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NINGBO SUNNY ELECTRONIC CO., LTD.

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 NOTICE OF MOTION AND 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.

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT pursuant to the Joint Stipulation and Order re Briefing Schedule for Plaintiff and Defendant Ningbo Sunny's Post-Trial Motions entered on December 16, 2019 (ECF No. 525), Defendant Ningbo Sunny Electronic Co., Ltd. ("Ningbo Sunny" or "Defendant") will and hereby does move pursuant to Federal Rule of Civil Procedure 59(a) for a new trial. As discussed in the accompanying Memorandum of Points and Authorities, Ningbo Sunny respectfully submits that the following (individually and/or collectively) constitute grounds for a new trial: (1) Plaintiff's repeated references to "Big Sunny" and its deep pockets; (2) Plaintiff's repeated, explicit statements that Orion will surely "die" if the jury does not award it millions in damages; (3) the jury's award of $16.8 million in damages on Plaintiff's Clayton Act, Section 7 claim despite Plaintiff proffering no evidence of Section 7 damages; (4) inclusion of Dr. Sasian's so-called "expert" testimony which should have been excluded under Rule 702 as not based on any "scientific, technical, or other specialized knowledge"; (5) instructing the jury that it could not consider Defendants' damages rebuttal expert on the topic of damages; and (6) all grounds for judgment as a matter of law set forth in Ningbo Sunny's Renewed Motion for Judgment as a Matter of Law filed concurrently herewith.

This motion for a new trial is based on this notice of motion, the accompanying memorandum of points and authorities, the complete files and records in this action, any oral argument of counsel, and such other matters as the Court may consider.

Dated: January 16, 2020

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By *_/s/ Leo D. Caseria_*
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Attorneys for Defendant
NINGBO SUNNY ELECTRONIC CO., LTD.

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I. INTRODUCTION

Defendant Ningbo Sunny respectfully moves for a new trial pursuant to Federal Rule of Civil Procedure 59(a). The jury in this case returned a verdict in favor of Plaintiff Orion for $16.8 million in damages (before trebling) on November 26, 2019, and partial judgment was entered as to Ningbo Sunny on December 5, 2019. ECF No. 518. Defendant now respectfully moves for a new trial on the following grounds:

1. Plaintiff's repeated references to "Big Sunny," a "multi-billion dollar" company owned by "one of the wealthiest men in the world" has zero relevance to any of the issues before the jury. The only possible motive in repeatedly referring to "Big Sunny" – which Plaintiff never attempted to hide – is to improperly bias the jury by arguing that because defendants have deep pockets, the jury should simply go ahead and award Plaintiff millions in damages without regard to the merits of Plaintiff's claims. The prejudicial nature of these statements is only exacerbated by the fact that "Big Sunny" is not a defendant, has never been accused of any wrongdoing, and is not in fact affiliated with any of the defendants.

2. To make matters worse, Plaintiff argued the flip side of that same coin – stating in very explicit terms that Orion will certainly "die" without a multi-million dollar verdict from the jury. Again, such statements have zero relevance to any of the issues before the jury, and their only intended effect is to improperly bias the jury in order to ensure a favorable and substantial verdict on damages in Orion's favor.

3. The jury's award of $16.8 million in damages on Plaintiff's Clayton Act, Section 7 claim warrants a new trial as Plaintiff presented *no* evidence of Section 7 damages. Prior to trial, the only Section 7 damages Plaintiff proffered calculated damages to Orion from not being able to acquire Meade for itself. Despite the fact that the Court later ruled on summary judgment that Defendants did *not* cause Orion's failure to acquire Meade, Orion proffered no other evidence of Section 7 damages at trial, instead choosing to fall back on its expert's calculations of overcharges which were never intended to, and did not in fact, establish damages flowing from Plaintiff's Section 7 claim.

4. Inclusion of so-called "expert" testimony from Plaintiff's industry expert, Dr. Jose

Sasian, was prejudicial error which led the jury to find that defendants were competitors capable of *per se* market allocation or price-fixing under Section 1 of the Sherman Act. By Dr. Sasian's own, repeated admissions at trial, his opinion that Ningbo Sunny and alleged co-conspirator Suzhou Synta "can" make similar consumer telescopes was *not* based on any "scientific, technical, or other specialized knowledge" helpful to the trier of fact, and was thus inadmissible under Federal Rule of Evidence 702.

