

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

OPTRONIC TECHNOLOGIES, INC,
Plaintiff,
v.
NINGBO SUNNY ELECTRONIC CO.,
LTD., et al.,
Defendants.

Case No. [5:16-cv-06370-EJD](#)

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO ALTER JUDGMENT; DENYING RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW; DENYING MOTION FOR NEW TRIAL; GRANTING MOTION FOR ATTORNEYS’ FEES AND COSTS

Re: Dkt. Nos. 534, 556, 557, 558

After nearly three years of litigation, this antitrust case went to trial last fall. On November 26, 2019, the jury returned a verdict for Plaintiff Optronic Technologies, Inc. (“Orion”) and against Defendants Ningbo Sunny Electronic Co., LTD (“Ningbo Sunny”), Sunny Optics, Inc. (“Sunny Optics”), and Meade Instruments, Corp. (“Meade”) on all claims. Dkt. No. 501. Presently before the Court are Ningbo Sunny’s Motion to Alter or Amend Judgment to Set Off Value of Prior Settlement Agreement (Dkt. No. 534), Ningbo Sunny’s Renewed Motion for Judgment as a Matter of Law (Dkt. No. 556), Ningbo Sunny’s Motion for a New Trial (Dkt. No. 557), and Orion’s Motion for Attorneys’ Fees and Costs (Dkt. No. 558). The Court has considered the parties’ papers and held a hearing. The Court’s rulings on these motions are stated below.

I. The Verdict, the Partial Judgment, and Relevant Post-Trial Procedure

The basic facts and procedural history underlying this case are well known to the Court

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1 and the parties, so the Court does not recount them here. The jury found that Defendants had
 2 conspired to fix prices or credit terms in violation of the Sherman Act Section 1 (Claim 1), had
 3 conspired to allocate the market for telescopes in violation of the Sherman Act Section 1 (Claim
 4 2), had attempted to monopolize the market in violation of the Sherman Act Section 2 (Claim 3),
 5 had conspired to monopolize the market in violation of the Sherman Act Section 2 (Claim 4), and
 6 that the acquisition of Meade by Ningbo Sunny and Sunny Optics harmed competition in violation
 7 of the Clayton Act Section 7 (Claim 5). Dkt. No. 501. The jury found that Orion suffered \$14
 8 million in damages for each of the Sherman Act claims and \$16.8 million for the Clayton Act
 9 Claim. *Id.* The jury awarded \$16.8 million in total damages. *Id.*

10 After the verdict, Sunny Optics and Meade entered bankruptcy and the litigation was
 11 stayed for them. Dkt. Nos. 511, 512. On December 5, 2019, the Court entered partial judgment
 12 against Ningbo Sunny in the amount of \$50,400,000 in accordance with the verdict's award of
 13 \$16,800,000 in damages as trebled pursuant to 15 U.S.C. § 15(a). Dkt. No. 518 (the "Partial
 14 Judgment"). The parties stipulated to a briefing schedule for both the instant motions and a
 15 separate briefing schedule for Orion's Motion for Permanent Injunction (Dkt. No. 583). Dkt. Nos.
 16 522, 525. The Permanent Injunction Motion includes Orion's state law claims, and the Court will
 17 address that motion in a separate order.

18 **II. Ningbo Sunny's Motion for New Trial (Dkt. No. 557)**

19 The Court first considers Ningbo Sunny's Motion for a New Trial pursuant to Federal Rule
 20 of Civil Procedure 59(a). Ningbo Sunny raises six arguments: (1) that Orion's references to non-
 21 party Sunny Optical Group as "Big Sunny" and as a "multibillion dollar" company owned by "one
 22 of the wealthiest" men in the world were not relevant and were unfairly prejudicial, (2) that Orion
 23 argued that it would "die" without a multimillion dollar verdict, (3) that Orion did not present any
 24 evidence of damages arising from Claim 5 brought under Section 7 of the Clayton Act, (4) that the
 25 testimony of Orion's technical expert Dr. José Sasian should have been excluded, (5) that the
 26 Court's instruction to the jury concerning the testimony of Ningbo Sunny's rebuttal expert, Dr.

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1 Celeste Saravia, was improper and prejudicial, and (6) that the arguments set out in its Renewed
 2 Motion for Judgment as a Matter of Law warrant a new trial. The Court finds that none of these
 3 arguments are persuasive and denies the motion.

4 a. Legal Standard

5 Federal Rule of Civil Procedure 59(a) provides that a district court may order a new trial
 6 “for any reason for which a new trial has heretofore been granted in an action at law in federal
 7 court.” Federal Rule of Civil Procedure 61 states that “unless justice requires otherwise,” no error
 8 “is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or
 9 otherwise disturbing a judgment or order.” A “trial court may grant a new trial only if the verdict
 10 is contrary to the clear weight of the evidence, is based upon false or perjurious evidence, or to
 11 prevent a miscarriage of justice.” *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007);
 12 *see also Settlegoode v. Portland Pub. Sch.*, 371 F.3d 503, 516-17 (9th Cir. 2004) (“A new trial
 13 should only be granted where the flavor of misconduct sufficiently permeates an entire proceeding
 14 to provide conviction that the jury was influenced by passion and prejudice in reaching its
 15 verdict.”).

16 Where the movant failed to raise contemporaneous objections to the alleged errors or
 17 misconduct, the threshold for granting a new trial is even higher. *Settlegoode*, 371 F.3d at 517.
 18 In such circumstances, the movant must show “plain or fundamental error.” *Id.* That showing
 19 requires the movant demonstrate (1) that there was “an error; (2) that the error [was] plain or
 20 obvious; (3) that the error [was] prejudicial or affect[ed] substantial rights; and (4) that review [is]
 21 necessary to prevent a miscarriage of justice.” *Id.* “Plain error is a rare species in civil litigation,
 22 encompassing only those errors that reach the pinnacle of fault.” *Apple, Inc. v. Samsung Elecs.*
 23 *Co.*, 2014 WL 549324, at *10 (N.D. Cal. Feb. 7, 2014).

24 b. Orion’s References to “Big Sunny”

25 Sunny Optical Group is a Chinese company that is an investor in and related party to
 26 Ningbo Sunny; its chairman and owner is the uncle of Defendants’ principal, Peter Ni. Trial Tr. at
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1 522:25-523:8, 526:10-16, 533:21-25; TX 1926 at 63. During its case-in-chief and its closing
 2 argument, Orion referred to Sunny Optical Group as “Big Sunny,” called it a “multibillion dollar”
 3 company, and stated it is owned “one of the wealthiest” people in the world. Trial Tr. at 2546:12-
 4 2547:14, 2548:20-2549:5, 2553:4-2556:18, 2605:22-25, 2606:6-7, 2606:16-19. Neither Sunny
 5 Optical Group nor Mr. Ni’s uncle are parties to this litigation. Ningbo Sunny contends that these
 6 statements were not relevant to the case and that they were an attempt to lead the jury to believe
 7 that Ningbo Sunny had the capacity to pay millions of dollars in damages. Such arguments about
 8 Defendants’ size and wealth were improper and prejudiced the jury, Ningbo Sunny argues,
 9 requiring a new trial.

10 The Court is not persuaded. Defendants themselves put their size and finances at issue in
 11 their opening statement and during the presentation of evidence in an effort to argue against
 12 Orion’s claimed damages. *See, e.g., id.* at 267-69 (Defendants’ counsel arguing, “We are entitled
 13 to provide some context to what Orion’s damages claims by benchmarking it against here is the
 14 revenue for these companies”), 395:22-396:9 (Defendants’ counsel arguing, “If you look at what
 15 Meade’s average profit was, you look at the past five years, it’s losing about \$2.2 million . . .
 16 Ningbo Sunny’s average yearly net profit is only about 3 and a half million dollars.”), 631:4 (Mr.
 17 Ni testifying that Ningbo Sunny’s “profit was very low”), 750:14-15 (Mr. Ni Testifying that “our
 18 profit margin is . . . low”). “It is widely recognized that a party who raises a subject in an opening
 19 statement ‘opens the door’ to admission of evidence on that same subject by the opposing party.”
 20 *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1130 (9th Cir. 2010). Defendants chose to put their
 21 finances before the jury. Orion was therefore entitled to present evidence about Defendants
 22 financial condition, including evidence as to a significant investor and related company. To the
 23 extent that Orion made the one reference, identified by Ningbo Sunny, to Mr. Ni’s uncle’s wealth,
 24 the Court finds that it was not sufficiently prejudicial to warrant a new trial.

