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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

OPTRONIC TECHNOLOGIES, INC. d/b/a Orion Telescopes & Binoculars, a California corporation,

Plaintiff,

v.

NINGBO SUNNY ELECTRONIC CO., LTD., SUNNY OPTICS, INC., MEADE INSTRUMENTS CORP., and DOES 1-25,,

Defendant.

Case No. 5:16-cv-06370-EJD-VKD
Assigned to: Honorable Edward J. Davila

DEFENDANT NINGBO SUNNY ELECTRONIC CO., LTD.'S REPLY IN SUPPORT OF MOTION FOR NEW TRIAL

Compl. Filed: November 1, 2016
Trial Date: October 22, 2019
Partial Judgment Entered: December 5, 2019
Hearing Date: February 20, 2020
Time: 9:00 a.m.

I. INTRODUCTION

Ningbo Sunny's opening brief identifies five specific errors at trial in this litigation that courts have recognized as likely to confuse or improperly influence a jury's verdict and require a new trial. In opposition, Orion does not seriously dispute that these things occurred. It does not seriously engage with the case law recognizing them as bases for a new trial. It does not cite any countervailing cases of its own. Instead, Orion relies almost entirely on procedural arguments about waiver and "opening the door." But Ningbo Sunny did not waive any of these errors, it did not open the door to them, and Orion's procedural arguments do not justify its efforts to encourage the jury to award a verdict not based on actual evidence. Ningbo Sunny is entitled to a new trial.

II. ARGUMENT

Orion purports to place "limits" on this Court's broad discretion to order a new trial that do not exist. This Court may grant a new trial on any basis supported by the case law. Fed. R. Civ. Proc. 59. Courts have summarized these myriad bases with broad phrases like "against the clear weight of the evidence" or "based upon evidence which is false" or "miscarriage of justice." *Murphy v. City of Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990). But there is no precise "verbal formula" to explain these concepts: "[a]ll that can be said is that a verdict should be set aside where, after giving full respect to the jury's findings, the judge is left with the definite and firm conviction that a mistake has been committed by the jury." Rutter Group Prac. Guide Fed. Civ. Trials & Ev. Ch. 20-B (quoting *Landes Const. Co., Inc. v. Royal Bank of Canada* (9th Cir. 1987) 833 F2d 1365, 1371-1372 (9th Cir. 1987). When a district court reaches this conclusion, it has "the right, and indeed the duty, to weigh the evidence as [it sees] it, and to set aside the verdict of the jury, even though supported by substantial evidence." *Id.* Here, each type of error identified in Ningbo Sunny's opening papers is squarely identified in the case law as a grounds for ordering a new trial, and Orion does not contend otherwise.

A. Orion Provides No Meaningful Justification For Its Counsel's Prejudicial Arguments and Questioning About "Big Sunny" and Mr. Ni's Uncle.

Orion makes no serious effort to defend its counsel's repeated arguments throughout the trial that "Big Sunny" and Mr. Ni's uncle by marriage have lots of money. Orion does not

contend that these arguments are relevant to any liability or damages issue in the case, because they clearly are not. Instead, Orion attempts to defend its counsel's conduct entirely on procedural grounds.

First, Orion asserts that its counsel's references to "Big Sunny" and the wealth of Mr. Ni's uncle "only" occurred during closing argument, and that Ningbo Sunny did not object to those arguments. Orion is wrong on both counts. Throughout the trial, Orion's counsel asked a number of argumentative questions regarding "Big Sunny" and Mr. Ni's uncle, and Ningbo Sunny *objected to those questions* for precisely the reasons it is asserting now. (10/23/19 Trial Tr., 529:13-18, 532:2-10). Indeed, in many cases Orion has simply excised Defendants' objections from its citations to the trial transcript. (Trial Tr. 522:25-523:8) ("Mr. Caseria: Objection."); (*id.*, 526:10-16 ("Mr. Caseria: We object") (requesting sidebar). These objections—which were clearly presented to the Court and ruled upon—were more than sufficient to preserve these arguments. *See Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536, 543 (9th Cir. 2016) (courts employ a "workable standard"—the matter must have been raised sufficiently for the trial court to rule on it. There is no waiver if the issue was raised, the party took a position, and the district court ruled on it).

