, are between 29 and 50 years old, and do not apply the plain error standard, and are therefore inapposite. (Mot. at 3-4.)

sympathetic light consistent with the evidence. Using some degree of emotionally charged language during closing argument in a civil case is a well-accepted tactic in American courtrooms." *Settlegoode*, 371 F.3d at 518 (9th Cir. 2004). All Orion did here was to reference uncontradicted testimony that had been admitted during trial – without any objection from Defendant – within the specific parameters given by the Court.

At trial, three of Orion's witnesses testified that if Defendants were allowed to continue violating the antitrust laws, Orion's business would be destroyed. As it admitted, Defendant failed to object to testimony on this subject at trial. (Trial Tr. 2498:20-2499:23 ("I've come very close to objecting."); *see also id*. 2499:24-2500:2 ("THE COURT: Well, it's interesting. I know when those questions were elicited I wondered if I was going to hear an objection, and I didn't. I appreciate your candor. You didn't object.").)

The Court went on to discuss questions directed to Orion's president by Defendants on cross-examination that attempted to impeach him on these issues, and explained that those had balanced the record. (*Id*. 2500:11-25.) In response, Defendant conceded that "these are grey areas" and the impeachment "probably d[id] balance it out." (*Id*. 2501:1-5.)

Defendant then described its own views of for closing argument:

> I think if what we're going to see in closing argument is a really focused heavy piece on if you don't give us $40 million in damages, all of these people are going to be out of jobs. How can you let Mr. Espinosa walk the streets without a home, that kind of stuff, ***I am going to have to stand up and object***.

(*Id.* 2501:6-11; *see also id.* 2502:20-21 ("If there's a heavy hand played on that, ***I'm going to feel compelled to stand up and object***.").) But that never happened. Defendant did not object to *any* of the statements it now contends are objectionable—likely because the Court had already explained that the type of argument that Orion ultimately presented was permissible in closing:

> THE COURT: . . . It's fair game in closing argument, emphasis on the "fair." I expect that we will hear, the jury is going to hear the impact that it's going to have on the employees, the impact that it's going to have on the business.
>
> MR. BORDEN: Absolutely.
>
> THE COURT: I think we know, at least it seems like that was the evidence that was a[dd]u[c]ed. . . . We're going to hear that. We're going to hear him say, yeah, the company is going to fold, these people will be unemployed if you don't give us the case. **Okay. That's fine**.

(*Id*. 2501:16-2502:3.)

Only now, with the hindsight of the jury's verdict, does Defendant claim that the Court committed an egregious error by allowing Orion to reference in closing the evidence it presented at trial, without objection. (Mot. at 4-5.) There was nothing wrong with the underlying testimony; a plaintiff may testify about how it has been harmed, and will be harmed, by the defendant's conduct. Because this testimony was in the record, Orion was allowed to argue any reasonable inference from it in closing. *Draper*, 836 F.3d at 1083-84 (9th Cir. 2016) ("During closing argument in a civil case, counsel is permitted to make inferences and advance 'plausible argument[s] in light of the record.'"); *see also Hammonds*, 2017 WL 10560471 at *1 ("The right to argue a case to the jury is very broad. Counsel may state his or her views as to what the evidence shows and the conclusions to be drawn therefrom."). All of the statements identified by Defendant were entirely appropriate at closing argument. *Settlegoode*, 371 F.3d at 518 (9th Cir. 2004).

Because all of the statements that Defendant complains about were well within the guidelines established by law generally and the Court in this particular case, Ningbo Sunny cannot come close to establishing plain error. This argument is not a basis for granting a new trial.