25 c. Orion’s Statement That It Would “Die” Without a Favorable Verdict

26 Ningbo Sunny contends that a new trial is necessary because Orion improperly argued

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1 during closing that it would “die” or otherwise cease to exist without the relief it sought. *See, e.g.,*
 2 Trial Tr. at 2576:24-2577:1, 2616:20-22. Ningbo Sunny argues that Orion’s financial condition
 3 was not relevant and served only to unfairly garner sympathy from the jury. The Court disagrees.
 4 During trial, Orion presented evidence, without objection from Defendants, that if Defendants
 5 continued their anticompetitive conduct, Orion would go out of business. *See id.* at 2499:24-
 6 2500:2. “The right to argue a case to the jury [during closing argument] is very broad. Counsel
 7 may state his or her views as to what the evidence shows and the conclusions to be drawn
 8 therefrom.” *Hammonds v. Yeager*, 2017 WL 10560471, at *1 (C.D. Cal. Aug. 9, 2017). “During
 9 closing argument in a civil case, counsel is permitted to make inferences and advance plausible
 10 arguments in light of the record.” *Draper v. Rosario*, 836 F.3d 1072, 1083-84 (9th Cir. 2016).
 11 Indeed, “[u]sing some degree of emotionally charged language during closing argument in a civil
 12 case is a well-accepted tactic in American courtrooms.” *Settlegoode*, 371 F.3d at 518. Evidence
 13 was in the record as to what Orion believed would be the effect of Defendants’ anticompetitive
 14 conduct. Orion was therefore permitted to argue in closing about the effect of that conduct.
 15 Orion’s statements in closing did not “permeate[.]” the trial such that it created the “conviction that
 16 the jury was influenced by passion and prejudice.” *Id.* at 516-17.

17 Ningbo Sunny supports its position with citations to several out of circuit cases, but the
 18 Court finds that they are all inapposite. Each of those cases concerned circumstances where the
 19 plaintiff had argued that “because the defendants were rich and because the plaintiff was poor, the
 20 jury should base its verdict in favor of plaintiff on this financial disparity.” *Draper v. Airco, Inc.*,
 21 580 F.2d 91, 95 (3rd Cir. 1978); *see also* *City of Cleveland v. Peter Kiewit Sons’ Co.*, 624 F.2d
 22 749, 757 (6th Cir. 1980) (same); *Koufakis v. Carvel*, 425 F.2d 892, 902 (2d Cir. 1970) (same).
 23 Here, Orion argued that its dire circumstances were caused by the alleged misconduct underlying
 24 the entire litigation, not that the jury should side with the underdog. Ningbo Sunny’s cases are off
 25 point.

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1 d. Damages Arising From Claim 5—the Clayton Act Claim

2 Ningbo Sunny next argues that the Court should order a new trial because the jury’s
3 verdict awarding Orion \$16.8 million for Claim 5—the Clayton Act claim—is against the weight
4 of evidence because Orion failed to introduce any evidence of injury arising from that claim. This
5 argument fails because it relies on far too narrow a reading of the report and testimony of Orion’s
6 retained damages expert, Dr. J. Douglas Zona. Ningbo Sunny argues that Dr. Zona’s report does
7 not disclose a theory of damages flowing from Claim 5 based on this sentence: “As a result of
8 Defendants’ collusion to fix prices and divide the market for telescope manufacturing, Orion’s
9 [*sic*] has suffered damages in the form of lost profits from price overcharges on telescopes
10 purchased from Defendants and their co-conspirators in a range from about \$11.4 million to \$30.6
11 million.” Zona Rep. ¶ 8(c).

12 This argument does not succeed because it relies entirely on that one summary sentence
13 while ignoring the rest of the report. Dr. Zona opined that in the years following the Meade
14 acquisition the Herfindahl–Hirschman Index (“HHI”) spiked, indicating that the telescope
15 manufacturing market became highly concentrated such that Defendants had market power or, in
16 other words, “power sufficient to impact competitive outcomes in a meaningful way.” Zona Rep.
17 ¶¶ 45, 48, 56-57; TX 1938. Dr. Zona’s overcharge analysis turned on the lack of competition in
18 that market. *See, e.g.*, Zona Rep. ¶¶ 76, 108. In his deposition, Dr. Zona testified to the
19 anticompetitive impact of the Meade acquisition. Dkt. No. 568-7 at 223:21-224:10. At trial he
20 testified that the Meade acquisition harmed competition and injured Orion. Trial Tr. at 1998:24-
21 1999:8, 2099:5-2100:7, 2057:13-23. Dr. Zona’s trial testimony, which is consistent with his
22 report and his deposition, was sufficient evidence for the jury to conclude that the Meade
23 acquisition contributed to and was a part of Defendants’ anticompetitive conduct that harmed
24 Orion.

25 e. Dr. Sasian’s Testimony

26 Ningbo Sunny’s next argument is that Dr. Sasian’s testimony should have been excluded

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1 and that its admission was prejudicial error. He testified that Ningbo Sunny and Suzhou Synta,
 2 one of the settling co-conspirators, were capable of manufacturing the same telescopes. *See, e.g.,*
 3 *id.* at 1856:24-1857:2. Ningbo Sunny argues that his opinion was purely theoretical and did not
 4 assist the jury in determining a fact at issue, and that he admitted that his opinion was not based on
 5 any technical or specialized knowledge. These arguments are not convincing because they do not
 6 account for the sum of his testimony. Dr. Sasian testified as to the technology and technical
 7 capabilities necessary to manufacture different types of telescopes—*e.g.*, (a) whether a
 8 manufacturer that can build a telescope with one size mirror can build a similar telescope with a
 9 mirror of a different size or (b) the role of certain machines or components in the manufacture of
 10 telescopes. *See, e.g., id.* at 1861:22-15, 1872:5-1873:13. He then concluded that Ningbo Sunny
 11 and Suzhou Synta were each technically capable of manufacturing the telescopes that were made
 12 by the other. *Id.* at 1862:16-1875:22. This testimony was relevant because it supports an
 13 inference that Ningbo Sunny and Suzhou Synta are horizontal competitors, despite Defendants’
 14 protestations that they do not compete. Further, his testimony and conclusions were based on his
 15 specialized knowledge and training, and were offered to assist the jury. A layperson would lack
 16 knowledge of the machines and technology used to manufacture telescopes. The quotes that
 17 Ningbo Sunny cherry picks to discredit Dr. Sasian do not fairly characterize the entirety of his
 18 testimony, his methodology, or his conclusions. It was not prejudicial error for the Court to admit
 19 Dr. Sasian’s testimony.

20 f. The Court’s Jury Instruction Regarding Dr. Saravia’s Testimony

21 Defendants chose not to disclose an affirmative expert report on damages. Instead, they
 22 disclosed a report written by their retained expert Dr. Saravia to rebut Dr. Zona’s affirmative
 23 report and testimony on Orion’s damages. As a rebuttal witness, Dr. Saravia was not permitted to
 24 offer an affirmative opinion or her own damages calculations. *See* Fed. R. Civ. P. 26(a)(2)(D)(ii).
 25 In conference with the Court, Defendants represented that Dr. Saravia would only offer testimony
 26 as to her sensitivity testing of Dr. Zona’s models, not her own damages calculations. *See, e.g.,*

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1 Trial Tr. at 2012:12-16. However, at trial Dr. Saravia attempted to offer her own damages
 2 calculations. *See, e.g., id.* at 2122:6-16, 2171:20-25. The Court held sidebars with counsel to
 3 discuss the issue; and finally spoke to the jury and counsel. The Court asked Defendants’ counsel,
 4 “This witness is a witness who is not testifying about damages. Is that correct, counsel?” *Id.* at
 5 2175:22-24. To which, Defendants’ counsel responded, “It is.” *Id.* at 2175:25. The Court then
 6 instructed the jury, “She is testifying, as the slide that she had before her is, limited to the area of
 7 sensitivities which is a distinct and different matter than damages. . . . You are not to consider this
 8 witness’s testimony as to any amount of damages, nor her opinion as to damages.” *Id.* at 2176:5-
 9 11. Defendants’ counsel did not raise a contemporaneous objection.

