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ORION TELESCOPES & BINOCULARS

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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,

Defendants.

Case No. 5:16-cv-06370-EJD

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

Date: Apr. 19, 2018
Time: 9:00 a.m.
Judge: Hon. Edward J. Davila
Ctrm: 4, 5th Floor

Compl. Filed: Nov. 1, 2016
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Trial Date: None Set

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Plaintiff Orion respectfully submits this Opposition to Defendants' Motion to Dismiss.

INTRODUCTION

Defendants' Motion reads the allegations in the First Amended Complaint ("FAC") out of sequence and in isolation to make the events seem random and attenuated. But the FAC is not like a black hole, where space-time ceases to function as it does on Earth. Nor is it rocket science. It is a simple, linear story. Ningbo Sunny and the Settling Manufacturer are the only significant telescope manufacturers in the galaxy. They agreed to fix prices together, to not compete against one another, to retaliate against Orion for asserting its rights, and to keep competitors out of the market – all of which are *per se* violations of Sherman Act § 1 under established Supreme Court and Ninth Circuit precedent cited in the FAC and unaddressed in Defendants' Motion. As a result of this illegal agreement, Defendants are able to charge astronomical prices that hurt U.S. consumers, which they could not do but for their unlawful agreement.

As detailed in the FAC, Defendants have maintained market power by colluding with the Settling Co-Conspirators. The new FINRA materials attached to the FAC are an example of this because they show that Ningbo Sunny worked with Settling Co-Conspirators to prevent a potential competitor from entering the market. This created a substantial injury to competition because it blocked competitors – including Orion – from obtaining Meade's critical IP and manufacturing capabilities. This would have increased competition by creating a potentially viable third source for telescope manufacturing and eliminating the conspirators' IP chokehold on the market.

Defendants' collusion, along with other market conditions, has created substantial barriers to entry. There are three significant telescope distributors, one of which is Orion, and the other two of which are owned by Ningbo Sunny and the Settling Manufacturer. In light of the small universe of sales that are not held in the gravitational field of Defendants and the Settling Co-Conspirators, and the conspirators' control of the "GoTo" IP necessary to sell telescopes, no new competitor has been willing to launch into the market by sinking the large costs of building a facility.

Orion sets forth a plausible, down-to-earth FAC that addresses the issues raised by the Court in its previous Order. The allegations in the FAC are supported by Defendants' own emails, admissions to the U.S. government, and the detailed factual allegations. This more than adequately

satisfies Orion's obligations at the pleading stage, where all the allegations are taken as true and construed in the light most favorable to Orion. Defendants' Motion largely ignores the allegations in the FAC, fails to put forth a plausible, legal explanation for the events above and offers legally untenable and self-contradictory arguments. (*Compare* Mot. at 14-15, arguing that Orion cannot state a § 1 claim because Ningbo Sunny has market power *with* Mot. at 18-21, arguing that Orion cannot state a § 2 claim because Ningbo Sunny does not have market power.) As already found by the Court in its previous Order, Orion has been damaged by Defendants' conduct and otherwise pleaded valid claims. Accordingly, Defendants' Motion should be denied.

FACTUAL BACKGROUND

A. The Parties

Orion is the last significant independent brand and distributor of telescopes in the U.S. (FAC ¶ 1.) Orion selects or creates the design for a telescope it wants to sell and then works with a contract-manufacturer to build the telescope and its relevant components. (*Id*. ¶ 24.)

Defendant Ningbo Sunny is one of the two major manufacturers for telescopes sold in the U.S. (*Id*. ¶ 2.) This case arises from Ningbo Sunny's collusion with the other manufacturer, which settled with Orion pre-suit (the "Settling Manufacturer"), and the Settling Manufacturer's wholly-owned distributors (collectively, the "Settling Co-Conspirators").

B. The Market

Like the Settling Manufacturer, Ningbo Sunny has purchased a distributor that competes with Orion. (FAC ¶ 46.) As a result of Ningbo Sunny and the Settling Co-Conspirators' unlawful agreements not to compete with one another (detailed below), the limited amount of sales opportunities, the high sunk costs of opening a factory, and the intellectual property rights controlled by Ningbo Sunny and the Settling Co-Conspirators, significant barriers to enter the market exist. (*Id.* ¶¶ 37-40.) For over a decade there have been no significant market entrants, and Ningbo Sunny and the Settling Co-Conspirators have colluded to dominate the market. (*Id.* ¶ 42.)

Together, Ningbo Sunny and the Settling Manufacturing manufacture over 90% of all recreational telescopes sold in the U.S. (*Id.* ¶¶ 25-26.) This has occurred as a result of Ninbgo Sunny's unlawful agreement not to compete with the Settling Manufacturer. (*Id.* ¶ 27.)

C. Defendants' Collusive and Anticompetitive Activities

In 2013, the Settling Co-Conspirators' principal told Orion that he was a co-founder and substantial owner of Ningbo Sunny. (FAC ¶ 57.) After Ningbo Sunny acquired Meade in 2013, he claimed that he transferred his ownership interest to a sister-in-law to facilitate the transaction. (*Id.*) Regardless of the precise ownership structure of the two entities (and their various subsidiaries and affiliates), they hold themselves out to U.S. regulators and the public, and now to this Court, as separately owned and controlled entities. (*Id.* ¶ 57.) As shown below, however, they operate in concert to dominate telescope manufacturing and sales.

