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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 REPLY IN
 SUPPORT OF 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.

TABLE OF CONTENTS

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

Page

I. INTRODUCTION.....1

II. ARGUMENT2

 A. None of Orion’s Arguments Relating to the Supply Agreement Merit Zero Set-Off.....2

 1. Orion’s Equity-Based Arguments Lack Merit2

 2. None of Orion’s Arguments Challenging the Accuracy of Ningbo Sunny’s Valuation of the Supply Agreement Merit Finding *Zero* Set-Off.....5

 3. Ningbo Sunny’s Motion is Not Legally Deficient7

 B. Orion’s Arguments Against Set-Off for the Value of the Hayneedle URLs Fail for the Same Reasons8

III. CONCLUSION9

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

1

2

3

4 *Bal Theatre Corp. v. Paramount Film Distr. Corp.*
206 F. Supp. 70 (N.D. Cal. 1962)8

5

6 *Gulfstream III Assoc., Inc. v. Gulfstream Aerospace Corp.*
995 F.2d 425 (3d Cir. 1993)1, 6, 8

7 *Zenith Radio Corp. v. Hazeltine Research, Inc.*
401 U.S. 321 (1971)1

8

FEDERAL RULES

9

10 Federal Rule of Evidence 4081, 2, 3

11

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1 **I. INTRODUCTION**

2 The parties agree on major aspects of Ningbo Sunny’s set-off motion:

3 *One*, Orion agrees that set-off is appropriate in antitrust cases like this one, based on “the
4 equitable principle that one who has recovered from one coconspirator may not recover the same
5 item of damage from another conspirator.” Opp. at 10 (*quoting Gulfstream III Assocs., Inc. v.*
6 *Gulfstream Aerospace Corp.*, 995 F.2d 425, 435 (3d Cir. 1993). Orion agrees that it would thus be
7 “unfair” to “permit[] Orion a double recovery.” Opp. at 7:6.

8 *Second*, Orion agrees that Ningbo Sunny is in fact entitled to a set-off of at least the
9 \$500,000 cash payment from the Synta Settlement Agreement. Opp. at 1, 18.

10 *Third*, Orion also agrees by omission that Ningbo Sunny is entitled to set off the \$600,000
11 cash payment under the Supply Agreement. Indeed, Orion previously confirmed that the
12 \$600,000 payment set forth in the Supply Agreement was part of Orion’s settlement with the
13 Synta Entities. Orion’s Supplemental Brief re Rule 408 (ECF No 420), at 4:1-5.

14 *Fourth*, Orion agrees that Ningbo Sunny is entitled to the marginal profit it earned from
15 sales of telescopes obtained through its Supply Agreement with Suzhou Synta and Nantong
16 Schmidt. Opp. at 13:13-14.

17 The dispute presented in Orion’s Opposition focuses on the specific set-off value to be
18 placed on Orion’s Supply Agreement and Hayneedle URLs obtained in settlement. Orion seeks to
19 avoid *any* set-off for the Supply Agreement and Hayneedle URLs, but this is inconsistent with
20 well-settled antitrust law, which provides, as Orion acknowledges, that:

21 [A] plaintiff who has recovered any item of damage from one coconspirator may
22 not again recover the same item from another conspirator; the law, that is, does
23 not permit a plaintiff to recover double payment.

24 *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 348 (1971). *See also Gulfstream*,
25 995 F.2d at 434 (“in antitrust context, “the rule...seems to be that anything of value received
26 should be set off in addition to the cash settlement.”) (*quoting Bal Theatre Corp. v. Paramount*
Film Distr. Corp., 206 F. Supp. 708, 714 (N.D. Cal. 1962) (ellipses in original)).

1 **II. ARGUMENT**

2 **A. None of Orion’s Arguments Relating to the Supply Agreement Merit Zero Set-**
 3 **Off**

4 As part of its settlement with the Synta Entities, Orion entered into a lucrative, long-term
 5 Supply Agreement with Suzhou Synta and Nantong Schmidt.¹ The Supply Agreement – the first
 6 of its kind between Orion and Suzhou Synta – guaranteed Orion’s supply of telescopes at “Most
 7 Favored Customer” (“MFC”) prices, along with additional favorable credit terms. Mot. at 4-5.
 8 The Supply Agreement has been effective since August 31, 2016, and renews automatically on an
 9 annual basis following an initial three-year term. *Id.* at 5. From September 2016 through August
 10 2019 alone, Orion generated revenues of \$32,824,192 from sales of products supplied to it by
 11 Suzhou Synta – a considerable sum which Orion does not dispute.