10 Ningbo Sunny now argues that the court’s instruction went too far in that the jury must
 11 have disregarded all of Dr. Saravia’s testimony, and that this error was prejudicial to Ningbo
 12 Sunny. Because Defendants did not object to the instruction, the Court will apply the plain error
 13 standard. *See Settlegoode*, 371 F.3d at 517. The Court finds that there was no plain error. Dr.
 14 Saravia’s testimony and sensitivity testing were subject to briefing and multiple conferences
 15 between the Court and the parties. *See, e.g.,* Dkt. Nos. 302, 314, 455; May 2, 2019 Hr’g Tr. at 8-
 16 10; Trial Tr. 2011:3-2012:2, 2126:4-16, 2172:3-2175:15. Defendants represented that Dr. Saravia
 17 would appropriately limit her testimony to rebutting Dr. Zona’s conclusion without presenting her
 18 own damages calculations. *See, e.g.,* Dkt. Nos. 302 at 2-3; May 2, 2019 Hr’g Tr. at 9:22-10:4;
 19 Trial Tr. at 2126:4-14, 2172:5-15. However, Dr. Saravia attempted to testify as to affirmative
 20 damages calculations. Trial Tr. at 2122:6-16, 2171:20-25. That testimony provoked the Court’s
 21 instruction. In front of the jury, Defendants’ counsel agreed with the Court that her testimony was
 22 not about damages. Accordingly, it was not plain error for the Court to instruct the jury that Dr.
 23 Saravia’s testimony was “limited to the area of sensitivities, which is a distinct and different
 24 matter than damages” and that the jurors should not consider her testimony as to “any amount of
 25 damages, nor her opinion as to damages.” *Id.* at 2176:6-7.

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1 g. Renewed Motion for Judgment as a Matter of Law

2 Finally, Ningbo Sunny moves for a new trial for the reasons argued in its Renewed Motion
3 for Judgment as a Matter of Law. As discussed below, the Court denies that motion, so the
4 arguments expressed therein are not grounds for a new trial.

5 **III. Ningbo Sunny’s Renewed Motion for Judgment as a Matter of Law (Dkt. No. 556)**

6 Defendants initially moved for judgment as a matter of law under Federal Rule of Civil
7 Procedure 50(a) on November 18, 2019—after Orion had concluded its presentation of evidence to
8 the jury. Dkt. No. 464. The Court denied that motion. Dkt. No. 500 (the “First JMOL Order”).
9 After the Court entered the Partial Judgment, Ningbo Sunny filed this Renewed Motion for
10 Judgment as a Matter of Law under Federal Rule of Civil Procedure 50(b) on Orion’s claims
11 under Sections 1 and 2 of the Sherman Act, Section 7 of the Clayton Act, California’s Cartwright
12 Act, and California’s Unfair Competition Law. Dkt. No. 556. Orion opposed. Dkt. No. 569.
13 Ningbo Sunny did not file a reply. The fundamental flaw in Ningbo Sunny’s motion is that, while
14 it argues that interpretations of the evidence that are contrary to the jury’s verdict are possible, it
15 fails to show that the jury’s conclusions were not supported by substantial evidence. The motion
16 must be denied.

17 a. Legal Standard

18 “A renewed motion for judgment as a matter of law ‘is properly granted if the evidence,
19 construed in the light most favorable to the nonmoving party, permits only one reasonable
20 conclusion, and that conclusion is contrary to the jury’s verdict.’” *Cieslikowski v. Chrysler*, 2019
21 WL 978095, at *3 (C.D. Cal. Feb. 4, 2019) (quoting *Escriba v. Foster Poultry Farms, Inc.*, 743
22 F.3d 1236, 1242 (9th Cir. 2014)). “A jury’s verdict must be upheld if it is supported by substantial
23 evidence that is adequate to support the jury’s findings, even if contrary findings are also
24 possible.” *Dunlap v. Liberty Nat. Prod., Inc.*, 878 F.3d 794, 797 (9th Cir. 2017). Although the
25 court must draw all reasonable inferences in the non-moving party’s favor, “a reasonable inference
26 ‘cannot be supported by only threadbare conclusory statements instead of significant probative

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1 evidence.” *Lakeside-Scott v. Multnomah Cty.*, 556 F.3d 797, 802 (9th Cir. 2009) (internal citation
 2 omitted). “It is error to deny a judgment as a matter of law when it is clear that the evidence and its
 3 inferences cannot reasonably support a judgment in favor of the opposing party.” *Weaving v. City*
 4 *of Hillsboro*, 763 F.3d 1106, 1111 (9th Cir. 2014) (internal alteration and citation omitted).

5 “[A] party cannot raise arguments in its post-trial motion for judgment as a matter of law
 6 under Rule 50(b) that it did not raise in its pre-verdict Rule 50(a) motion.” *OTR Wheel Eng’g, Inc.*
 7 *v. W. Worldwide Servs., Inc.*, 897 F.3d 1008, 1016 (9th Cir. 2018).

8 b. Claims Under Section 2 of the Sherman Act

9 Ningbo Sunny first attacks the jury’s findings on the claims for attempted monopolization
 10 and conspiracy to monopolize, both brought under Section 2 of the Sherman Act. The Court finds
 11 that Orion presented substantial evidence that supports the jury’s verdict as to both claims.

12 i. Shared Monopoly

13 First, Ningbo Sunny argues that Orion presented a theory of liability based on a joint or
 14 shared monopoly between Defendants and the Synta Entities, and that the Court adopted that
 15 theory of liability in the First JMOL Order. This would be legal error because “[t]he Ninth Circuit
 16 does not recognize a ‘shared monopoly’ or ‘joint monopoly’ theory.” *Lenhoff Enterprises, Inc. v.*
 17 *United Talent Agency, Inc.*, 2015 WL 7008185, at *4 (C.D. Cal. Sept. 18, 2015). However, this
 18 argument is based on a misunderstanding of the First JMOL Order. The Court did not find that
 19 Defendants and the Synta Entities had attempted to acquire, or conspired to acquire a shared or
 20 joint monopoly. Rather, the Court found that the circumstances around the Meade acquisition
 21 were sufficient to support a jury verdict that Defendants and the Synta Entities had conspired for
 22 “one of the parties to the agreement [to] obtain or maintain monopoly power in the telescope and
 23 accessory manufacturing market.” *See* Dkt. No. 499 at 56 (Jury Instruction No. 41§ ii); *see also*
 24 Dkt. No. 500 While the Court grants that the single sentence of the First JMOL Order quoted by
 25 Ningbo Sunny could have been more clear, there is insufficient evidence to support Ningbo
 26 Sunny’s position. Moreover, the jury was instructed that the alleged monopoly had to be held by

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1 “one of the parties to the agreement.” *See, e.g.*, Dkt. No. 499 at 56. The jury was not instructed
2 on a joint monopoly theory.

3 Ningbo Sunny’s two subsidiary arguments—that Orion did not introduce sufficient
4 evidence of specific intent to monopolize the market, and that Orion did not introduce sufficient
5 evidence of a conspiracy to monopolize—also fail. Starting with specific intent, Ningbo Sunny
6 argues that the Meade acquisition, in and of itself, is insufficient for the jury to have found specific
7 intent. But Orion presented much more evidence of specific intent than just the fact of Ningbo
8 Sunny’s acquisition of Meade. Indeed, the conduct of Defendants and the Synta Entities in
9 carrying out the Meade acquisition, combined with the acquisition itself, were sufficient to support
10 the jury’s finding. For example, a Ningbo Sunny email flatly stated that it sought to acquire
11 Meade in order “[t]o prevent” another competitor from acquiring it. TX 1378. Additionally,
12 Orion presented evidence that the Synta Entities attempted to hide facts about the Meade
13 Acquisition from U.S. regulators; David Shen, the principal of the Synta Entities, provided
14 funding to assist with the acquisition through his company Sky Rainbow but he represented to the
15 FTC that he had no involvement in the acquisition. Trial Tr. at 581-583; TX 1779; TX 1377.
16 Orion additionally notes that Defendants’ also made misrepresentations about the acquisition to
17 the FTC, and that Mr. Ni purchased Meade in his personal capacity and then transferred it to
18 Ningbo Sunny for one dollar. *See* TX 1779; TX 1377; TX 2153; TX 1077; TX 1928; Trial Tr. at
19 581-58, 722-725. This evidence sufficiently supports a finding of specific intent. Moreover,
20 specific intent to monopolize may be inferred from Defendants’ conduct—discussed below—
21 supporting Orion’s claims under Section 1 of the Sherman Act. *See William Inglis & Sons Baking*
22 *Co. v. ITT Cont’l Baking Co.*, 668 F.2d 1014, 1028 (9th Cir. 1981); Dkt. No. 499 at 53 (Jury
23 Instruction No. 39). The evidence presented to the jury goes beyond showing a “mere intention to
24 exclude competition and to expand one’s own business.” *Great Escape, Inc. v. Union City Body*
25 *Co.*, 791 F.2d 532, 541 (7th Cir. 1986). Orion has presented substantial evidence to support the
26 jury’s conclusion that Defendants acted with specific intent.