Second, Orion argues that Ningbo Sunny "opened the door" to Orion's "Big Sunny" arguments by presenting evidence of Defendants' profits. As Ningbo Sunny's counsel explained in open court at the time, however, this evidence is directly relevant to core issues in the case that have nothing to do with Ningbo Sunny's ability to pay damages: it shows (1) that Orion's damages analysis makes no sense because its expert would have had Ningbo Sunny operate its business ***at a significant loss*** and (2) that Orion's claim that it would have made more than $40 million in additional profit but for the alleged conduct simply cannot be true in an industry of this financial size. (10/22/19 Trial Tr. 267-269). Orion has nothing at all to say about these rebuttals to its damages analysis; instead, Orion ignores them and pretends that the Defendants' profits could *only* be relevant to an "ability to pay" argument—an argument Ningbo Sunny never made.

Tellingly, moreover, Orion is unable to articulate *any* theory of relevance with respect to its own assertions concerning the supposed net worth of "Big Sunny" and Mr. Ni's uncle, who are not parties to this litigation, are not affiliated with any party, and are not bound by the judgment. Orion parades a series of half-quotes and non-quotes from the trial transcript to suggest that Mr. Ni testified to some ongoing affiliation between Ningbo Sunny and "Big Sunny." A simple review of Orion's citations reveals Orion's trick. Here is what Mr. Ni actually testified to at trial, over and over again: Ningbo Sunny and "Big Sunny" "have no relations." (10/28/19 Trial Tr. 795). Despite the best efforts of Orion's counsel, who spent *full trial days* interrogating Mr. Ni on these issues, there is zero evidence in the record to the contrary.

Indeed, Orion seems to misunderstand what it means to "open the door" to evidence: argument that Orion's damages model was baseless and inflated did not "open the door" to evidence about "Big Sunny" and Mr. Ni's uncle, for the simple reason that the latter does nothing to respond to the former—the financial resources of "Big Sunny" and Mr. Ni's uncle do nothing to undermine Ningbo Sunny's arguments at trial that Orion's "but for" damages model makes no sense and yields damages that bear no relation to the financial realities in this industry.

B. Ningbo Sunny Did Not Waive Its Objection to Orion's Arguments That Orion Would "Not Be Around This Time Next Year" If The Jury Did Not Award It $40.3 Million.

Orion asserts that its counsel's argument to the jury that—to take just one example—"***my clients will not be around this time next year without the relief that we're requesting from each of you***" (11/21/19 Trial Tr. 2616), was merely argument about "the impact of Ningbo Sunny's anticompetitive conduct." (Opp. at 9:23-24). That is absurd. Notably, Orion does not address any of Ningbo Sunny's authorities identifying exactly this mode of argument as a basis for a new trial, nor does it cite any authorities of its own endorsing such behavior. Instead, Orion again resorts to the procedural argument that Ningbo Sunny waived any objection to Orion's conduct.

Again, there was no waiver. Ningbo Sunny objected to Orion's attempt to introduce evidence of Orion's supposedly imminent demise as a naked attempt to obtain a verdict based on considerations other than the evidence. (Trial Tr., 2498:21-2499:23). Ningbo Sunny obtained a

ruling on that objection. (*Id.*). Nothing more was required to preserve this issue. *See Yamada*, 825 F.3d at 543.

C. Orion's Opposition Brief Confirms The Absence of Evidence to Support The Jury's Finding of Damages With Respect to Orion's Section 7 Claim.

