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13 Attorneys for Defendant
 14 NINGBO SUNNY ELECTRONIC CO., LTD.

15 UNITED STATES DISTRICT COURT

16 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

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

19 Plaintiff,

20 v.

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

23 Defendant.

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

**DEFENDANT NINGBO SUNNY
 ELECTRONIC CO., LTD.'S NOTICE OF
 MOTION AND MOTION PURSUANT TO
 FRCP 59(e) TO ALTER OR AMEND THE
 JUDGMENT TO SET OFF VALUE OF
 PRIOR SETTLEMENT AGREEMENT**

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.

1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE THAT on February 20, 2020, in Courtroom1, 5th Floor, 280
3 South 1st Street, San Jose, California, before the Honorable Edward J. Davila, Defendant Ningbo
4 Sunny Electronic Co., Ltd. (“Ningbo Sunny” or “Defendant”) will and hereby does move pursuant
5 to Federal Rule of Civil Procedure 59(e) to alter or amend the partial judgment to set off the value
6 of Plaintiff Optronic Technologies, Inc.’s (“Orion” or “Plaintiff”) September 2016 settlement with
7 alleged co-conspirators including Suzhou Synta Optical Technology Co., Ltd. and Nantong
8 Schmidt Opto-Electrical Technology Co., Ltd. (collectively, the “Synta Entities”) against the
9 \$16.8 million judgment (\$50.4 million after trebling) entered as to Ningbo Sunny on December 5,
10 2019.

11 This motion for set-off is based on this notice of motion, the accompanying memorandum
12 of points and authorities, the complete files and records in this action, any oral argument of
13 counsel, and such other matters as the Court may consider.

14
15 Dated: January 2, 2020

16 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

17
18 By

/s/ Leo D. Caseria

LEO D. CASERIA

Attorneys for Defendant

NINGBO SUNNY ELECTRONIC CO., LTD.

1 **I. INTRODUCTION**

2 Defendant Ningbo Sunny respectfully moves to set off the value of Plaintiff's September
3 2016 settlement with alleged co-conspirators the Synta Entities¹ against the partial judgment of
4 \$16.8 million (\$50.4 million after trebling) entered on December 5, 2019. (ECF No. 518). Under
5 controlling Ninth Circuit law, the damages amount after trebling must be reduced by the value of
6 the prior settlement with alleged co-conspirators which includes, among other things, cash
7 payments, transfer of the "Hayneedle URLs," and a long-term Supply Agreement with the Synta
8 Entities in the following amounts:

Cash Payment under Settlement Agreement	\$500,000.00
Value of Hayneedle URLs	\$3,000,000.00
Value of Supply Agreement from September 2016 through August 2019	\$8,665,586.59
Cash Payment under Supply Agreement	\$600,000.00
SETTLEMENT TOTAL	\$12,765,586.59

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15 Defendant requests that the Court alter or amend the judgment pursuant to Federal Rule of
16 Civil Procedure 59(e) to deduct the above value of the prior settlement with the Synta Entities, to
17 reflect a total amended judgment of **\$37,634,413.41** after trebling.

18 **II. RELEVANT LEGAL STANDARD**

19 It is well settled that a plaintiff who recovers damages under the antitrust laws from one
20 co-conspirator, by verdict or settlement, may not recover those same damages again. *See, e.g.,*
21 *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 348 (1971) ("a plaintiff who has
22 recovered any item of damage from one coconspirator may not again recover the same item from
23 another conspirator; the law, that is, does not permit a plaintiff to recover double payment.");
24

25 ¹ The "Synta Entities" include all the entities that settled with Orion pursuant to the September 14,
26 2016 Settlement Agreement ("Settlement Agreement"): Suzhou Synta Optical Technology Co.,
27 Ltd.; Nantong Schmidt Opto-Electrical Technology Co., Ltd.; Good Advance Industries Limited;
28 David Shen; Celestron Acquisition LLC; Synta Technology Corp.; Atlas E-Commerce LLC; and
SW Technology Corporation. Ex. A to the Declaration of Leo Caseria filed concurrently herewith
("Caseria Decl.") (ORION000001-19 (Settlement Agreement)).

1 *Seymour v. Summa Vista Cinema, Inc.*, 809 F.2d 1385, 1389 (9th Cir. 1987) (recognizing
 2 “fundamental principle that a payment made by a joint tortfeasor diminishes the claim against the
 3 remaining tortfeasors.”) (*citing* Restatement (Second) of Torts § 885(3) (1977)); *Husky Refining*
 4 *Co. v. Barnes*, 119 F.2d 715, 716 (9th Cir. 1941) (accord); *In re Piper Aircraft*, 792 F. Supp. 1189,
 5 1190-91 (N.D. Cal. 1992) (holding that defendant “is entitled to a set off for economic damages
 6 previously compensated through the settlement agreement”); *In re Nat’l Mortg. Equity Corp.*
 7 *Mortg. Pool Certificates Sec. Litig.*, 636 F. Supp. 1138, 1151 (C.D. Cal. 1986) (“*In re Nat’l*
 8 *Mortg.*”) (recognizing well-settled rule that when a plaintiff sues multiple defendants in an
 9 antitrust case and settles with one or more of them, and then prevails at trial against the other
 10 remaining defendant(s), the settlement payments must be credited against the amount awarded at
 11 trial).