12 Orion fails to provide an alternative valuation for the Supply Agreement to the one
 13 advanced by Ningbo Sunny, and fails to support its position that the set-off should be zero.

14 **1. Orion’s Equity-Based Arguments Lack Merit**

15 Ningbo Sunny is not judicially estopped from moving for set-off. Contrary to Orion’s
 16 position, Ningbo Sunny did *not* previously argue that the Supply Agreement was not part of
 17 Orion’s settlement. Opp. at 3. It is undisputed that the Supply Agreement was part of the release
 18 of Orion’s claims against the Synta Entities and incorporated into the Settlement Agreement.
 19 Ningbo Sunny instead argued that the Supply Agreement, standing on its own, could be shown to
 20 the jury without revealing any information about the settlement prohibited under Rule 408.
 21 Borden Decl. iso Orion’s Opp. (“Borden Decl.”), Ex. 1 (10/16/19 Tr.) at 172:4-9 (counsel for
 22 defendants argued: “the fundamental point that we’re trying to make is that 408 does not apply to
 23 that Supply Agreement because you have a separate document. If you look at that document – if
 24 you were to show the jury that document, they would have no idea that there was a settlement

25 ¹ As in Ningbo Sunny’s Motion, Suzhou Synta and Nantong Schmidt are referred to collectively
 26 as “Suzhou Synta.” The term “Synta Entities” also tracks the meaning set forth in Ningbo
 27 Sunny’s Motion.
 28

1 agreement. So you're not revealing anything about the settlement.”).² Ningbo Sunny did *not*
2 claim that the Supply Agreement was not incorporated by reference in the Settlement Agreement
3 as part of the settlement. Indeed, Ningbo Sunny explicitly acknowledged the opposite. *Id.* at
4 172:10-13 (“it’s attached to the Settlement Agreement and it’s incorporated by reference”).³

5 The Court similarly did *not* rule that the Supply Agreement was not part of, or
6 incorporated by reference in, the Settlement Agreement. Instead, the Court issued a narrower
7 ruling that “[t]he Supply Agreement, **standing alone**, is only a business document.” 10/17/19
8 Second Order re Motions in Limine and Other Pretrial Motions (ECF No. 416), at 6:25-26
9 (emphasis added). The Court also agreed that the Settlement Agreement incorporates the Supply
10 Agreement such that the Supply Agreement is a material term and condition of settlement, but
11 concluded that “that provision *of the Settlement Agreement* neither transforms the *Supply*
12 *Agreement* into evidence of the compromise, nor integrates the two documents to the extent that
13 they are inseparable.” *Id.* at 7 (emphases in original). The Court held that the jury may consider
14 the Supply Agreement “without it acting as evidence” of a settlement between Orion and the Synta
15 Entities. *Id.*

16 The Court also did not allow the entire Supply Agreement – or the value thereof – to be
17 presented to the jury. The Court only allowed admission of a single section of the Supply
18 Agreement relating to MFC prices (Section 4). *Id.* at 6. *See also* 10/21/19 Order re Docket Entry
19 420 (ECF No. 423) (clarifying that prior order applied only to section 4 of the Supply Agreement).

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22
23 ² *See also id.* at 150:17-18 (“So I’m saying that this document by itself is not a settlement, it’s not
24 a release of claims.”).

25 ³ *See also id.* at 150:21-151:11 (counsel for defendants explicitly agreeing with the Court that the
26 Supply Agreement was incorporated by reference in the Settlement Agreement, but arguing that
27 the fact of incorporation or reference itself does not prohibit its use under Rule 408).
28

1 Thus, Orion cannot establish the first and second elements of judicial estoppel here:
2 Ningbo Sunny did not take “clearly inconsistent” positions and thus Ningbo Sunny also did not
3 successfully persuade the Court to adopt an earlier, inconsistent position. Opp. at 5.