II. DR. ZONA'S TESTIMONY SUPPORTS THE JURY'S AWARD OF DAMAGES, AND DEFENDANTS HAVE WAIVED ANY CHALLENGE THERETO

Defendant contends that Dr. Zona's only analysis of Clayton Act § 7 damages was the losses he calculated from Orion's failure to acquire Meade, that Dr. Zona did not offer any testimony on Orion's § 7 damages, and that therefore Defendant is somehow entitled to a new trial. (Mot. at 6-7.) Defendant's Motion relies entirely on an argument that Defendant already waived, and which mischaracterizes the Court's summary judgment order and Dr. Zona's analysis. As the Court has already held at least twice, its Order granting partial summary judgment only precluded Orion from seeking damages for Orion's failure to acquire Meade itself; it did not preclude Orion from seeking damages resulting from Ningbo Sunny's acquisition of Meade – which the jury found lessened competition. As Dr. Zona explained, the damages arising from this market concentration are the same overcharges that resulted from Defendants' attempt and conspiracy to monopolize, market allocation and price fixing. His testimony was wholly appropriate.

A. Defendant Expressly Waived This Argument on the Record

Defendant understood that Orion's damages expert had opined that the overcharges from Defendants' various antitrust violations overlapped and waived any objection to this testimony on the record. During the motion *in limine* hearing on October 11, 2019, Defendant first tried to argue that Orion had not presented any Section 7 damages, and then expressly waived this contention:

> MR. SCARBOROUGH: ***Your Honor, they don't have a damages analysis under Section 7***. Look, I can understand particularly the way that they set up the case the Section 1 AND Section 2 issues overlap, and Your Honor has made some reference to that in some of the Court's prior rulings. So to the extent that they're going to say by virtue of both Section 1 and Section 2 violations there have been overcharges and those go as high as 38.5 [million], that's fine.
>
> What I'm looking -- what I want to know and what I want to be able to advise my client and be able to reasonably speak to the jury about is what are the maximum damages here that we're dealing with? We have two buckets of damages that are live.
>
> Those are the overcharge damages of 38.5 and they are the Hayneedle asset acquisition damages of 1.8. ***There is no other expert testimony to support any other damages.***
>
> THE COURT: Well, I think this goes to your 6, your in limine number 6, this discussion does. And I think this is in regards to -- you talk about -- I think that's punitive damages.
>
> MR. SCARBOROUGH: Well, that's another -- I look at that as kind of a separate very discrete issue, you're right about that, Your Honor. I'm just focused right now on them making a plea to the jury saying, well, I want my $38.5 million in damages for overcharge, I want $1.8 million in damages for the Hayneedle acquisition, and I want some undisclosed number that we have no idea about relating to Section 7 Or Section 2.
>
> THE COURT: Well, there's a Section 7 cause of action here. do you want to talk about that now or do you want to –
>
> MR. HAGEY: We would love to. We're happy to talk about Section 7 and Section 2 because the injury that is suffered in connection with defendants' attempted monopolization and their acquisition of Meade and the effect of that on my client is precisely what is detailed throughout, it's seriatim throughout Dr. Zona's report. And they're the same type of injury that has been suffered both as to the Section 1 collusion issues as well as the Clayton Act and the Section 2 attempted monopolization.
>
> So it's all in Dr. Zona's report, and that's what we're going to be relying on.
>
> 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.***

> What I do have a problem with is them arguing that there should be some other quantum of damage. There should be some other bucket of damage that has been disclosed nowhere that was not in Dr. Zona's report, that they come up with on the spot through Dr. Zona or some other vehicle and say, oh, you should award us 20 million in damages for a Section 7 violation or for a Section 2 violation. That's the whole purpose of expert discovery rules.
>
> THE COURT: Do you wish to comment?
>
> MR. HAGEY: We don't have a secret relief pitcher hiding out in the wings coming in on those, Your Honor. Dr. Zona has disclosed his analysis and that's what we'll be relying on for Section 2.
>
> MR. SCARBOROUGH: ***That's what I needed to hear, Your Honor***.

(Borden Decl. Ex. 4, 10/11/19 Hrg. Tr. 29:22-32:9.)

As seen above, Defendant was neither surprised, nor had any objection to Dr. Zona testifying 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." For this reason alone, the Motion should be denied.