1. Ningbo Sunny and the Settling Manufacturer Share Key Business Information, Coordinate Operations, Fix Prices, and Control Output

Ningbo Sunny shares information about the pricing and availability of its products, as well as credit arrangements and order forecasts with its only ostensible competitor, the Settling Manufacturer. They also coordinate their business activities, agree upon prices together, and manufacture products for one another's brands. (FAC ¶¶ 53, 58, 60-61.)

When Orion wants to purchase telescopes from Ningbo Sunny, it does so through the Settling Manufacturer's Assistant to General Manager, Joyce Huang. In emails to Orion, Ms. Huang quotes Ningbo Sunny's manufacturing prices, takes Orion's sales orders, and delivers Ningbo Sunny's annual price list to Orion. (*Id.* ¶¶ 61-65.)

Orion also negotiates its credit terms (a key component of pricing) with Ningbo Sunny through the Settling Co-Conspirator. "For example, when Orion sought to negotiate its Ningbo Sunny credit terms, it did so not with a Ningbo Sunny representative but with the Settling Manufacturer's CEO." (*Id.* ¶ 66.)

Ningbo Sunny and the Settling Manufacturer also integrate their booking of purchase orders, the processing of payment for such orders, and the shipping of product to customers. (FAC ¶¶ 68, 69.) Orion receives invoices for products purchased from Ningbo Sunny from an entity affiliated with the Settling Manufacturer. (*Id.*) Defendants even require Orion to wire payment to the Settling Manufacturer's affiliate for goods manufactured by Ningbo Sunny. (*Id.*)

If the Settling Manufacturer was really trying to compete with Ningbo Sunny, there is no legitimate business reason and/or explanation for why it would be trying to help Ningbo Sunny's

business operations in this manner. Nor is there any reason that competitors would share sensitive information, such as wholesale price lists, with each other.

The conclusion that Ningbo Sunny conspired with the Settling Co-Conspirators to fix prices is further supported by the fact that Ningbo Sunny's prices have not changed with market conditions. For example, they remained the same notwithstanding the massive devaluation of Chinese currency. (FAC ¶ 88.)

2. Defendants Allocated Manufacturing Operations between Themselves

Defendants coordinate their manufacturing output with the Settling Manufacturer so as to divide the market between them rather than compete. (FAC ¶¶ 80, 90.) The Settling Manufacturer makes Orion's higher-end products, such as Orion's GoTo Dobsonian telescopes, and Ningbo Sunny manufactures low-end products, such as Orion's FunScope. (*Id*. ¶ 90.)

3. Ningbo Sunny Conspired with the Settling Manufacturer to Set the Terms of Orion's Credit

One example of Defendants engaging in price fixing and colluding with the Settling Co-Conspirators is Defendants' efforts to help the Settling Co-Conspirators secure the Hayneedle Assets. (FAC ¶¶ 96-110.) These assets included the key URLs telescopes.com and binoculars.com, and the independent telescope brand Zhumell.

In mid-2014, when Hayneedle stated it would sell its assets, Orion sought to buy the telescopes.com URL because it already owned the URL telescope.com on the Internet, through which it makes a significant percentage of its sales. (FAC ¶¶ 96, 98.) The Settling Manufacturer stated that it did not want Orion to acquire the Hayneedle Assets and pressured Orion not to bid on them. (*Id*. ¶¶ 99-101.) When Hayneedle accepted Orion's bid over a competing bid from the Settling Co-Conspirators, Defendants colluded to interfere with the acquisition despite their knowledge that Hayneedle and Orion had executed a letter of intent giving Orion an exclusivity period to do due diligence on the purchase. (*Id*. ¶¶ 100-06.)

On the same day, Orion received virtually identical emails from the Settling Manufacturer's CEO and Ningbo Sunny's President, Wen Jun (Peter) Ni, stating they would cut off Orion's credit if Orion did not walk away from the acquisition. (*Id*. ¶¶ 101-02.) Both emails stated, verbatim: "if

Orion really buys Hayneedle, this will be the beginning of a hazard." (*Id.* ¶ 102.) Shortly after, when Orion tried to order telescopes from Ningbo Sunny, the Settling Manufacturer's employee Huang, speaking for Ningbo Sunny, stated Ningbo Sunny had cut off Orion's credit. (*Id.* ¶ 103.)

Right before the deal was set to close, Hayneedle suddenly demanded more money and refused to agree to a previously uncontroversial non-compete term. (FAC ¶ 105.) This about-face occurred because "Ningbo Sunny's competitors and/or their agents were communicating with Hayneedle and threatening Hayneedle to not go through with the sale." (*Id.*) Orion ultimately was unable to close the deal because "Orion had no additional funds to offer Hayneedle because of the conspiracy to cut off Orion's lines of credit." (*Id.* ¶ 106.) Immediately thereafter, the Settling Co-Conspirators bought the assets, and Ningbo Sunny and the Settling Co-Conspirator restored Orion's lines of credit. In fact, the Settling Manufacturer informed Orion of Ningbo Sunny's decision. (*Id.* ¶ 107.)