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1 Ningbo Sunny next argues that Defendants cannot be held liable for a conspiracy to
2 achieve a joint monopoly and that there is insufficient evidence to show that Defendants and the
3 Synta Entities conspired to vest one firm with monopoly power. As discussed above, the Court
4 did not adopt a joint monopoly theory and the jury was not instructed on such a theory. Moreover,
5 Orion presented sufficient evidence that Defendants and the Synta Entities conspired for Ningbo
6 Sunny to obtain a monopoly in connection with the Meade acquisition. *See* TX 1393; TX
7 1301.002; TX 1301.002; TX 1317; TX 1323.14; TX 1305.015; Trial Tr. 956:23-958:2; Trial Tr. at
8 997:3.

9 ii. Dangerous Probability of Achieving Monopoly Power

10 Next, Ningbo Sunny argues that Orion failed to present sufficient evidence that there is a
11 dangerous probability that Ningbo Sunny would obtain monopoly power. “Monopoly power is
12 the power to control prices or exclude competition.” *Axiom Advisers & Consultants, Inc. v. Sch.*
13 *Innovation & Advocacy, Inc.*, 2006 WL 1049997, at *6 (E.D. Cal. Mar. 20, 2006); *see* Dkt. No.
14 499 (Jury Instruction No. 40). Market power may be demonstrated by direct or circumstantial
15 evidence. *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995). Orion has
16 presented substantial evidence that Ningbo Sunny can control prices. For example, witnesses
17 testified that Ningbo Sunny refused to negotiate over prices and credit terms with Orion. Trial Tr.
18 at 1310-1311, 1654:13-1655:25. Orion also presented evidence that Ningbo Sunny charged Orion
19 30 to 80 percent more than it charged its co-conspirator Celestron. TX 1771; TX 1935; Trial Tr.
20 at 1725:20-1726:17. And documents produced by Ningbo Sunny discuss restricting Orion’s
21 supply: “Our pricing strategy of sales should not be altered, even when Orion lowers its prices, we
22 would reduce sales volume rather than following suit blindly.” TX 1194.

23 A plaintiff may also demonstrate market power by “(1) defin[ing] the relevant market, (2)
24 show[ing] that the defendant owns a dominant share of that market, and (3) show[ing] that there
25 are significant barriers to entry and show that existing competitors lack the capacity to increase
26 their output in the short run.” *Rebel Oil*, 51 F.3d at 1434. Orion has also presented sufficient

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1 evidence to make this showing. First, Dr. Zona sufficiently testified as to the definition of the
 2 relevant market (further discussed in § III.b.iv). Trial Tr. at 1978-1983, 2079-2086, 2052-2053,
 3 2100-2101. Second, he offered un rebutted testimony that Defendants' market share ranged from
 4 around 33 percent to over 63 percent during the relevant time period. TX 1938. Dr. Zona further
 5 testified that the market was concentrated beyond what DOJ Guidelines find acceptable. Trial Tr.
 6 at 1987:20-1989:4. Orion also offered evidence that following the Meade acquisition, Ningbo
 7 Sunny became the largest telescope manufacturer in the world. TX 1295; TX 1927. The third
 8 factor was satisfied by witness testimony that no new companies have entered the market in the
 9 past decade. Trial Tr. at 1649:6-1650:19. Orion presented sufficient evidence for the jury to find
 10 that Defendants had a dangerous probability of achieving monopoly power.

11 iii. Damages Arising From the Section 2 Claims

12 Ningbo Sunny argues that Dr. Zona's trial testimony went beyond his pre-trial expert
 13 report because he testified that he based his opinion on his overcharge analysis on the Section 1
 14 and the Section 2 claims (*see* Trial Tr. at 2057:17-23), while his report only applied the overcharge
 15 analysis to the Section 1 claims. So, Ningbo Sunny argues, his trial testimony must be excluded
 16 by Federal Rule of Civil Procedure 37(c)(1) as an alteration to the conclusions of his expert report.
 17 The Court does not consider this argument though because Ningbo Sunny did not argue for
 18 exclusion of his testimony in the First Motion For a Judgment as a Matter of Law. *See* Dkt. 464 at
 19 4-5. Ningbo Sunny has therefore waived the argument. *OTR Wheel Eng'g.*, 897 F.3d at 1016.

20 iv. The Relevant Market

21 Next, Ningbo Sunny contends that Orion failed to adequately define the relevant market.
 22 Dr. Zona testified as to what it means to define a market in an antitrust case. Trial Tr. at 1978:15-
 23 1979:12. He explained how he defined the market in this case. *Id.* at 2081:8-2086:3, 2102:3-
 24 2103:6. He testified that he examined the entities in the market, their roles in the market and why
 25 some entities that do not manufacture telescopes fall outside the market (*id.* at 1979:21-1981:1,
 26 20:52:22-2053:7); that he examined the products produced and sold in the market (*id.* at

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1 1981:1982:9, 2079:22-2081:10); and that he considered past actions by the FTC in the telescope
 2 industry and how the FTC defined the market (*id.* at 1982:11-1983:2, 2100:16-2102:1). His
 3 testimony is substantial evidence of the relevant market that supports the jury's verdict. Ningbo
 4 Sunny also argues that Dr. Zona's analysis is fatally flawed because he did not perform certain
 5 tests or analyses, and did not consider certain facts. But Ningbo Sunny cites no authority holding
 6 that the tests it raises are necessary to properly define a market, and the Court is not persuaded that
 7 they are necessary in this case. While Ningbo Sunny's arguments may support a finding contrary
 8 to the jury's finding, they do not show that the jury's verdict cannot stand. *See Dunlap*, 878 F.3d
 9 at 797.

10 v. Predatory Conduct

11 To support its Section 2 claims, Orion had to show that Defendants engaged in predatory
 12 conduct. *See Coalition for ICANN Transparency, Inc. v. Verisign, Inc.*, 611 F.3d 495, 506 (9th
 13 Cir. 2010). In the First JMOL Order, the Court found that Defendants' conduct in connection with
 14 the Meade acquisition and the Hayneedle Assets was sufficient to support a finding of predatory
 15 conduct. The facts of the Meade acquisition and the Hayneedle assets also underpin much of
 16 Orion's Section 1 claims. Ningbo Sunny contends that if this motion succeeds on the Section 1
 17 claims, then it must also succeed in showing that there was insufficient evidence to support a
 18 finding of predatory conduct. Accordingly, the motion is denied as to the predatory conduct
 19 argument for the same reasons that motion is denied as to the Section 1 claims as discussed below.

20 c. Claims Under Section 1 of the Sherman Act

21 Ningbo Sunny advances three arguments pertaining to Orion's claims under Section 1 of
 22 the Sherman Act: (1) that Orion failed to produce sufficient evidence to prove that Ningbo Sunny
 23 joined a conspiracy to fix Orion's prices or credit terms, (2) that Orion did not produce sufficient
 24 evidence that Ningbo Sunny joined a conspiracy to allocate the market, and (3) that there is no
 25 evidence of injury or of a conspiracy continuing after September 2016.

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1 i. Conspiracy to Fix Prices or Credit Terms

2 Ningbo Sunny attacks the sufficiency of the evidence as to Claim 1 for Conspiracy to fix
3 prices and credit terms on three separate grounds. Ningbo Sunny first argues that there is not
4 sufficient evidence that Ningbo Sunny and Suzhou Synta—the Synta entity with which it is a
5 direct horizontal competitor—entered into a conspiracy. The argument is that Orion purchased
6 Ningbo Sunny’s telescopes through an individual named Joyce Huang who worked for a
7 distributor called Good Advance and not for Suzhou Synta. And that Ningbo Sunny provided its
8 pricing information to Huang. Trial Tr. at 1331:25-1335:19, 1578:1-12, 1579:3-20. So, the
9 argument goes, Ningbo Sunny had legitimate reasons to exchange pricing information with Huang
10 as the distributor of its telescopes. But this argument overlooks the abundant evidence that Shen
11 also controlled Good Advance and that Huang worked for Shen. *Id.* at 432:13-433-23; TX
12 1779.007; TX 2091.002; TX 1402. Orion also produced evidence that Defendants and the Synta
13 Entities conspired through Huang to fix prices. *See, e.g.*, TX 1347; TX 1864; TX 1935.
14 Accordingly, there was substantial evidence for the jury to find that Defendants and the Synta
15 Entities conspired to fix prices. Because this evidence is sufficient to support the jury’s verdict on
16 this claim, the Court does not need to consider Ningbo Sunny’s other arguments concerning this
17 Claim.