B. Substantial Evidence Supports the Jury's Section 7 Damages Award

Defendant contends that the Court's summary judgment order precluded Orion from seeking damages on its Section 7 claim. (Mot. at 6.) That is inaccurate. The Court's summary judgment Order expressly noted that the Order did not preclude Section 7 damages:

> Orion[] . . . does not state that its failure to acquire Meade is the only harm caused by the alleged conspiracy. Rather, Orion claims that the conspiracy to enact the merger harmed it by increasing market concentration. . . . An antitrust injury can arise from a merger or acquisition that results in 'either . . . a lessening of competition due to the acquisitions or from 'anticompetitive acts made possible' by the acquisitions.'"

(Dkt. No. 338 at 5-6 (citing *McCaw Pers. Commc'ns, Inc. v. Pac. Telesis Grp.*, 645 F. Supp. 1166, 1170 (N.D. Cal. 1986).) That is precisely what Dr. Zona did. Dr. Zona calculated damages from the lessening of competition due to the Meade acquisition and the anticompetitive effects it made possible.

As noted above, Defendants knew before trial, and did not object, that Dr. Zona's opinion was that Orion's Clayton Act § 7 damages (overcharges resulting from Defendant's acquisition of Meade in violation of § 7) were the same damages Orion suffered in connection with Defendants'

other antitrust violations. Dr. Zona repeatedly testified as the damages Orion suffered as a result of the Meade acquisition:

> Q. . . . Your consulting calculations in this case, is it not, the size of the actual profits compared to what Orion's profits should have been ***if the market had been healthy and Synta and Sunny and Meade had been competing against each other***?
>
> A. Yeah, it's probably not exactly to scale. The two boxes are roughly three-to-one, so the healthy market profits are about three times bigger than actual profits. Actual profits are around 20 million, and ***healthy market profits, by my calculation, would be more like 60 million***.

(Trial Tr. 1998:24-1999:8.) Dr. Zona further explained that his overcharge damages related to the unlawful Meade acquisition because that was the means by which Meade became part of the Sunny and Synta conspiracy:

> Q. So, Doctor, what I'm wondering is you understand that there are claims related to the collusion that occurred regarding the Meade transaction and that Orion has claimed and alleged that that transaction allowed the defendants to continue to maintain the artificially high level of price. You have that general understanding about the allegations; correct?
>
> THE WITNESS: Yes, I have that understanding.
>
> Q. And did, did those allegations and the defendants' conduct relating to the Meade transaction inform your understanding of their ability to set these higher prices and leading to the Orion damages that you indicated to the jury?
>
> A. Yes.
>
> Q. Feel free to explain yourself.
>
> . . .
>
> THE WITNESS: Okay. So I think that the particular Meade transaction and my understanding of the allegations, only the allegations, are that the -- there was a conspiracy to have those productive assets, those assets, the Meade assets that would have contributed to the manufacturing of telescopes, those became part of Sunny and Synta.
>
> And there were three in that case, not just two. So there would have been three firms that could have supplied and the combination brought those three together.

(Trial Tr. 2099:5-2100:7.) This is precisely the sort of harm that "can arise from a merger or acquisition that results in 'either . . . a lessening of competition due to the acquisitions or from 'anticompetitive acts made possible' by the acquisitions'" that the Court's summary judgment Order contemplated.

Indeed, Dr. Zona explicitly testified that his overcharge calculations – his $38.5 million damage figure – expressed overcharge damages in connection with Defendants' conspiracy and attempted monopolization, both of which the unlawful purchase of Meade was an essential part of:

> Q. . . . And in your report and in your presentation today you listed a number of input overcharge damages; correct?
>
> A. I just want to understand what you mean by "input overcharge damages."
>
> 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.

(Trial Tr. 2057:13-23 (emphasis added).)