5. The Court improperly instructed the jury that it may not consider any testimony from defendants' rebuttal damages expert, Dr. Celeste Saravia, as to *any* issue of damages. The Court's instruction went far beyond the narrow issue of whether Dr. Saravia could proffer an alternative damages calculation, and in effect prohibited the jury from considering any of Dr. Saravia's testimony as to any issue of damages. This left the jury with only Plaintiff's overinflated damages model to consider, which resulted in an inflated damages award.

6. *Lastly*, Ningbo Sunny moves for a new trial for all the reasons set forth in its Renewed Motion for Judgment as a Matter of Law ("Renewed JMOL") filed concurrently herewith.

II. RELEVANT LEGAL STANDARD

A court may order a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a). A new trial is appropriate where "the verdict is against the weight of the evidence, [ ] the damages are excessive, or [ ] for other reasons, the trial was not fair to the party moving." *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007); *Rattray v. City of Nat'l City*, 51 F.3d 793, 800 (9th Cir. 1994) (new trial to prevent "miscarriage of justice").

In ruling on a motion for new trial, "[t]he judge can weigh the evidence and assess the credibility of witnesses, and need not view the evidence from the perspective most favorable to the prevailing party." *Landes Constr. Co., Inc. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987). Unlike motions for judgment as a matter of law, a court must "weigh the evidence as [the court] saw it" and may set aside the verdict even if it is supported by substantial evidence. *Molski*, 481 F.3d at 729; *see also* 9B Wright, Miller & Kane, Federal Practice and Procedure §

2539 (3d ed. 2002) (noting that in practice, courts may grant a new trial even though they are constrained to deny a renewed motion for judgment as a matter of law).

III. ARGUMENT

A. Plaintiff's Repeated References to "Big Sunny" and its Deep Pockets Warrant a New Trial

Evidence of a company's size and net worth has zero relevance to the issue of liability and damages. A central theme, however, in Plaintiff's closing statement (and its case in chief) was that Defendant Ningbo Sunny and its owner, Peter Ni, had the backing and support of "Big Sunny," a "multi-billion dollar," "publicly traded entity" owned by "one of the wealthiest men in the world":

- "[Y]ou have the specter of what we refer to as **Big Sunny**, the publicly traded entity, the **multibillion dollar**, I think over **$100 billion in Hong Kong dollars** is what Mr. Ni referred to." Trial Tr. (11/21/19) at 2605:22-25 (emphasis added).
- "**The Defendants aren't small**. They're not some tiny organization that is just barely scraping through." *Id.* at 2606:6-7 (emphasis added).
- "[W]e all know what the relationship is there with Mr. Ni being the **nephew of one of the wealthiest men in the world**, indeed at least in China." *Id.* at 2606:16-19 (emphasis added).

The prejudicial nature of these irrelevant statements are only exacerbated by the fact that "Big Sunny" is *not* a defendant in this case, has never been accused of *any* wrongdoing, and *not* in fact affiliated with any of the defendants. Defendants objected to these "Big Sunny" references as improper and clearly prejudicial attempts to argue that Defendants have deep pockets. *E.g.*, *id*. at 2546:12-2547:14, 2548:20-2549:5, 2553:4-2556:18. The only possible motive in discussing "Big Sunny" – particularly in the context of discussing the amount Orion was seeking in damages – is to improperly inflame the prejudice of the jury by arguing that because Defendants have such deep pockets, the jury should simply go ahead and award Orion millions of dollars (which in fact the jury did), without regard to whether Orion has in fact established the elements of its claims against Defendants.

Such arguments regarding size and wealth in an effort to improperly bias the jury constitute prejudicial error warranting a new trial. *E.g., Igo v. Coachmen Indus., Inc.*, 938 F.2d 650, 653 (6th Cir. 1991) (reversing jury verdict and ordering new trial based in part on plaintiff counsel's reference to defendant's wealth, "obviously to demonstrate that [defendant] could pay a big verdict" which the court held to be "blatant, inappropriate argument"); *City of Cleveland v. Peter Kiewit Sons' Co.*, 624 F.2d 749, 757-58 (6th Cir. 1980) (granting new trial where plaintiff's counsel made improper comments about the financial disparity between the parties); *Draper v. Airco, Inc.*, 580 F.2d 91, 95 (3d Cir. 1978) (reversing lower court's denial of new trial based on plaintiff's counsel's arguments that because defendants were wealthy and plaintiff was poor, the jury should find for plaintiff on this basis: "justice is not dependent upon the wealth or poverty of the parties and a jury should not be urged to predicate its verdict on a prejudice against bigness or wealth."); *Koufakis v. Carvel*, 425 F.2d 892, 902 (2d Cir. 1970) (remarks "which can be taken as suggesting that the defendant should respond in damages because he is rich and the plaintiff is poor, are grounds for a new trial.").