18 ii. Conspiracy to Allocate the Market

19 Ningbo Sunny’s next argument—that there is insufficient evidence that it conspired with
20 the Synta Entities to divide the market—fares no better. Orion presented evidence that the
21 Defendants and the Synta Entities had an agreement to “cooperate for the benefit of the entire
22 group of companies” and to “dominate the telescope industry.” TX 1311; TX 1805. Orion further
23 presented evidence that the Synta Entities and Defendants coordinated to allocate customers
24 between them. TX 1769.001; TX 1765. Orion also presented evidence that even though
25 Defendants and the Synta Entities are capable of manufacturing competing lines of telescopes,
26 Defendants do not make lines of telescopes that compete with telescopes made by the Synta

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1 Entities, which supports an inference that they are, in fact, competitors. Trial Tr. at 1856:11-
2 1857:2, 1864:11-21; TX 1927; TX 1438.

3 Ningbo Sunny argues that this evidence is deficient. First, it argues that the
4 communications between Defendants and the Synta Entities can be interpreted in a way that would
5 not imply unlawful conduct. This argument fails because the Court must draw inferences in
6 Orion’s favor on this motion. *See Dunlap*, 878 F.3d at 797; *Cieslikowski*, 2019 WL 978095, at *3.
7 Next, Ningbo Sunny argues that this theory of liability makes no economic sense because Dr.
8 Zona testified that over 200 entities operate in the market. Trial Tr. at 1989:9-22. However, this
9 argument omits that those 200 entities control just 20-30 percent of the market. *Id.*; TX 1938.
10 Ningbo Sunny also argues that a market-allocation conspiracy makes no economic sense because
11 its subsidiary Meade and Celestron compete against each other to sell high-end telescopes.
12 However, the substantial evidence that Mr. Shen and other officers for the Synta Entities—
13 including Celestron itself—assisted Ningbo Sunny in acquiring Meade undercuts this theory. *E.g.*,
14 Trial Tr. 581:23-582:4, 818:4-821:15, 956:23-958:2; TX 1076 Ex. A; TX 1303.002; TX 1378; TX
15 1787; TX 1209; TX 1779.007; TX 1157; TX 1317. Indeed, after the acquisition Mr. Ni and Mr.
16 Shen shared information about Meade’s pricing and business strategy, and they, along with the
17 officers of Meade and Celestron, discussed strategy on multiple occasions. Trial Tr. 680:11-16;
18 TX 1017; TX 1286; TX 1660; TX 1306; TX 1533; TX 1082; TX 1313; TX 1208. Finally, Ningbo
19 Sunny argues that the testimony Dr. Sasian is inadmissible because it was based on neither his
20 technical or specialized knowledge, nor his personal knowledge. *See Fed. R. Evid. 702.*
21 However, Ningbo Sunny did not raise this argument in its Rule 50(a) motion, so it is waived here.
22 *OTR Wheel Eng’g.*, 897 F.3d at 1016. But even if it had not been waived the Court would deny
23 this argument for the reasons discussed above in section II.e of this order.

24 iii. Conspiracy After September 2016

25 In September 2016, Orion and the Synta Entities executed a settlement agreement and a
26 supply agreement. Dkt. No. 534-2 (the “Settlement”); Dkt. No. 534-4 (the “Supply Agreement”).

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1 Under these agreements, Orion began purchasing telescopes directly from the Synta Entities with a
2 “Most Favored Customer” pricing provision. Dkt. No. 534-4. At that time, Ningbo Sunny
3 stopped selling products to Orion. Trial Tr. at 1642:3-5. The Synta Entities now provide about 75
4 percent of Orion’s supply. Trial Tr. at 1738:11-21, 1767:1768:15, 1769:23-1770:14. Ningbo
5 Sunny argues that Orion bears of the burden of showing that the conspiracy extended past the date
6 of those agreements, and that it has failed to do so. Assuming without accepting that Ningbo
7 Sunny’s legal argument is correct, the Court would still reject this argument. As discussed above,
8 Orion has presented significant evidence that Defendants and the Synta Entities engaged in an
9 anticompetitive conspiracy that targeted Orion. Orion presented evidence that the conspiracy
10 continued into 2016. *See, e.g.*, TX 1208. And Orion’s witnesses testified that following the
11 execution of the Settlement and the Supply Agreement, the Synta Entities briefly reset its prices,
12 but then began increasing them so that Orion must now pay more for telescopes that it had before.
13 Trial Tr. at 1738:11-21, 1767:1768:15, 1769:23-1770:14. Given the totality of the evidence and
14 Ningbo Sunny’s heavy burden, the Court denies the motion as to this argument.

15 d. Claim 5—the Clayton Act Claim

16 In assessing claims brought under Section 7 of the Clayton Act, courts employ a burden
17 shifting framework where the plaintiff must first establish a prima facie case that the merger in
18 question is anticompetitive, then the burden shifts to the defendants to rebut the prima facie case,
19 and if the defendant can do so the burden shifts back to the plaintiff. *See Saint Alphonsus Med.*
20 *Ctr.-Nampa Inc. v. St. Luke’s Health Sys., Ltd.*, 778 F.3d 775, 783 (9th Cir. 2015). “To establish a
21 prima facie case, the [plaintiff] must (1) propose the proper relevant market and (2) show that the
22 effect of the merger in that market is likely to be anticompetitive.” *Fed. Trade Comm’n. v. Penn*
23 *State Hershey Med. Ctr.*, 838 F.3d 327, 337–38 (3d Cir. 2016). “Definition of the relevant market
24 is a factual question dependent upon the special characteristics of the industry involved.” *Saint*
25 *Alphonsus*, 778 F.3d at 783 (citation and quotation omitted).

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1 Ningbo Sunny first argues that there is insufficient evidence to sustain the jury’s verdict on
 2 Claim 5 because Orion failed to properly define the relevant market. For the reasons discussed
 3 above, the Court finds that this argument is not persuasive. Next, Ningbo Sunny refers back to its
 4 Rule 50(a) motion to argue that the Meade acquisition was actually pro-competitive because
 5 Ningbo Sunny was brought back from the brink of bankruptcy. However, Dr. Zona analyzed the
 6 Meade acquisition’s effect on the Herfindahl-Hirschman Index (“HHI”) for the market and found
 7 that following the acquisition, the HHI spiked more than 1000 points. TX 1939. This jump in
 8 HHI is substantial evidence that the Meade acquisition’s effect “may be substantially to lessen
 9 competition, or to tend to create a monopoly.” 18 U.S.C. § 18; *see United States v. Anthem, Inc.*,
 10 855 F.3d 345, 367 (D.C. Cir. 2017); *ProMedica Health Sys., Inc. v. Fed. Trade Comm’n*, 749
 11 F.3d 559, 570 (6th Cir. 2014); *Fed. Trade Comm’n v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C.
 12 Cir. 2001). Thus, Ningbo Sunny’s argument is not the only reasonable conclusion the jury could
 13 have reached, and it has failed to rebut Orion’s prima facie case.

14 Finally, Ningbo Sunny argues that Orion has not presented any evidence of damages
 15 flowing from Claim 5. The Court had already considered and rejected this argument as discussed
 16 above in section II.d of this order.

17 e. State Law Claims

18 Finally, Ningbo Sunny argues that because Orion’s state law claims are based on the same
 19 conduct as the federal claims, it is entitled to judgment as a matter of law on those claims as well.
 20 *See Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001); *Stevens v.*
 21 *Sup. Ct.*, 75 Cal. App. 4th 594, 602 (1999). But, as discussed above, the Court finds that the
 22 motion must be denied as to the federal claims, so it must also be denied as to the state law claims.