The Motion states Dr. Zona's report by claiming that it offers categories of damages tied to specific causes of actions, "including one specifically pertaining to Plaintiff's Section 7 claim." (Mot. at 6:6-7.) That is inaccurate. At no point in Dr. Zona's report does he associate any of his categories of damages with any particular cause of action. (Borden Decl. Ex. 5 (Zona Report).) As Dr. Zona explained at his deposition, from an economic perspective, market concentration that arises from a horizontal conspiracy is indistinguishable from market concentration arising from an acquisition, and the resulting overcharge is identical:

> Q. Did you do any analysis -- can you point to any analysis in your report about the likelihood of anticompetitive impact resulting from Ningbo Sunny's acquisition of Meade?
>
> THE WITNESS: Well, I think that the analysis of the price overcharge includes a component that reflects ***the access to the Meade assets, or control of the Meade assets***, whether it is three-to-one overcharges associated with a three-to-one change through conspiracy or two-to-one change through conspiracy, and also the Meade purchase, or Meade asset damage calculation separately would reflect an anticompetitive effect of the acquisition.

(Borden Decl., Ex. 6, Zona Dep. 223:21-224:10.)

In sum, Dr. Zona's damages analysis was fully permitted by the Court's summary judgment Order, and was tied to Defendant's conduct, not any particular claim. This is common in antitrust cases, where (as here) the conduct that supports liability under one cause of action frequently also

supports liability under another. Accordingly, Defendant is not entitled to a new trial on Clayton Act § 7 damages.

III. DR. SASIAN'S OFFERED PROPER EXPERT TESTIMONY

Defendant contends, as it did in its *Daubert* motion, that Dr. Sasian's testimony should have been excluded under Federal Rule of Evidence 702 on the grounds that his testimony was not helpful to the jury.[4] (Mot. at 7-8.)

The Motion should be denied for the same reason set forth in the Court's Order denying Ningbo Sunny's *Daubert* motion:

> The manufacture of telescopes requires specialized knowledge. For example, whether a company that can make a reflector telescope with a 4.5-inch mirror can necessarily also make a telescope with a six-inch or eight-inch reflector is not a question that lay jurors can readily be expected to understand. Dr. Sasian's expertise and opinions are relevant and will assist the jury with understanding the evidence.

(Dkt. No. 339 at 6:4-8.) At trial, Defendant conceded that Dr. Sasian was qualified as an expert in optics and the design and manufacture of telescopes. And the testimony that Dr. Sasian offered at trial is precisely the testimony that the Court's *Daubert* order contemplated:

> Q. You mentioned that it this telescope has a 4.5 mirror?
>
> A. Yes.
>
> Q. And what did you conclude based on that?
>
> A. Well, the manufacturing of this telescope involved a given expertise, some level of technology, and you can ask yourself, can I make something smaller? Can I make something bigger?
>
> And the answer is that if you are producing a telescope of that size, one person should be able to scale it to 6 to 8 inches, or to 3 or 2 inches if they choose to. It's the same technology. . . . It's a matter of scaling. It's a matter of increasing tooling size, perhaps. But technology -- in terms of technology development, there are no new challenges in that regard.
>
> So it's feasible for someone who makes that type of telescope size to have -- to make a bigger telescope.

(Trial Tr. 1861:22-15.) Dr. Sasian went on to explain how he reviewed specifications of telescopes manufactured by both Defendant and Synta, and based upon his review, concluded that each could manufacture telescopes that the other made. (*Id.* at 1862:16-1875:22.) This testimony went

[4] The Motion also cites Federal Rules of Evidence 402 and 602, but does not explain why those rules were violated by Dr. Sasian. As such, any argument under Rules 402 and 702 is waived.

directly to the contested issue of whether Synta and Defendant were competitors—a fact that Defendant's witnesses attempted to deny. (Trial Tr. 1507:15-1508:12 (James Chiu testifying that he did not consider Synta a competitor because they manufactured different products).)