4 Orion similarly fails as to the third element of judicial estoppel. Ningbo Sunny did not, as
5 Orion contends, argue that the jury should reduce the damages awarded by the value of the Supply
6 Agreement, nor does the verdict form reflect any such decision by the jury. As made clear at the
7 same pretrial hearing Orion cites to extensively (Opp. at 3-4), defendants argued that the Supply
8 Agreement was mainly relevant to the issue of *causation*. Borden Decl., Ex. 1 at 148:11-12 (“It
9 goes to the issue of causation. It’s not about liability or damages.”). Specifically as to causation,
10 defendants argued at trial that judgment should be entered in defendants’ favor because Orion’s
11 claim of a price-fixing conspiracy that continued beyond 2016 through August 2019 was baseless
12 given the MFC prices guaranteed to Orion in the Supply Agreement as of 2016 and beyond. *See*
13 Declaration of Helen C. Eckert iso Ningbo Sunny’s Reply filed concurrently herewith (“Eckert
14 Decl.”), Ex. A (11/21/19 Trial Tr.) at 2640:8-2642:13.

15 Indeed, Ningbo Sunny did *not* inform the jury (nor was it allowed to) of the \$600,000 cash
16 payment in the Supply Agreement or attempt to determine the monetary value of the Supply
17 Agreement so as to urge the jury to deduct that value from the damages award. Set-off, which
18 applies in antitrust cases only *after* defendant is found liable and the judgment is automatically
19 trebled, is not even a jury issue (and the jury is not allowed to be informed of trebling or set-off).
20 The verdict form only asked the jury to make determinations regarding liability and total damages
21 for each of Orion’s five claims. 11/26/19 Verdict Form (ECF No. 501). It did not ask the jury to
22 show its math or specify damages by year. *See id.* There is no basis for Orion’s argument that the
23 jury reduced the damages awarded based on the Supply Agreement. Again, the issue of set-off
24 was not presented to the jury, and the jury had no way of determining the value of the Supply
25 Agreement, particularly given that only section of the Supply Agreement presented to the jury was
26 an MFC provision. Orion is thus wrong to claim that Ningbo Sunny is “using the Supply
27 Agreement to reduce its damages twice” (Opp. at 7:5-6) and neither the equitable principles of
28

1 judicial estoppel nor avoiding a purported “double recovery windfall” for Ningbo Sunny
2 invalidates the right to a set-off here.⁴

3 Despite Ningbo Sunny’s best efforts to mount a successful defense at trial, the jury
4 nevertheless found for Orion and awarded \$16.8 million in damages. Post-judgment, Ningbo
5 Sunny is now requesting set-off for the value of Orion’s settlement with co-conspirator Suzhou
6 Synta, based on the well-settled rule that the law does not permit double recovery for Orion.

7 Also, contrary to Orion’s argument, Ningbo Sunny’s set-off request is *not* “in effect a
8 request that the Court reward Ningbo Sunny for its illegal (and successful) concentration of the
9 telescope market.”⁵ Opp. at 10. Orion’s argument simply rehashes its substantive antitrust
10 presentation to the jury, in effect arguing that because the jury already found defendants liable for
11 antitrust violations, it would be unfair to apply a set-off. Opp. at 10-11. But there is no set-off
12 exception for antitrust cases. The applicability of set-off in the antitrust conspiracy context is
13 well-settled law, which Orion acknowledges, and Orion cannot avoid its application here merely
14 by pointing to the fact that the jury found defendants liable.

15 **2. None of Orion’s Arguments Challenging the Accuracy of Ningbo**
16 **Sunny’s Valuation of the Supply Agreement Merit Finding Zero Set-**
17 **Off**

18 As set forth above, a set-off for the value of the Settlement and Supply Agreements is
19 appropriate here. With respect to the proper valuation of the Supply Agreement, Orion’s
20

21 ⁴ These same arguments apply with equal force to Orion’s repetitive argument that there can be no
22 set-off because defendants had already argued to the jury that damages should be reduced pursuant
23 to the Supply Agreement. Opp. at 7-8.

24 ⁵ None of the aftermath of this trial – including a \$50 million judgment, nearly \$5 million in
25 claimed attorneys’ fees, and bankruptcy protection for Ningbo Sunny’s subsidiary – is in any
26 sense “reward[ing]” Ningbo Sunny for illegal conduct.
27
28

1 arguments against Ningbo Sunny's valuation are baseless, and Orion offers no alternative
2 valuation to the \$8.665 million value calculated by Ningbo Sunny.⁶

3 Orion admits that Ningbo Sunny is entitled to set off the marginal profit from Orion's sales
4 of telescopes it purchased pursuant to the Supply Agreement, but does not provide a number.