B. Plaintiff's Repeated Statements that Orion Will Surely "Die" if Not Awarded the Relief it Requests Warrant a New Trial

In combination with Plaintiff's arguments as to "Big Sunny's" wealth, Plaintiff also argued the flip side of that same coin throughout its closing – that Orion will certainly "die" or cease to exist if the jury did not award it the tens of millions in damages it was seeking:

- "[Y]ou understand at a very core center, the common sense reality is that **Orion is going to die if they don't get relief**." Trial Tr. (11/21/19) at 2576:24-2577:1 (emphasis added).
- "[W]e're now down to one, the sole last United States telescope brand struggling and fighting for its life…**without the relief that they're seeking here, they will not exist. The jobs and families and connections that they've made will not exist**." *Id.* at 2576:4-10 (emphasis added).
- "This [trial] is **their last resort**." *Id.* at 2577:2-3 (emphasis added).
- "We brought you the fact witnesses, the employees and owners of Orion, to testify

regarding their experience and their fears and their **dire concern about what is going to happen in this case should they not get relief**." *Id.* at 2593:9-12 (emphasis added).

- "And here there is a very simple issue at the end of the day, and that is **my clients will not be around this time next year without the relief that we're requesting from each of you**." *Id.* at 2616:20-22 (emphasis added).

Such repeated and explicit statements that Orion's very existence – and that of its employees and families (who were in fact present in the courtroom and introduced to the jury during Plaintiff's closing statement) – depends on the jury awarding it millions in damages has zero relevance to any of the issues before the jury. The only intended effect – which did in fact affect the jury's verdict as intended – was to improperly garner the jury's sympathy in order to ensure a favorable verdict for Orion.

Anticipating exactly these types of improper statements, defendants lodged a preemptive objection the day before closing to preclude Orion from making such statements to the jury. Defendants argued that such statements are improper, prejudicial, and intended only to inflame the passions of the jury. Trial Tr. (10/20/19) at 2498:21-2499:23. The Court warned Orion not to take this argument too far, but Orion did not heed the Court's warning.

For the same reasons that statements about defendants' substantial net worth constitutes prejudicial error warranting a new trial, the same is true for the flip side of that coin that plaintiff is small and cannot survive without a sizeable verdict awarded in its favor. *E.g.*, *City of Cleveland*, 624 F.2d at 757-58 (granting new trial where plaintiff's counsel made improper comments about the financial disparity between the parties); *Draper*, 580 F.2d at 95 (granting new trial based on plaintiff's counsel's argument in closing that because "the defendants were rich (giants of the industrial world) and because the plaintiff was poor, the jury should base its verdict in favor of plaintiff on this financial disparity.") (collecting cases finding that appealing to jury's sympathy based on the parties' financial disparity is improper); *Koufakis*, 425 F.2d at 902 (remarks "which can be taken as suggesting that the defendant should respond in damages because he is rich and the plaintiff is poor, are grounds for a new trial.").

C. The Jury's Verdict of $16.8 Million in Damages for Plaintiff's Clayton Act, Section 7 Claim is Against the Clear Weight of the Evidence

The jury's verdict awarding $16.8 million in damages on Plaintiff's Clayton Act, Section 7 claim is against the clear weight of the evidence: Plaintiff presented *no* evidence of damages with respect to its Section 7 claim at trial.

Plaintiff's damages expert, Dr. Zona, initially analyzed four specific categories of damages in his January 3, 2019 Report, including one specifically pertaining to Plaintiff's Section 7 claim. Dr. Zona opined that Orion was damaged in the range of $11.9 to $26.7 million from having been prevented from acquiring Meade for itself. Declaration of Leo D. Caseria filed concurrently herewith, Ex. A (1/3/2019 Expert Report of J. Douglas Zona, at ¶¶ 8, 120-124, 132). This particular economic injury from not being able to acquire Meade for itself was the *one and only* category of Section 7 damages Orion proffered. *See id*.