23 **IV. Ningbo Sunny’s Motion Alter or Amend Judgment (Dkt. No. 534)**

24 Ningbo Sunny moves to reduce the amount of the Partial Judgment by the value of the
 25 Settlement and the Supply Agreement. Ningbo Sunny’s motion is based on four separate values
 26 that it contends arise from those agreements: (a) \$500,000 that the Synta Entities paid to Orion as

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1 part of the Settlement; (b) \$8,665,586.59 that Ningbo Sunny represents is the profits that Orion
 2 earned from telescopes purchased from Suzhou Synta through the Supply Agreement, *i.e.*, the
 3 value of the Supply Agreement; (c) \$600,000 that the Synta Entities paid cash to Orion under the
 4 Supply Agreement; and (d) \$3 million that Ningbo Sunny represents is the value of the Hayneedle
 5 Assets that were transferred to Orion from the Synta Entities as part of the Settlement. Orion
 6 agrees that the \$500,000 should be offset from the Partial Judgment. Accordingly, the Court will
 7 deduct \$500,000 from the Partial Judgment. The parties disagree as to the three other amounts.
 8 The Court denies the motion as to the \$8,665,586.59 purportedly representing the value of the
 9 Supply Agreement, grants the motion as to the \$600,000 paid under the Supply Agreement, and
 10 partially grants the motion as to value of the Hayneedle Assets.

11 “[A] plaintiff who has recovered any item of damage from one coconspirator may not
 12 again recover the same item from another conspirator; the law . . . does not permit a plaintiff to
 13 recover double payment.” *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 348,
 14 (1971). “If the payment made is in a form other than cash, the district court should value the
 15 property and deduct that amount.” *Seymour v. Summa Vista Cinema, Inc.*, 809 F.2d 1385, 1389
 16 (9th Cir.), *amended*, 817 F.2d 609 (9th Cir. 1987); *see also Bal Theatre Corp. v. Paramount Film*
 17 *Distrib. Corp.*, 206 F. Supp. 708, 714 (N.D. Cal. 1962) (“The rule . . . seems to be that anything of
 18 value received should be set off in addition to the cash settlement.”). However, “[d]istrict courts
 19 may not . . . engage in speculation in evaluating settlements.” *Seymour*, 809 F.2d at 1390. Courts
 20 should first treble the damages award, and then deduct the amount of any prior settlements.
 21 *William Inglis & Sons*, 981 F.2d at 1024.

22 a. The Supply Agreement

23 i. Judicial Estoppel

24 Orion first opposes setting off any value from the Supply Agreement on the grounds that
 25 Ningbo Sunny is judicially estopped from arguing that the Supply Agreement is part of the
 26 Settlement because Ningbo Sunny already successfully argued—in opposing Orion’s *limine*

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1 motion—that the Supply Agreement and the Settlement are separate. *See* Dkt. Nos. 329 (Orion’s
 2 *limine* motion), 356 (Defendants’ opposition), 416 & 423 (the Court’s orders on Orion’s *limine*
 3 motion). “Judicial estoppel is an equitable doctrine that precludes a party from gaining an
 4 advantage by asserting one position, and then later seeking an advantage by taking a clearly
 5 inconsistent position.” *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir.
 6 2001). Courts should consider three factors when determining whether to apply the judicial
 7 estoppel doctrine: (1) whether a party’s later position “must be clearly inconsistent” with its earlier
 8 position, (2) whether the party succeeded in persuading the court to accept its earlier position, and
 9 (3) whether the party seeking to assert the inconsistent position would derive an unfair advantage
 10 if not estopped. *Id.*

11 Orion’s argument misreads both Ningbo Sunny’s earlier argument and the Court’s prior
 12 orders such that that Orion cannot succeed on the first and second factors. While Ningbo Sunny
 13 did argue that the Settlement and the Supply Agreement are separate documents, it did not argue
 14 that the Supply Agreement was not incorporated into the Settlement or that the Supply Agreement
 15 was not a material term of the Settlement. *See* Trial Tr. at 150:17-18 (the Supply Agreement “*by*
 16 *itself*, is not a settlement. It’s not a release of claims. It is a pure business document.”) (emphasis
 17 added), 172:10-13 (“it’s attached to the Settlement Agreement and it’s incorporated by
 18 reference”). Similarly, the Court did not rule that the Supply Agreement is not “part of” the
 19 Settlement. Rather, the Court ruled that Federal Rule of Evidence 408 did not bar the admission
 20 of the Supply Agreement’s § 4, which is the most favored customer pricing provision. Dkt. Nos.
 21 416 at 5-8, 423. The Court reasoned that § 4 of the Supply Agreement “standing alone” was not
 22 evidence of the Settlement, so it did not fall within the plain text of Federal Rule of Evidence 408.
 23 Dkt. No. 416 at 6-7. The Court also found that precluding admission of § 4 would likely lead to
 24 inefficiencies at trial and confusion among the jurors. *Id.* at 5, 7. The Court did not find that the
 25 Supply Agreement is not a material term or condition of the Settlement. Accordingly, Orion does
 26 not succeed on the first and second factors, so this argument fails.

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1 ii. Orion’s Profits Arising From The Supply Agreement

2 The Court now considers the two amounts stemming from the Supply Agreement: the
3 \$600,000 cash payment from the Synta Entities to Orion, and Orion’s purported profits
4 attributable to the Supply Agreement. Orion does not address this cash payment in its opposition
5 and did not address it at the hearing. Because the Supply Agreement is a material term of the
6 Settlement, the Court finds that the cash payment under the Supply Agreement, like the cash
7 payment under the Settlement, should be deducted from the Partial Judgment.

8 Turning to the Orion’s profits from the Supply Agreement, the parties disagree as to proper
9 way to determine the value of such a non-monetary, commercial settlement term. Ningbo Sunny
10 attached a declaration from Dr. Savaria, wherein she concludes that Orion acquired \$8,665,586.59
11 in profits from September 2016 to August 2019 on account of the Supply Agreement. Dkt. No.
12 435 ¶ 5. Dr. Savaria’s declaration, Ningbo Sunny argues, is not an expert report and is therefore
13 admissible. Ningbo Sunny argues that Orion does not provide a monetary valuation of the Supply
14 Agreement, so the Court should accept Dr. Saravia’s valuation and reduce the Partial Judgment by
15 that amount. Orion counters that Ningbo Sunny, as the movant, bears the burden of proving the
16 value of the Supply Agreement and that Dr. Savaria’s declaration is an inadmissible expert report.
17 So, the argument goes, Ningbo Sunny has not met the burden of proof as to this portion of the
18 motion.

19 Orion has the better argument. First, Dr. Savaria’s declaration is an expert report that is
20 untimely and inadmissible under Federal Rules of Civil Procedure 26 and 37, and Federal Rule of
21 Evidence 702. Ningbo Sunny’s argument that Dr. Savaria merely tallied Orion’s supply purchases
22 from the Synta Entities and applied the profit margin calculated by Dr. Zona oversimplifies her
23 declaration and her methodology. For example, she made the decision to apply the profit margin
24 that Dr. Zona calculated for *all* of Orion’s sales from 2012 through 2018, instead of a profit
25 margin for Orion’s profits from Synta Suzhou telescopes from September 2016 through August
26 2019. Her conclusion “assum[es]” that Orion had the same margin on products provided by

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1 Suzhou Synta as products from other suppliers. Dkt. No. 435 at 2 n.2. The Court does not accept
 2 that the decision to apply one margin of profit for certain products over a specific time period to
 3 other products sold over a different time period is a decision that can be made without expertise or
 4 specialized technical knowledge. The Court does not raise this issue to find that her conclusion is
 5 incorrect, but rather to point out that her declaration and her conclusion as to the value of the
 6 Supply Agreement fall within the scope of Federal Rule of Evidence 702. Dr. Savaria’s
 7 declaration is expert testimony. Because it was not properly disclosed during expert discovery, it
 8 is inadmissible now. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir.
 9 2001).

10 In its reply, Ningbo Sunny changes its argument from simply offering Dr. Savaria’s
 11 number as the proper amount to offset as it did in the motion (Dkt. No. 534 at 4-5) to arguing that
 12 because there is a settlement, the burden shifts to Orion to demonstrate the monetary value of the
 13 Supply Agreement so that it can be offset from the Partial Judgment (Dkt. No. 573 at 6). Because
 14 Orion does not provide such a value, Ningbo Sunny contends that Dr. Savaria’s number is
 15 “unrebutted.” Ningbo Sunny bases its argument on the Third Circuit case *Gulfstream III Assocs.,*
 16 *Inc. v. Gulfstream Aerospace Corp.*, 995 F.2d 425, 435 (3d Cir. 1993). But that case is off-point
 17 and inapplicable here. There, the Third Circuit considered how to allocate the values of various
 18 settlements with different settling defendants across the plaintiff’s multiple claims supporting its
 19 judgment against a single non-settling defendant. *See id.* at 433-36. The plaintiff contended that
 20 one of the settlements resolved state law fraud claims against one settling defendant, so that
 21 settlement amount should not be deducted from the jury award for his federal antitrust claim
 22 against the non-settling defendant. *Id.* The monetary values of the settlements in question were
 23 not in dispute. *See id.* at 433-35. The Third Circuit found that a burden-shifting framework would
 24 be appropriate to allocate the definite settlement amounts across various claims relating to
 25 different defendants. *Id.* at 436. Ningbo Sunny cites no cases that have applied such a burden-
 26 shifting framework to determining the monetary value of the non-monetary terms of a settlement.