The totality of Dr. Sasian's testimony makes clear that his expertise and opinions were relevant and helpful to the jury's adjudication of the facts. Defendant cannot demonstrate any error, let alone prejudicial error, and the Motion therefore should be denied. *See* Fed. R. Civ. P. 61 ("Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order.").

IV. THE COURT'S CURATIVE INSTRUCTION REGARDING DR. SARAVIA WAS NOT PLAIN ERROR

The Court's curative instruction regarding Defendants' rebuttal expert Dr. Celeste Saravia, Ph.D.—to which Defendant never objected, and in fact endorsed—was necessary and appropriate. It was necessary to remedy Dr. Saravia's repeated attempts to stray beyond the bounds of her disclosed rebuttal opinion regarding her sensitivity analysis to offering affirmative opinions on damages. And it was appropriate because Dr. Saravia had repeatedly disregarded the Court's express admonitions made outside the presence of the jury.

A. Defendant Represents to the Court that Dr. Saravia Would Only Offer Rebuttal Sensitivity Opinions, Not Affirmative Damages Opinions

Defendant elected not to disclose any affirmative experts in this case. At the May 2, 2019 trial setting conference, Orion raised the issue that Defendants were going to try to sandbag Orion by smuggling affirmative expert opinions through their rebuttal expert. (Borden Decl., Ex. 7, 5/2/19 Hearing Tr. at 8:11-15.) In response, Defendants represented to the Court: "It's not true that we're going to do anything that is not properly within the scope of rebuttal testimony. Under the Federal Rules you're allowed to contradict or rebut evidence *on the same subject matter* identified by another party. That's exactly what we're going to do. We're going to produce *traditional rebuttal reports*[.]" (*Id*. at 9:22-10:3 (emphasis added).)

Defendant offered no affirmative expert reports, and disclosed Dr. Saravia as its rebuttal economic expert in this case. Orion moved to preclude her portions of her testimony on the

grounds that some of her opinions went beyond rebuttal testimony. In Defendant's Opposition to Orion's motion to preclude Dr. Saravia's testimony (Dkt. No. 302), Defendant represented that she had not presented an affirmative damages opinion, but merely a "sensitivity test." (*Id*. at 2 ("Dr. Saravia does not put forward an affirmative pass-through rate, as incorrectly suggested by the Plaintiff. . . . Dr. Saravia's informed decision to use 100 percent for the sensitivity test falls squarely into the purview of rebuttal testimony."); *id*. at 3 ("Dr. Saravia is doing precisely what a rebuttal expert is supposed to do – test assumptions by running sensitivity and robustness tests in order to demonstrate how sensitive damages are to Dr. Zona's unsupported assumptions").) In allowing Dr. Saravia to testify, the Court expressly relied on Defendant's representation that her analysis was a "sensitivity test" ***as opposed to an alternative damages calculation***. (Dkt. No. 314 at 11 ("It is appropriate for Dr. Saravia to use such a sensitivity test on Dr. Zona's own model.").)

When Defendant disclosed its proposed demonstratives for use with Dr. Saravia, however, it was apparent that Dr. Saravia intended to offer affirmative damages opinions, even though she had repeatedly disclaimed any affirmative opinions at her deposition. (*Compare* Dkt. No. 455-2 (excerpts of Dr. Saravia's deposition disclaiming any affirmative damages opinions) *with* Dkt. No. 455-1 at 11 (Dr. Saravia's proposed slide entitled "Making Reasonable Adjustments Dramatically Lowers Dr. Zona's Damages.").) In light of this clear transgression of the Federal Rules, Dr. Saravia's deposition testimony, and Defendant's prior representations to the Court, Orion filed objections to such slides and testimony and asked that Dr. Saravia be precluded from presenting them to the jury. (Dkt. No. 455.)