On cross-motions for summary judgment, however, the Court ruled as a matter of law that Defendants did *not* cause Orion's failure to acquire Meade. 9/20/19 Order (ECF No. 313), at 5.[1] This ruling thus barred Orion from proffering at trial evidence of damages arising from its failure to acquire Meade *and Orion proffered no alternative evidence at trial of damages flowing from its Section 7 claim*. Orion instead relied on Dr. Zona's calculations of "overcharge" damages resulting from conspiracy to fix prices and allocate markets, but those overcharge damages were never offered for the purpose of, and did not in fact, establish damages flowing from Orion's Section 7 claim. *See* Declaration of Leo Caseria filed concurrently herewith, Ex. A (Zona Report, at ¶ 8c ("As a result of Defendants' collusion to fix prices and divide the market for telescope manufacturing, Orion's [sic] has suffered damages in the form of lost profits from price overcharges on telescopes purchased from Defendants and their co-conspirators in a range from about $11.4 million to $30.6 million.")). Dr. Zona never timely disclosed any expert opinion or expansion of his opinions to encompass damages to Orion flowing from its Section 7 claim.

[1] The Court, however, declined to dismiss Plaintiff's Section 7 claim altogether because Plaintiff did not state that its failure to acquire Meade for itself was the only harm: "Rather, Orion claims that the conspiracy to enact the merger harmed it by increasing market concentration." *Id.*

Without *any* evidence proffered at trial as to damages flowing from its Section 7 claim, the jury's $16.8 million verdict on the Section 7 claim is against the clear weight of evidence and warrants a new trial.[2] *See McClinchy v. Shell Chem. Co.*, 845 F.2d 802, 808-09 (9th Cir. 1988) (plaintiff must present competent evidence from which a jury can fairly estimate damages; affirming summary judgment for defendants where plaintiff's only evidence of damages was the testimony of experts whose opinions were properly excluded); *Klapmeier v. Telecheck Intn'l, Inc.*, 482 F.2d 247, 253 (8th Cir. 1973) (reversing jury verdict and granting new trial as to damages as there was no substantial evidence supporting the jury award)*; see also Am. Bearing Co. Inc. v. Litton Indus.*, 729 F.2d 943, 952 (3d Cir. 1984) (granting new trial as evidence of injury-in-fact and causation on antitrust claims was sufficiently weak that jury's damages award was against the weight of the evidence).

D. The Court's Inclusion of So-Called "Expert" Testimony from Dr. Sasian Warrants a New Trial

Plaintiff proffered the so-called "expert" testimony of Dr. Sasian at trial, to provide an opinion as to whether defendant Ningbo Sunny and alleged co-conspirator Suzhou Synta "can" theoretically manufacture the same consumer telescopes. *See* Trial Tr. (11/13/19) at 1856:8-10. Dr. Sasian's testimony was offered as evidence that Ningbo Sunny and Suzhou Synta were competitors capable of *per se* price-fixing or market allocation in violation of Section 1 of the Sherman Act, and the jury ultimately found defendants liable for both of these *per se* violations. 11/26/19 Verdict Form (ECF No. 501), at 1-2. Dr. Sasian's testimony, however, should have been excluded under Rules of Federal Evidence 402, 602 and 702, and the Court's failure to do so constitutes prejudicial error warranting a new trial.

Dr. Sasian's testimony at best related to the theoretical possibility that Ningbo Sunny and Suzhou Synta "can" make similar consumer telescopes. Trial Tr. (11/13/19) at 1856:24-1857:2. But that is not helpful to the trier of fact to determine a fact at issue of whether Ningbo Sunny entered into an unlawful conspiracy to divide the telescope manufacturing market with its

[2] Defendants objected to the Section 7 claim being submitted to the jury at all because there was no longer any evidence of damages arising from this particular claim. *E.g.*, Joint Final Pretrial Conference Statement (ECF No. 335-1), at 11; Trial Tr. (11/20/19) at 2482:20-2483:5.

horizontal competitor, Suzhou Synta. *See* Fed. R. Evid. 702 (qualified expert may only testify if his specialized knowledge will help the trier of fact determine a fact in issue); and 402 (irrelevant evidence is inadmissible). More importantly, Dr. Sasian himself explicitly volunteered throughout his testimony, on several separate occasions, that his opinions were not based on any expert or scientific knowledge: "[Y]ou don't need a Ph.D. to give it." Trial Tr. (11/14/19) at 1953:13-14; *see also id*. at 1953:15-20 (testifying that you don't need a Ph.D. to look at astronomy magazines to view the products that Ningbo Sunny and Suzhou Synta's subsidiaries have been advertising to know that these companies can both make high-end telescopes). By his own admissions, his testimony should have been excluded under Rule 702 as not based on any "scientific, technical, or other specialized knowledge." Fed. R. Evid. 702. Defendants did in fact move to exclude Dr. Sasian's testimony on this basis at trial. Trial Tr. (11/14/19) at 1955:7-1958:5 (that motion was denied). Inclusion of Dr. Sasian's testimony that Ningbo Sunny "can" make the same types of telescopes as Suzhou Synta was prejudicial given the jury's finding against defendants on Orion's *per se* market allocation and price-fixing claims. *See also* Ningbo Sunny's Renewed JMOL, at 15-19.