Once again, Orion's primary argument is waiver; and once again, Orion is wrong. Ningbo Sunny objected at trial to Orion's attempt to mislead the jury into believing that it could award damages based on Ningbo Sunny's acquisition of Meade, and obtained a ruling on that objection. (11/15/19 Trial Tr., 2098:7-2099:14, 2057:11-2061:23). The issue was preserved.

Orion says the Court's summary judgment order "only precluded Orion from seeking damages for Orion's failure to acquire Meade for itself; it did not preclude Orion from seeking damages resulting from Ningbo Sunny's acquisition of Meade." (Opp. at 11:23-25). But that distinction is irrelevant to this Motion, because there was ***zero evidence*** presented at trial that Orion suffered ***any*** "damages resulting from Ningbo Sunny's acquisition of Meade." It is beyond dispute that Dr. Zona's expert report contains no analysis of any damages under Section 7. And Dr. Zona's expert report—or, more precisely, his testimony consistent with that report—*was* the damages evidence Orion presented to the jury.

Indeed, the attorney dialogue that Orion quotes as a supposed "waiver" of this issue only underscores this point. That dialogue, as quoted, boils down to a commitment by *Orion's counsel* that "Dr. Zona has disclosed his analysis and that's what we'll be relying on for Section 2." (Opp. at 13:6) (quoting 10/11/19 Trial Tr. 32). That is exactly the point. Dr. Zona disclosed his damages analysis in his expert report. That analysis contained no calculation of damages "resulting from Ningbo Sunny's acquisition of Meade"—the only type of damages that Orion could conceivably have sought to recover under Section 7. Thus, the commitment by Orion's counsel that it would rely on Dr. Zona's damages analysis confirms that no evidence was presented to the jury of any damages under Section 7.

Orion contends that Dr. Zona's report does not tie his damages calculations to "specific causes of actions [sic]." That is true. Instead, Dr. Zona's report ties his damages calculations to specific types of alleged conduct that he says caused the resulting bucket of damages. Those types

of conduct were (1) price-fixing and market allocation; (2) Orion's inability to acquire the Hayneedle assets; and (3) Orion's inability to acquire Meade (the category excluded by the Court on summary judgment). Glaringly absent from this list, following the Court's summary judgment order, is any category of damages resulting from Ningbo Sunny's acquisition of Meade—*i.e.*, the type of damages cognizable under Section 7. Dr. Zona did not do such an analysis. It is not in his report. The Court has never held otherwise.

None of the "substantial evidence" Orion cites even speaks to this issue. Dr. Zona simply did not testify that any portion of his claimed damages were based on Ningbo Sunny's acquisition of Meade, for the simple reason that he could not have presented such testimony, because such an analysis appears nowhere in the expert report binding his testimony at trial.

D. Orion Effectively Concedes That Dr. Sasian Had No Specialized Knowledge Regarding Any of the Issues That Were Actually Relevant to Orion's Claims.

Orion appears to contend that the Court's pre-trial *Daubert r*uling is dispositive of this post-trial issue. It is not. As set forth in Ningbo Sunny's opening papers, it is Dr. Sasian's testimony at trial—a factual record not yet in existence at the *Daubert* stage—that confirms the inadmissibility of that testimony.

The snippet of testimony quoted by Orion in its brief only further demonstrates that Dr. Sasian's "expert" testimony was not helpful to the jury. Orion quotes Dr. Sasian as telling this jury that "someone" who makes a smaller telescope can necessarily make a larger telescope. (11/13/19 Trial Tr. 1861:22-1862:12). But whatever that hypothetical statement was intended to mean, it does not get close to the essential issue underlying Orion's antitrust claims in this litigation—namely, whether these specific companies, Ningbo Sunny and Suzhou Synta, could profitably mass produce the specific types of telescope at issue in this case. Dr. Sasian could provide no meaningful—much less helpful—testimony on that question because, as he effectively admitted over and over again on cross-examination, he did not know any more about these entities, or their factories, or their profit margins, or even *what it takes to mass produce telescopes in general*, than any of the individual jurors did. (*See* Trial Tr. 1878-79, 1883:22-1885:7, 1929:16-24, 1941:8-1943:18, 1945:13-21).