During the next day's morning conference, the Court expressed its concern regarding the scope of Dr. Saravia's forthcoming testimony:

> THE COURT: . . . This is a rebuttal witness, so she has had benefit of Plaintiff's affirmative report, and she has done that analysis. At her deposition, at least what I've seen at [ECF No.] 455, there were representations made that, oh, no, I didn't do a damage calculation, I didn't do any numbers. this is for a completely different purpose, et cetera.
>
> . . .
>
> THE COURT: And then she comes to court and then opines as to a damage number where she hadn't previously. They haven't had the

> benefit of testing that opinion, but now she comes in and says, well, I've sat through and now I'm permitted to give that report.
>
> . . .
>
> THE COURT: . . . There's something not on squares about that. I think you follow me.

(Trial Tr. 2011:3-2012:2.) Just as Defendant had represented in its *Daubert* opposition, (Dkt. No. 302), Defendant assured the Court that Dr. Saravia would only be providing a sensitivity analysis—the same representation that the Court had relied on in its Order denying Orion's *Daubert* motion. (Dkt. No. 314 at 11.)

B. Dr. Saravia Repeatedly Attempted to Offer Affirmative Damages Opinions on the Stand, Necessitating the Court's Curative Instruction

When Dr. Saravia began testifying, she almost immediately began offering affirmative damages opinions suggesting that her selected alternative inputs were more consistent with the facts of the case and produced lower damages:

> What I did is that I conducted sensitivities on his damages analysis. So what that means is that he has the parameters or the inputs that he puts into his damages model, and ***I used alternative inputs that are more consistent with facts in the case***.
>
> And when I did that, his estimate of damages -- this is the sensitivity -- goes way down. And so what that means is that ***if I take his model and make adjustments to make it more reasonable, if I see the estimate of damages go way down, that implies that he's really overstated damages***.

(Trial Tr. 2122:6-16 (emphasis added).)

Orion immediately objected, and during the subsequent sidebar the Court made clear—and Defendant agreed—that Dr. Saravia was not to testify regarding alternative theories of damages:

> THE COURT: Well, to the extent that [she is] going to talk about alternative theories of damages, and I'm not going to do that. You're not going to ask her that.
>
> MR. DILLICKRATH: No, I'm not.
>
> THE COURT: You can ask her questions, and she sounds pretty certain of her opinions and criticism, and she can talk about the criticism.
>
> But to get into the damages, and I think, you know, a better damages would have been this, et cetera.
>
> MR. DILLICKRATH: Not looking to elicit that testimony, Your Honor.

(Trial Tr. 2126:4-12.)

But immediately after the Court's admonition, Dr. Saravia continued to represent her sensitivity analysis as an affirmative damages opinion:

> If we go one column over, those are the sensitivities that I've conducted.
>
> So the first sensitivity that I did is I took his 16.4 million, which calculated damages through August 2019, and ***I cut the damages period off at September 2016 and then I -- that changes to 8.4 million***.

(Trial Tr. 2171:20-25 (emphasis added).) Orion again objected, and another sidebar was taken.

The Court—having already warned Defendant twice—made clear that it would be issuing a curative instruction and that Dr. Saravia needed to confine her testimony within the bounds of her disclosed opinions on pain of termination of her examination:

> MR. DILLICKRATH: This is Mr. Dillickrath. And all I asked her to do was to report on the numbers and I -- that's all I'm looking to elicit is to explain here's what you did, and this is the number that resulted without -- I didn't ask for --
>
> THE COURT: This is damages.
>
> MR. DILLICKRATH: This is sensitivities.
>
> . . . .
>
> I will in my next question advise her to please just refer to these as sensitivities and --
>
> THE COURT: Well, I'm going to advise the jury that this is not testimony related to damages. It's a sensitivity. The[y] are two different things.
>
> MR. HAGEY: Your Honor, from the Plaintiff's perspective, when we had a motion in limine on this, Your Honor was very clear in the Court's Order. You were very clear in the Order subsequently leading up to this.
>
> When we met and conferred about it, and we were on the record discussing these issues, counsel represented that they were not going to elicit any testimony that these were damages figures, yet their witness that's under their control, their expert has consistently gotten up before the jury and said these things.
>
> We can't unring those bells except with a pretty stern statement from the Court that these are not alternative damages and she's not entitled to and she's not offered an opinion on that.