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1 This Court sees no reason to use such a framework here.

2 Instead, the Court will follow the Restatement of Torts that places the burden of proving
3 that an offset is appropriate on the defendant. *See* Restatement (Third) of Torts: Apportionment of
4 Liability § 16 cmt. f (2000). The Court notes that this approach aligns with other courts in this
5 District. *See, e.g., Borges v. Cty. of Humboldt*, 2017 WL 4552006, at *2 (N.D. Cal. Oct. 12, 2017)
6 (“A defendant seeking an offset against a money judgment has the burden of proving the offset”);
7 *Davis v. Prison Health Servs.*, 2012 WL 4462520, at *3 (N.D. Cal. Sept. 25, 2012) (“Defendant
8 has the burden of showing that he is entitled to an offset.”); *Velez v. Roche*, 335 F. Supp. 2d 1022,
9 1042 (N.D. Cal. 2004) (“[The non-settling defendant] has failed to meet its burden” to prove an
10 offset is appropriate.).

11 The Court finds that Ningbo Sunny bore the burden of proving the value that Orion derived
12 from the Supply Agreement. Because Ningbo Sunny relied on an inadmissible expert report, it
13 has failed to carry its burden as to this portion of the motion. The Court will not offset any profits
14 Orion may have obtained from the Supply Agreement.¹

15 b. The Hayneedle Assets

16 Ningbo Sunny also moves to offset \$3 million, which it represents is the value of the
17 Hayneedle Assets. The Synta Entities transferred them to Orion as part of the Settlement. Dkt.
18 No. 534-2 § 3. Orion originally tried to purchase the Hayneedle Assets in 2014 for \$4.4 million.
19 Trial Tr. at 1804:7-1805:9; TX 1241. After Orion and the Synta Entities executed the Settlement
20 and Orion acquired the Hayneedle Assets, Orion’s President valued them between \$2-3 million in
21 an internal document. TX 217-004. Orion argues that Ningbo Sunny has not adequately proven
22

23
24 ¹ In Section III of its opposition, Orion makes two arguments that it represents apply to both its
25 profits under the Supply Agreement and the Hayneedle Assets. However, the arguments presented
26 concern only Orion’s profits from the Supply Agreement, not the value of the Hayneedle assets.
27 The Court does not consider these arguments because it has already ruled that it will not deduct
28 Dr. Saravia’s calculation of Orion’s profits from the partial judgment. For similar reasons, the
Court does not consider Orion’s argument in Section I.C that also applies only to the value of the
Supply Agreement.

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1 their value so this offset must be denied in full. The Court finds that Ningbo Sunny has carried its
2 burden in part. Unlike the value of the Supply Agreement, expert analysis is not necessary here
3 because Orion’s president calculated the value in question. Orion also argues that unrebutted trial
4 testimony indicates that when Orion obtained them, “they had been greatly diminished in value.”
5 Trial Tr. at 1820:25-1821:1. This argument does not move the Court because it is consistent with
6 Orion’s attempt to purchase them for \$4.4 million in 2014, and its assessment of their value at \$2-
7 3 million after the acquisition two years later.

8 Orion also argues that Defendants’ interference with Orion’s 2014 attempt to purchase the
9 Hayneedle Assets was litigated to the jury and the jury knew that Orion eventually acquired them,
10 so the jury’s damages award already offset their value. This argument is pure speculation. While
11 there was trial testimony that Orion acquired the Hayneedle Assets, Defendants did not argue that
12 the jury should deduct their value from any damages award, and the verdict form does not indicate
13 that the jury considered the value of the Hayneedle Assets in determining damages. *See* Dkt. No.
14 501. This argument does not move the Court.

15 Because Orion’s president determined the value of the Hayneedle Assets to fall within a
16 range, the Court will only offset the Partial Judgment by the low end of that range. It is Ningbo
17 Sunny’s burden to show that more than the minimum amount should be offset. It has not done so.

18 c. Conclusion

19 The Court denies the motion to offset the purported value of the Supply Agreement; grants
20 the motion as to the \$500,000 paid under the Settlement and the \$600,000 paid under the Supply
21 Agreement, and partially grants the motion as to the value of the Hayneedle Assets by deducting
22 \$2 million from the Partial Judgment. In total, the Court will offset \$3.1 million from the Partial
23 Judgment.

24 **V. Orion’s Motion for Attorneys’ Fees and Costs (Dkt. No. 558)**

25 Orion moves for an order to recover its attorneys’ fees and costs. As the prevailing party,
26 the Partial Judgment recognized that Orion is entitled to such a recovery. Dkt. No. 518. Ningbo

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1 Sunny opposed the motion. Orion seeks \$4,204,664.85 in fees and \$525,706.88 in costs for a total
 2 award of \$4,730,371.73. Having considered the parties papers—including the declaration of
 3 Orion’s counsel, Noah Hagey of the law firm Braun Hagey & Borden LLP (“BHB”), and the
 4 exhibits attached thereto, the Court grants the motion. Dkt. Nos. 562-1 (Hagey’s Declaration.),
 5 558-2, 553-3 (the exhibits to the Hagey Declaration).²

6 The Clayton Act provides that a prevailing antitrust plaintiff “shall recover . . . the cost of
 7 suit, including a reasonable attorney’s fee.” 15 U.S.C. § 15(a). In the Ninth Circuit, courts use the
 8 “lodestar” method of calculating attorneys’ fees. *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973,
 9 982 (9th Cir. 2008). “The ‘lodestar’ is calculated by multiplying the number of hours the
 10 prevailing party reasonably expended on the litigation by a reasonable hourly rate.” *Morales v.*
 11 *City of San Rafael*, 96 F.3d 359, 363 (9th Cir.1996). “The prevailing party must submit evidence
 12 of the appropriate hours expended on the litigation and establish that its requested hourly rates are
 13 in line with those prevailing in the community for similar services by lawyers of reasonably
 14 comparable skill, experience, and reputation.” *Masimo Corp. v. Tyco Health Care Group, L.P.*,
 15 2007 WL 5279897, *2 (C.D. Cal. Nov. 5, 2007); *see also Frank Music Corp. v. Metro-Goldwyn-*
 16 *Mayer Inc.*, 886 F.2d 1545, 1557 (9th Cir. 1989) (“Plaintiffs bear the burden of showing the time
 17 spent and that it was reasonably necessary to the successful prosecution of their copyright
 18 claims.”). “In establishing the reasonable hourly rate, the court may take into account: (1) the
 19 novelty and complexity of the issues; (2) the special skill and experience of counsel; (3) the
 20 quality of representation; and (4) the results obtained.” *Caplan v. CNA Fin. Corp.*, 573 F. Supp.
 21 2d 1244, 1249 (N.D. Cal. 2008). The party opposing the motion “has the burden of rebuttal to
 22 challenge the accuracy or reasonableness of the hours charged.” *Masimo*, 2007 WL 5279897, at
 23 *2. In most cases, the lodestar calculation is presumptively reasonable. *Camacho*, 523 F.3d at
 24 982. While in some cases, the prevailing party may need to submit detailed records of its time,

25
 26 ² Orion originally filed the Hagey Declaration at Docket Number 558-1, but later filed an errata at
 Docket Numbers 562 and 562-1.

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1 “[t]he lack of contemporaneous records does not justify an automatic reduction in the hours
2 claimed.” *Frank Music*, 886 F.2d at 1557. If the hours claimed under are “reasonable under the
3 circumstances and supported by other evidence such as testimony or secondary documentation,”
4 the court may credit the hours. *Id.*

5 At the outset, the Court notes that Ningbo Sunny’s counsel, the law firm Sheppard, Mullin,
6 Richter & Hampton LLP (“Sheppard”), has billed over \$9 million in attorneys’ fees and costs for
7 this litigation. Dkt. No. 558-3 at 3. Ningbo Sunny’s bills are approximately twice the amount that
8 Orion seeks in this motion. The Court finds that this disparity in billing between the two firms is
9 strong evidence that BHB’s bills and costs are reasonable.