5 Opp. at 13. Orion's position fails the burden-shifting framework outlined in *Gulfstream*:

6 [W]e conclude that where a plaintiff executes a general settlement instrument
7 which settles multiple claims with a defendant, but the non-settling defendant is
8 not a party to that agreement, the non-settling defendant need show only that the
9 plaintiff settled a claim on which the non-settling defendant was found liable at
10 trial. If the defendant makes this showing, the burden then shifts to the plaintiff to
11 prove that, under the terms of its agreement with the settling defendant, the
12 settlement or part thereof did not represent damages arising under the same theory
13 of liability as those forming the basis for the jury reward. The view we adopt is
14 consistent with the rule that a settling plaintiff is entitled to only one full recovery
15 while at the same time it protects the plaintiff from the application of amounts
16 received in settlement of unrelated claims.

17 995 F.2d at 436. Ningbo Sunny's valuation therefore stands un rebutted by Orion and is the
18 amount that should be applied as a set-off.

19 Ningbo Sunny's valuation of the Supply Agreement is reasonable and accurate. It is based
20 on Orion's own data and expert work. As set forth in the declaration of Celeste Saravia, (ECF No.
21 535), the \$8.665 million figure results from multiplying (1) Orion's \$32.824 million in revenues
22 from sales of telescopes supplied by Suzhou Synta under the Supply Agreement between 2016-
23 2019 (which Orion does not challenge or dispute), by (2) the 26.4% average profit margin for

24 ⁶ As set forth in the Motion, Ningbo Sunny's valuation was based on Orion's revenues of \$32.8
25 million on telescopes purchased from Suzhou Synta between September 2016 and August 2019
26 (which Orion does not dispute), multiplied by Orion's average margin of 26.4% (which Orion's
27 own expert, Dr. Zona, calculated). Mot. at 5.

1 Orion's telescope sales calculated by Dr. Zona, Orion's *own expert*.⁷ Mot. at 5. Thus, the \$8.665
2 million is derived from Orion's own expert work, applied to Orion's own financial data.

3 Second, as to Orion's arguments that Ningbo Sunny is only entitled to marginal profit,
4 which, according to Orion, is less than absolute profit, Orion is mistaken. Orion's marginal profit
5 and absolute profit under the Supply Agreement are the same. But for Orion's settlement with the
6 Synta Entities, Orion would have named the Synta Entities as defendants in this case. It is well-
7 recognized that a company that has been sued has good reason to refuse to continue doing
8 business with the company that has sued it. Indeed, this is precisely what Ningbo Sunny did and
9 the Court granted summary judgment dismissing Orion's refusal to deal claim on that basis.

10 9/30/19 Summary Judgment Order (ECF No. 338), at 14-15. Orion cannot reasonably contend
11 that it would have had any profits from selling Synta products absent its settlement. Orion has
12 already explained to this Court that the Supply Agreement was the most material term of the
13 settlement "because otherwise its whole business would have been crushed because Synta would
14 have cut off supply, and that would have been devastating to Orion financially, and that's why it's
15 included in this settlement." Eckert Decl., Ex. B (10/16/19 Tr.) at 176:16-177:2 (statement by
16 Orion's counsel).

17 3. Ningbo Sunny's Motion is Not Legally Deficient

18 Orion argues that because Orion's refusal to deal claim was dismissed by the Court on
19 summary judgment, Ningbo Sunny cannot now seek a set-off for the value of an agreement
20 regarding supply from Suzhou Synta. *See* Opp. at 15-16. This makes no sense. There has been
21 no question throughout this matter that Orion's settlement with the Synta Entities, which expressly
22 includes the Supply Agreement with Suzhou Synta, was in settlement of all the same allegations

23 _____
24 ⁷ Orion mischaracterizes Dr. Saravia's declaration as providing an "affirmative opinion about the
25 value of the Supply Agreement." Opp. at 12. Rather, her declaration only presents a basic
26 calculation of Orion's profits between 2016-2019. There is no expert opinion expressed by Dr.
27 Saravia in her declaration on the value of the Supply Agreement or any other topic.
28

1 of anticompetitive conduct ultimately tried against defendants in this matter. Mot. at 2-3. Orion
 2 cannot now backtrack from that reality by positing the facially unsustainable argument that a
 3 *supply* agreement can only be used to set off a *refusal to supply* claim. There is no legal or factual
 4 basis for such a position. The terms of the Settlement and Supply Agreements say nothing about a
 5 refusal to deal claim specifically. Nor could they; the refusal to deal claim that the Court
 6 dismissed at summary judgment was specific to Ningbo Sunny, based on Ningbo Sunny’s alleged
 7 refusal to deal with Orion after Orion filed a lawsuit.