E. The Court's Instruction to the Jury that They May Not Consider Testimony from Defendant's Rebuttal Damages Expert as to *Any* Issue of Damages Warrants a New Trial

Defendants respectfully submit that the Court's instructions to the jury during the testimony of Defendants' damages expert, Dr. Saravia, that "[t]his witness is a witness who is not testifying about damages" and "[s]o 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," warrant a new trial as to damages. Trial Tr. (11/15/19) at 2175:22-23, 2176:8-11; *see also id.* at 2176:1-4 ("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 the witness is testifying about."); *id.* at 2177:6-8 ("I will terminate this examination if we can't stay away from this [damages] issue").

Dr. Saravia's testimony at trial, including testimony regarding her sensitivity analysis of Dr. Zona's damages model, was well within the proper scope of rebutting Plaintiff's damages

expert. *See, e.g.*, Fed. R. Civ. P. 26(a)(2)(D)(ii) (defining a rebuttal expert as one "intended solely to contradict or rebut evidence on the same subject matter identified by another party"); *Hart v. BHH, LLC*, 15-cv-4804, 2018 WL 3471813, *9 (S.D.N.Y. July 19, 2018) (rebuttal expert who opined that plaintiff's expert had made incorrect assumptions which affected his damages calculations falls within the scope of proper rebuttal). The jury was entitled to consider Dr. Saravia's sensitivity analysis when determining whether and to what extent the jury should accept Dr. Zona's damages model and the assumptions made therein, yet the Court explicitly instructed the jury on several occasions "*not* to consider [Dr. Saravia's] testimony as to any amount of damages nor her opinion as to damages." Trial Tr. (11/15/19) at 2176:9-11. As givend, the Court's instruction went too far, on its face prohibiting the jury from considering any of Dr. Saravia's testimony when deciding the issue of damages.

To be clear, Dr. Saravia was not testifying to an alternative damages calculation for the jury to consider in lieu of Dr. Zona's damages numbers, and Defendants were accordingly not opposed to a narrow jury instruction to that effect. *See, e.g.*, Trial Tr. (11/15/19) at 2176:14-16 ("Just to clarify, Dr. Saravia, you're not intending to offer any alternative damages calculation to the jury today, correct?") But the instruction that was in fact given went far beyond clarifying to the jury that Dr. Saravia was not offering an alternative damages calculation – the instruction in effect prohibited the jury from considering any of Dr. Saravia's testimony as to any issue of 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." Trial Tr. (11/15/19) at 2176:8-11 (emphasis added).

This erroneous instruction was highly prejudicial. The Court essentially instructed the jury to disregard defendants' expert's entire rebuttal to Plaintiff's damages expert and model. Once a trial error is found, prejudice is presumed, and that presumption of prejudice can only be rebutted by the party who benefitted from the error by a showing that "it is more probable than not that the jury would have reached the same verdict even if the evidence had been admitted." *Obrey v. Johnson*, 400 F.3d 691, 701 (9th Cir. 2005) (internal citation omitted) (granting new trial as court could not conclude that the erroneous exclusion of evidence did not affect the jury's verdict);

Galdamez v. Potter, 415 F.3d 1015, 1025 (9th Cir. 2005) (applying the standard laid out in *Obrey* to order a new trial). Plaintiff cannot overcome the presumption of prejudice. The instruction barring the jury from considering testimony of Defendants' damages expert as to any issue of damages left the jury with only Plaintiff's overinflated damages number, which resulted in a $16.8 million damages award.

IV. CONCLUSION

For the foregoing reasons, as well as all the reasons set forth in the concurrently filed Renewed JMOL, Defendant Ningbo Sunny respectfully requests that the Court grant its motion for a new trial.

Dated: January 16, 2020

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By */s/ Leo D. Caseria*
LEO D. CASERIA

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NINGBO SUNNY ELECTRONIC CO., LTD.