> And, frankly, I feel like that slide shouldn't be up anymore if that's how this witness is going to be speaking about her analysis.
>
> THE COURT: Well, if she can't refrain from using the word "damages" we'll end her testimony.
>
> MR. DILLICKRATH: Your Honor, I will advise her in my next question.
>
> THE COURT: Tell her that.
>
> MR. DILLICKRATH: I will be completely direct, and I will represent to Mr. Hagey and the Court it's inadvertent. This is not her trying to slide a word in.
>
> . . .
>
> THE COURT: Damages should not be in her nomenclature on this testimony. Sensitivity should be, not damages.
>
> MR. DILLICKRATH: Your honor, I will make it clear in the next question that she's not offering an alternative damages model, and I will instruct her, with the Court's permission to lead, not to use the word "damages" and use the word "sensitivities" going forward.
>
> . . .
>
> THE COURT: I appreciate that. And I don't know if she was advised that she was not to use the word "damages."
>
> MR. DILLICKRATH: She was advised, and it was instinct.

(Trial Tr. 2172:5-2175:12.)

The Court then issued its curative instruction—which Defendant not only failed to object to, ***but specifically endorsed*** as to the portion stating that Dr. Saravia was not offering testimony regarding damages:

> THE COURT: . . . Ladies and gentlemen -- Counsel, you're going to ask a question in just a moment, but I am going to strike the testimony of this witness that -- where this witness indicated that she cut the damages of an amount.
>
> This witness is a witness who is not testifying about damages.
>
> Is that correct, Counsel?
>
> MR. DILLICKRATH: It is, Your Honor.
>
> THE COURT: She's not here to testify nor to opine or offer any opinion as to her work and how that work results in this witness's opinion of the issue of damages. That is not what this witness is testifying about. She is testifying as the slide that she had before her is limited to the area of sensitivities which is a distinct and different matter than damages.

> So this witness's testimony should not be taken. it's not permitted to be in front of you, and you are not to consider this witness's testimony as to any amount of damages nor her opinion as to damages.
>
> Counsel, you can follow up if you would like.

(Trial Tr. 2175:18-2176:12.)

Defendant's counsel did not object or seek clarification of the Court's Order. To the contrary, Defendant's next question affirmed the Court's instruction a second time: "Just to clarify. Dr. Saravia, you're not intending to offer any alternative damages calculation to the jury today; correct?" (Trial Tr. 2176:14-16.)

C. Defendant Cannot Complain Regarding the Court's Instruction After Agreeing on the Record that Dr. Saravia Should Not Use the Word Damages

Defendant made the strategic choice not to present an affirmative expert. Defendant repeatedly represented that Dr. Saravia would not offer an affirmative damages opinion at trial. Dr. Saravia repeatedly attempted to do so. At numerous points, Defendant recognized on the record that Dr. Saravia's testimony was exceeding the bounds of her disclosed opinion, Defendant's prior representations, and the Court's Orders. When the Court issued its curative instruction, Defendant not only did not object, but in fact ***endorsed*** the Court's statement that Dr. Saravia was "not testifying about damages." (Trial Tr. 2175:22-23.)

A party cannot endorse a curative instruction only to subsequently claim that it was error warranting the extreme remedy of a new trial. Even if Defendant had not waived any claim of error, the record demonstrates that the Court's curative instruction was correct, appropriate, and even restrained in light of Defendant's strategic choices regarding the scope of its experts and Dr. Saravia's repeated inability to testify within the confines of Rule 26. In sum, there was no error—let alone plain error—created by the Court's curative instruction. Accordingly, this argument does not support a new trial.

CONCLUSION

For all the foregoing reasons, Orion respectfully requests that the Court deny Defendant's Motion for a new trial.

Dated: January 30, 2020

Respectfully submitted,

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