Orion suggests that the admission of Dr. Sasian's testimony was harmless error. But Dr. Sasian's "expert opinion" about Ningbo Sunny's and Suzhou Synta's supposed manufacturing capabilities was the only evidence presented to the jury on this essential element of Orion's Section 1 claims. Had the testimony been excluded, the jury would have had no evidentiary basis whatsoever for finding in Orion's favor on those claims.

E. Orion Is Wrong That The Distinction Between A "Damages Model" and A "Damages Sensitivity Analysis" Justified A Jury Instruction That Ningbo Sunny's Damages Expert Could Not Present "Her Opinion As To Damages."

As set forth in Ningbo Sunny's opening papers, the Court repeatedly instructed the jury in stark terms that Ningbo Sunny's damages expert could not offer the jury "her opinion as to damages." (11/15/19 Trial Tr. 2175-2177). Contrary to Orion's assertion, Defendants did not agree to or endorse any such admonishment. What Defendants freely acknowledged at trial was something far more limited: that Dr. Saravia was not presenting her own affirmative damages model. Instead, as set forth at length in her expert report and explained exhaustively at her pre-trial deposition, Dr. Saravia had performed a series of "sensitivity analyses"—a common method for assessing the validity of damages models in antitrust cases, which involves altering certain inputs in the opposing expert's model and analyzing what effect those changes have on the resulting damages figures. By necessity, a sensitivity analysis cannot be meaningfully presented without using the word "damages"—the entire point of the analysis is to show that the expert's model is equally consistent with damages figures *that are lower* than the ones he presented to the jury.

Dr. Saravia's trial testimony was perfectly consistent with these concepts, including the selective half-quotations of that testimony Orion presents in its brief. Not once did Dr. Saravia purport to provide an affirmative damages calculation, or misrepresent the nature of a sensitivity analysis. On direct examination, Ningbo Sunny's own counsel took pains to make clear that Dr. Saravia did not perform an affirmative damages model. To the extent there was any lingering confusion, Orion's counsel could have easily dispelled it on cross-examination. Regardless of the fact that the lower damages figures that Dr. Saravia attempted to present to the jury resulted from a

sensitivity test, and not a separate damages model, they were *lower damages figures* produced by a reliable econometric method, and Dr. Saravia should have been freely permitted to present them as such to the jury.

Ningbo Sunny appreciates that the Court's repeated admonishments regarding Dr. Saravia's testimony—which included a threat in the presence of the jury to terminate the examination—were motivated by a desire to draw a bright line between an affirmative damages model and a sensitivity analysis. Regardless of whether it was necessary or appropriate to draw such a line, however, the Court's instructions obviously went much further, and informed the jury that it could not consider the testimony of Ningbo Sunny's damages expert as an "opinion as to damages." A rational juror could only infer from these instructions—wrongly—that Ningbo Sunny had no damages evidence of its own.

At a minimum, this error requires a new trial limited to damages. *See, e.g., Bavlsik v. General Motors, LLC*, 870 F.3d 800, 808-812 (8th Cir. 2017) (affirming district court's grant of partial new trial on damages); *Wharf v. Burlington Northern R.R. Co.*, 60 F.3d 631, 638 (9th Cir. 1995 (no injustice resulting from retrial on damages only without reopening liability issues). A new trial limited to the issue of damages could be completed expeditiously, given that each side presented only a single damages witness and the damages portion of the trial consumed less than two full trial days.

III. CONCLUSION

For the foregoing reasons, as well as the reasons set forth in Ningbo Sunny's opening papers and papers filed in support of its concurrent Renewed Motion for Judgment as a Matter of Law, Ningbo Sunny respectfully requests that the Court grant its motion for a new trial.

Dated: February 6, 2020

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