8 Orion is also wrong that there is no authority to support valuation of commercial terms in a
 9 settlement agreement as part of set-off. The very cases Orion discusses (Opp. at 17-18) mandate
 10 valuation of commercial terms in settlement agreements, without regard to whether those
 11 commercial terms had been assigned a monetary value as part of the settlement itself. *Gulfstream*,
 12 995 F.2d at 434 (“in antitrust context, ‘the rule...seems to be that *anything of value received*
 13 *should be set off in addition to the cash settlement.*’”) (quoting *Bal Theatre*, 206 F. Supp. at 714
 14 (N.D. Cal. 1962) (ellipses in original; emphasis added); *Bal Theatre*, 206 F. Supp. at 714
 15 (applying value of “intangible right” which was “unliquidated in amount” but subsequently
 16 determined by the trier of fact to set off judgment).

17 As quoted in Orion’s own Opposition:

18 The problem of determining the value of non-monetary consideration paid for the
 19 release is no more difficult than the commonplace difficulties encountered in
 20 determining damages in any antitrust case.

21 Opp. at 11. n.5 (quoting *Winchester Drive-In Th.. v. Twentieth Century-Fox Film Co.*, 232 F.
 22 Supp. 556 (N.D. Cal. 1964), *reversed on other grounds by Twentieth Century-Fox Film Corp. v.*
 23 *Winchester Drive-In Th.*, 351 F.2d 925 (9th Cir. 1965), *abrogated on other grounds by Avery v.*
United States, 829 F.2d 817 (9th Cir. 1987)).

24 **B. Orion’s Arguments Against Set-Off for the Value of the Hayneedle URLs Fail**
 25 **for the Same Reasons**

26 Orion alleged that defendants conspired with the Synta Entities to withdraw credit from
 27 Orion, in order to prevent Orion from acquiring the Hayneedle assets (for which Orion claimed
 28 damages in perpetuity). Opp. at 8-9; Borden Decl., Ex. 1 (11/15/19 Trial Tr.) at 2093:18-25.

1 Orion obtained those assets two years later, and Orion's expert estimated \$1.8 million in damages.
2 Eckert Decl., Ex. C (11/15/19 Trial Tr.) at 2050:7-2051:4. Orion now opposes Ningbo Sunny's \$3
3 million set-off on the grounds that this amount is more than the damages calculated by Dr. Zona.
4 As with Orion's position on the Supply Agreement, there is no legal or factual basis for Orion's
5 position. Orion did not obtain the Hayneedle assets through the Settlement Agreement only in
6 resolution of its Hayneedle claims. Instead, the Settlement and Supply Agreements were an
7 overall package designed to resolve all of Orion's claims. Orion cannot parse each element of its
8 Settlement and Supply Agreements and view them in isolation in order to avoid set-off.

9 Contrary to Orion's position, Ningbo Sunny did not argue before the jury that any damages
10 awarded for Hayneedle should be discounted by the value of the Hayneedle assets Orion obtained
11 in settlement. Nor does the verdict form reflect any such discount by the jury.

12 Lastly, Orion argues that the amount of the Hayneedle set-off cannot be supported by just
13 one document. That one document, however, was personally drafted by Orion's own President,
14 Peter Moreo, less than three months after the settlement with the Synta Entities, for the express
15 purpose of determining the increased value of Orion as a company, in large part due to the assets it
16 obtained from that settlement. Mot. at 4; Caseria Decl., Ex. F (TX 2179-004). As with the
17 Supply Agreement, Orion has failed to present any contrary evidence to meet the burden shifting
18 requirements of a set-off analysis.

19 **III. CONCLUSION**

20 For the foregoing reasons, Ningbo Sunny respectfully requests that the Court grant its
21 motion to set off the value of Orion's settlement with the Synta Entities – totaling \$12,765,586.59
22 – against the \$50.4 million in trebled damages, thereby altering or amending the partial judgment
23 entered on December 5, 2019 to **\$37,634,413.41**.