10 Turning to the BHB’s claimed hourly rates for its attorneys, contract attorneys, legal
11 assistants, and paralegals, the Court finds them to be reasonable. BHB charges hourly rates
12 between \$795 to \$425. Dkt. No. 562-1 ¶ 8. These rates are in line with rates that have been
13 approved in other cases in the Northern District. *See, e.g., Walker v. B&G Foods, Inc., et al.*, Case
14 No. 16-15349, slip op. at 306, Dkt. No. 26, (9th Cir., Jul. 20, 2017) (finding BHB’s rates to be
15 reasonable); *Hill v. Robert's American Gourmet Food, LLC*, No. 3:13-mc-80166-JST, Dkt. No. 17,
16 slip op. at 1-2 (N.D. Cal. Oct. 11, 2013) (granting BHB’s motion for fees at an hourly rate of
17 \$695); *In re TFT-LCD (Flat Panel) Antitr. Litig.*, No. 3:07-md-01827-SI, Dkt. No. 7688, slip op.
18 at 13-14 (approving award where special master set hourly rates between \$350 and \$1,000). The
19 four contract attorneys Orion hired charged between \$225 and \$450 per hour. Dkt. No. 562-1 ¶
20 45. Each of the contract attorneys are well credentialed and their billing rates are in line with, or
21 less than, the rates of the U.S. Attorney’s Office Fees Matrix, which the federal government uses
22 when seeking fees for attorneys who represent the United States. Dkt. No. 575-2. For its
23 paralegals and legal assistants, BHB charged hourly rates between \$175 and \$275. Dkt. No. 562-1
24 ¶¶ 52-56. While these rates are above the U.S. Attorney’s Office Fees Matrix rate of \$173, the
25 Court finds that they are not unreasonable given the quality of the representation provided to
26 Orion by BHB, the results of the trial, and the difference between BHB’s total claimed bills and

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1 the total bills charged to Ningbo Sunny by its counsel. *See Theme Promotions, Inc. v. News Am.*
2 *Mktg. FSI, Inc.*, 731 F. Supp. 2d 937, 948 (N.D. Cal. 2010); *Caplan*, 573 F. Supp. 2d at 1249.

3 The Court also finds that the hours claimed in this motion are reasonable. Before filing
4 this motion, BHB wrote off over \$122,000 in billing that was excessive or redundant. Dkt. No.
5 562-1 ¶ 57. BHB then wrote off an additional five percent of its total billing, reducing its claimed
6 bills by an additional \$221,298.15. *Id.* The Court also notes that the underlying facts of this
7 litigation were complex and that the litigation was hard fought. Defendants are a foreign parent
8 company and its two subsidiaries. The antitrust conspiracy involved many other foreign entities
9 allegedly controlled by one person. This litigation has been before this Court since November
10 2016. Defendants filed two motions to dismiss. Dkt. Nos. 17, 44. The parties produced nearly
11 6.5 million pages of documents, and deposed multiple Mandarin speaking witnesses. The parties
12 brought several discovery disputes before the assigned magistrate judge. *See, e.g.*, Dkt. Nos. 97,
13 115, 138, 173, 174, 175, 120, 208, 242. Both parties moved for summary judgment. Dkt. Nos.
14 256, 270. Both parties filed two motions to exclude expert testimony. Dkt. Nos. 252, 254, 257,
15 259. They briefed a total of 10 *limine* motions. Dkt. Nos. 316, 317, 318, 319, 320, 321, 322, 324,
16 325, 329. The trial lasted 18 court days during which time, the parties presented arguments,
17 offered evidence, and made objections. Ningbo Sunny objects because Orion has not submitted
18 any billing records. But here, the Court finds that significant difference in bills between the two
19 law firms indicates that the claimed hours are reasonable under the circumstances, so the Court
20 may rely on Hagey's declaration—which was made and signed under penalty of perjury—without
21 reviewing contemporaneous billing records. Dkt. No. 562-1; *Frank Music*, 886 F.2d at 1557.

22 Finally, Ningbo Sunny objects that Orion did not meet and confer before filing this motion
23 as required by Civil Local Rule 54-5(a). However, one of Orion's attorney's filed a declaration
24 stating that BHB requested to continue another conference to discuss Orion's attorneys' fees and
25 costs, but Ningbo Sunny's counsel declined. Dkt. No. 575-5 ¶ 3. He represents that Ningbo
26 Sunny's counsel stated that further discussion would not be productive and would have no point.

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1 *Id.* The Court finds that Orion’s attempt to meet and confer satisfies the requirement of Civil
2 Local Rule 43-5(a).

3 The Court will also award Orion its claimed costs. Orion initially sought \$778,117.02 in
4 costs, but when Ningbo Sunny objected to certain costs in its opposition, Orion removed those
5 costs from its request. This reduced Orion’s request by \$252,410.14 to \$535,706.88. *See* Dkt. No.
6 575 at 6 n.2. Ningbo Sunny objects that Orion has not submitted sufficient records to support this
7 portion of the motion, but again, the Court finds that the comparison between BHB’s billings and
8 Sheppard’s billings indicates that the claimed costs are reasonable and that the Court need not
9 review more detailed records. *See Frank Music*, 886 F.2d at 1557. The Court can and will rely on
10 the Hagey declaration.

11 Ningbo Sunny next two arguments are related and seem to arise from a misunderstanding
12 of the Clayton Act’s fee shifting provision. Ningbo Sunny argues that Civil Local Rule 54-1
13 requires a prevailing party to file a Bill of Costs in order to recover taxable costs. It then argues
14 that many of the claimed costs are not recoverable under the Local Rule or 28 U.S.C. § 1920.
15 These arguments are related because Local Rule 54-3 and 28 U.S.C. § 1920 set out what costs are
16 taxable, and the Bill of Costs is required for a party seeking to recover taxable costs. The flaw in
17 this argument is that under the Clayton Act and Ninth Circuit case law, Orion’s recovery goes
18 beyond taxable costs. In *Grove v. Wells Fargo Financial California, Inc.*, the Ninth Circuit held
19 that the statutory phrase “reasonable attorney’s fees includes certain litigation expenses when it is
20 the prevailing practice in a given community for lawyers to bill those costs separate from their
21 hourly rates.” 606 F.3d 577, 580 (9th Cir. 2010). The Clayton Act directs that a prevailing
22 antitrust plaintiff “shall” recover “a reasonable attorney fee.” Here, the Hagey declaration states
23 that the claimed costs were ordinarily incurred and paid by the client. Accordingly, Orion may
24 recover the claimed non-taxable costs. Ningbo Sunny’s objections to certain costs as not
25 authorized under Local Rule 53-3 or 28 U.S.C. § 1920 lack merit.

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1 The Court further finds that Hagey’s declaration satisfies Local Rule 54-1’s requirement
2 that Orion file a Bill of Costs. Exhibit 1 to the declaration lists all of the claimed costs and
3 Hagey’s sworn declaration attests that they are a true and correct list of Orion’s expenses. Orion
4 filed it pursuant to a stipulated briefing schedule that included the instant motion. Denying this
5 motion because Orion filed a declaration instead of a Bill of Costs would elevate form over
6 substance. *Cf. Murguia v. Palmer*, 2016 WL 54669, at *2 (D. Nev. Jan. 5, 2016); *McCullough v.*
7 *Johnson, Rodenburg & Lauinger*, 2009 WL 2476543, at *5 (D. Mont. June 3, 2009). Orion may
8 recover \$525,706.88 in costs.


9 Orion’s Motion for Attorneys’ Fees and Costs is granted. The Court will add
10 \$4,730,371.73 to the Partial Judgment.

11 **VI. Conclusion**

12 For the reasons discussed above, the Court denies Ningbo Sunny’s Motion for a New Trial,
13 denies Ningbo Sunny’s Renew Motion for Judgment as a Matter of Law; denies in part and grants
14 in part Ningbo Sunny’s Motion to Alter the Judgment; and grants Orion’s Motion for Attorneys’
15 Fees and Costs. Based on these rulings the Court will deduct \$3,100,000 from the Partial
16 Judgment to offset the value of the Settlement and the Supply Agreement, and then add
17 \$4,730,371.73 for Orion’s attorneys’ fees and costs. The Court will issue an Amended Partial
18 Judgment totaling \$52,030,371.73.

19 **IT IS SO ORDERED.**

20 Dated: April 3, 2020

21 
22 _____
23 EDWARD J. DAVILA
24 United States District Judge
25
26

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