12 It is also well settled that the appropriate set-off calculation in antitrust cases is to first
 13 treble the amount of the damage award, and then to deduct the value of any prior settlements from
 14 that trebled amount. *See William Inglis & Sons Baking Co. v. Continental Baking Co., Inc.*, 981
 15 F.2d 1023, 1024 (9th Cir.1992); *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 398 (9th Cir. 1957); *see*
 16 *also, e.g., In re Nat’l Mortg.*, 636 F. Supp. at 1151-52 (“[c]ases since *Flintkote* have uniformly
 17 accepted its [post-trebling] rule” that settlement payments should be deducted from the award
 18 against the non-settling defendants after trebling of damages) (collecting cases); *In re TFT-LCD*
 19 *(Flat Panel) Antitrust Litig.*, No. 10-4572-SI, 2013 WL 6174683, at *6 (N.D. Cal. Nov. 20, 2013),
 20 *aff’d*, 637 F. App’x 981 (9th Cir. 2016) (deducting settlement after trebling).

21 **III. ARGUMENT**

22 **A. The Value of Orion’s Settlement with the Synta Entities Should be Set Off** 23 **Against the Trebled Damages Awarded by the Jury**

24 In September 2016, Orion entered into a settlement agreement with the Synta Entities to
 25 settle and resolve Orion’s allegations that the Synta Entities engaged in various anti-competitive
 26 conduct as detailed in a draft complaint which was later filed against defendants in this action in
 27 November 2016. Caseria Decl., Ex. A at p. 1. Orion’s settlement with the Synta Entities was for
 28 the same antitrust claims tried against defendants in this action. *E.g.*, Caseria Decl., Ex. B

1 (10/22/2019 Trial Tr.) at 291:6-10 (referring to the settlement with the Synta Entities in Plaintiff's
 2 opening statement) and 406:24-407:22 (court instruction to jury as to Orion's "settlement with
 3 third parties it claimed were part of the underlying subject matter of this case."); *see generally*
 4 Orion's Motion in Limine No. 1 re Settlement with Settling Coconspirators, ECF No. 329.

5 The Settlement Agreement included, among other things, the following consideration of
 6 value to Orion:

7 (1) a cash payment of \$500,000 pursuant to the Settlement Agreement (Caseria Decl.,
 8 Ex. A, § 1);

9 (2) transfer to Orion of all rights, title and interest to the URLs "Telescopes.com",
 10 "Binoculars.com", "Binocular.com" and "SpottingScopes.com" (collectively, the "Hayneedle
 11 URLs") pursuant to the Settlement Agreement (*id.* at § 3); and

12 (3) a Supply Agreement between Orion, Suzhou Synta and Nantong Schmidt, "the
 13 execution and performance of which is a material term and condition of this [Settlement]
 14 Agreement, as well as consideration to Orion[.]" (*id.* at § 2) which also included a cash payment of
 15 \$600,000. Caseria Decl., Ex. C (ORION000020-42 (Supply Agreement)), at § 5.3.

16 The total value of the above settlement should be set off against the trebled damages
 17 awarded in this case.

18 **1. The Cash Payment of \$500,000 Pursuant to the Settlement Agreement**

19 Pursuant to the Settlement Agreement, Orion received payment of \$500,000 within twenty
 20 days of the agreement's execution in September 2016. Caseria Decl., Ex. A at § 1. That
 21 settlement payment should be set off against the trebled damages of \$50.4 million. *See, e.g.,*
 22 *Zenith Radio*, 401 U.S. at 348; *Flintkote*, 246 F.2d at 398; *In re Nat'l Mortg.*, 636 F.Supp. at 1152;
 23 *In re TFT-LCD*, 2013 WL 6174683, at *6.

24 **2. The Hayneedle URLs Pursuant to the Settlement Agreement**

25 Also pursuant to the Settlement Agreement, Orion received all the rights, title and interest
 26 to certain assets, specifically, the Hayneedle URLs, within five days from the Effective Date of the
 27 September 2016 Settlement Agreement. Caseria Decl., Ex. A at § 3.

1 The Hayneedle URLs were a valuable asset to Orion, which Orion offered to purchase in
2 2014 for \$4.4 million. Caseria Decl., Exs. D and E (11/13/2019 Trial Tr. at 1804:7-1805:9 and
3 TX 1241 (6/17/2014 Letter of Intent), respectively). Orion obtained the Hayneedle URLs as part
4 of its settlement with the Synta Entities just two years later in exchange for a release. *See id.*, Ex.
5 A at § 3.

6 Post-settlement, Orion’s President, Peter Moreo, determined that the Hayneedle URLs
7 increased the value of Orion by \$2-3 million. Ex. F (TX 2179-004) (“Add \$2 to 3M for URLs”).
8 Valuing the Hayneedle URLs at \$3 million is a conservative estimate given that the gross revenues
9 that Hayneedle derived from the URLs in 2013 was \$17.83 million, Ex. E (TX 1241.004), and
10 Orion estimated 2014 net revenues from the URLs to total \$10.45 million. Ex. G (TX 1921.027).

11 Accordingly, \$3 million for the value of the Hayneedle URLs Orion received as part of its
12 settlement with the Synta Entities should be set off against the \$50.4 million damages amount.
13 *See Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp.*, 995 F.2d 425, 434 (3d Cir. 1993)
14 (holding that when the value of a settlement is in non-monetary form, courts must bring an
15 “informed economic judgment to bear in assessing its value” for set-off purposes; “[i]f probative
16 evidence of the monetary value of such a benefit is available, it should of course be used.”)
17 (internal citation omitted); *Bal Theatre Corp. v. Paramount Film Distrib. Corp.*, 206 F. Supp. 708,
18 714 (N.D. Cal. 1962) (in the antitrust context, “anything of value received should be set off in
19 addition to the cash settlement”). *See also, e.g., Zenith Radio*, 401 U.S. at 348; *Flintkote*, 246 F.2d
20 at 398; *In re Nat’l Mortg.*, 636 F.Supp. at 1152.

21 **3. The Supply Agreement with Suzhou Synta and Nantong Schmidt**

22 “A material term and condition” of Orion’s Settlement Agreement was the concurrent
23 execution of a Supply Agreement between Orion on the one hand, and Suzhou Synta and Nantong
24 Schmidt on the other (collectively, “Suzhou Synta”). Caseria Decl., Ex. A, at § 2; *see generally*
25 *id.*, Ex. C. That Supply Agreement, effective as of August 31, 2016, guaranteed Orion, among
26 other things, supply of telescope products from Suzhou Synta at “Most Favored Customer” prices,
27 along with a credit limit of \$1,000,000 and payment terms of net 30 days from the bill of lading
28

1 date (and net 60 days during the holiday season). *Id.*, Ex. C at §§ 4.2 and 5.

2 The Supply Agreement, effective for three years starting August 31, 2016 and
 3 automatically renewed thereafter for successive one-year terms, has been extremely valuable to
 4 Orion. Orion procured 75-80% of its telescope products from Suzhou Synta after execution of the
 5 Supply Agreement. *Id.*, Ex. H (11/6/2019 Trial Tr. at 1295:14-19). From September 2016
 6 through August 2019, Orion generated revenues of \$32,824,192 from sales of products supplied
 7 by Suzhou Synta. Declaration of Celeste Saravia filed concurrently herewith (“Saravia Decl.”), ¶
 8 4 and Ex. 2. Multiplying Orion’s revenues from sales of Suzhou Synta products during this period
 9 by the 26.4% margin Orion achieved – as derived by Orion’s own expert, Dr. Zona (1/3/2019
 10 Expert Report of J. Douglas Zona, ¶ 88) – equals \$8,665,586.59 in profits for Orion. *Id.*, ¶ 5.

11 \$8.665 million is a conservative estimate of the value of the Supply Agreement to Orion as
 12 it only accounts for sales from September 2016 through August 2019 even though the Supply
 13 Agreement is ongoing and renews automatically for successive one-year terms unless either party
 14 provides at least 12-months’ notice of its intent not to renew. Caseria Decl., Ex. C at § 14.1.²

15 In addition to the \$8.665 million in profits, Orion also received a cash payment of
 16 \$600,000 pursuant to the Supply Agreement, paid in equal installments on July 1, 2017 and July 1,
 17 2018. *Id.* at § 5.3. This \$600,000 cash payment was paid in exchange for Orion’s release.
 18 Orion’s Supplemental Brief re Rule 408, at 4 (ECF No. 420); *see also* Caseria Decl., Ex. A at § 2.

19 Accordingly, Orion’s Supply Agreement with the Synta Entities, conservatively valued at
 20 \$9,265,586.59 (\$8,665,586.59 + \$600,000) should be set off against the \$50.4 million judgment.
 21 *See, e.g., Gulfstream III*, 995 F.2d at 434; *Bal Theatre*, 206 F. Supp. at 714; *Zenith Radio*, 401
 22 U.S. at 348; *Flintkote*, 246 F.2d at 398; *In re Nat’l Mortg.*, 636 F.Supp. at 1152; *In re TFT-LCD*,
 23 2013 WL 6174683, at *6.

24 **IV. CONCLUSION**

25 For the foregoing reasons, Defendant respectfully requests that the Court grant its motion

26
 27 ² Defendant reserves the right to request an additional set off in the future based on as yet
 28 unearned profits to Orion under the Supply Agreement.

1 to set off the value of Orion's settlement with the Synta Entities – totaling \$12,765,586.59 –
2 against the \$50.4 million in trebled damages, thereby altering or amending the partial judgment
3 entered on December 5, 2019 to **\$37,634,413.41**.
4

5 Dated: January 2, 2020

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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7 By

/s/ Leo D. Caseria

8 _____
LEO D. CASERIA

9 Attorneys for Defendant
10 NINGBO SUNNY ELECTRONIC CO., LTD.
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