D. Ningbo Sunny Acquired Meade by Misleading U.S. Regulators

When Ningbo Sunny acquired Meade in 2013, it filed a Schedule 13D with the U.S. Securities and Exchange Commission in which it represented that it had no relationship with the Settling Manufacturer. (FAC ¶¶ 57, 75.) However, the Settling Manufacturer and Ningbo Sunny had previously claimed to share at least one common owner. (*Id.* ¶ 57.)

Had the government known the true facts, it is unlikely it would have allowed such a merger to occur because the FTC had already blocked a similar transaction in 2002, when the then-independent competitor brand (which the Settling Manufacturer later acquired) tried to merge with Meade. (FAC ¶ 91.) The FTC found that such a combination "would raise significant competitive concerns and would violate the FTC Act and Section 7 of the Clayton Act," that "the two companies together would monopolize the market for Schmidt-Cassegrain telescopes and would eliminate substantial actual competition … in the market for performance telescopes," that the merger "would likely result in anticompetitive activity in the two markets at issue," and "that entry into the relevant telescope markets sufficient to deter or counteract the anticompetitive effects of the proposed acquisition is unlikely to occur." (*Id.*)

Ningbo Sunny's acquisition of Meade consolidated under a single conglomerate's control three of the four leading telescope brands. It also transferred valuable intellectual property and manufacturing capabilities from a previously independent market participant to the market monopolists, and prevented competitors such as Orion from acquiring assets they could have used to compete against the Ningbo Sunny cartel. (FAC ¶¶ 94, 95.)

E. Court's Prior Order

On September 28, 2017, the Court granted Defendants' Motion to Dismiss with leave to amend. (Dkt. No. 38 ("Order").) The Order held that Orion had established antitrust injury for its Section I and Section II claims and Article III injury. (Order at 9-10.) However, it held that Orion had not plausibly alleged collusion between Defendants and the Settling Co-Conspirators sufficient to support the § 1 claim. (Order at 13.) In specific, the Order sought additional information regarding how it could be that Ningbo Sunny would conspire with the Settling Co-Conspirators when the Complaint also alleged that Ningbo Sunny had market power. (Order at 12-13.) The Order dismissed Orion's Sherman Act § 2 claims on the ground that Orion had not sufficiently detailed the barriers to entry and expansion that exist in the telescope manufacturing market. (Order at 15-16.) The Order finally held that Orion had not alleged antitrust injury for its Clayton Act § 7 claim on the grounds that Orion had not adequately alleged injury to competition from the Meade acquisition. (Order at 11.)

F. The First Amended Complaint

As detailed further below, the FAC addresses the issues identified by the Court by showing that barriers to entry exist because now that Ningbo Sunny and the Settling Manufacturer own the two other major telescope brands, the significant time and sunk capital costs of building a manufacturing facility exceed any ability to recoup that money that a market entrant could earn. (FAC ¶¶ 36-44.) Coupled with Defendants' collusion, substantial barriers to entry exist given the highly technical process of producing high-quality optics and telescope parts; the litigation or licensing costs related to the Settling Manufacturer's and Ningbo Sunny's intellectual property rights concerning manufacturing and design technology; and settling Manufacturer's patents

covering the key technology consumers demand such as "GoTo" software, which enables telescope users to automatically track known celestial objects. (*Id.* ¶¶ 23, 40, 94.)

The FAC further explains that the reason that Ningbo Sunny has colluded with the Settling Co-Conspirators, even though Ningbo Sunny now has market power, is that such collusion is what enabled it to obtain market power in the first place. (FAC ¶ 33 n.1, 55.) The FAC adds additional facts regarding Defendants' collusion, including that Ningbo Sunny and the Settling Co-Conspirators conspired to help Ningbo Sunny acquire Meade – another act which is antithetical to what true competitors would do. (*Id.* ¶¶ 74-76.) The FAC further alleges that but for Defendants' collusion, a non-conspirator would have acquired Meade's key IP rights and manufacturing facility, which would have increased competition in the market. (*Id.* ¶¶ 74-79, 94, 120.)

ARGUMENT

A motion to dismiss is denied if the Complaint states a plausible claim for relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). The plausibility standard "does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Id.*

I. ORION HAS STATED A CLAIM UNDER SHERMAN ACT § 1

Defendants assert that Orion's conspiracy claims are "still implausible." (Mot. at 4.) They contend without meaningful analysis that Orion's allegations are conclusory or make no economic sense by presenting the arguments in isolation and out of sequence, and then asserting that there are possible innocent explanations. (*Id.* at 4-18.) Such contentions do not defeat Orion's factual allegations showing a plausible claim under § 1 of the Sherman Act.

In an antitrust case, "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) (internal citations, parentheticals, and quotation marks

omitted). In short, "[i]n accessing [defendant's] potential antitrust liability, the Court considers the effects of its conduct in the aggregate, including, as appropriate, cumulative or synergistic effects." *Church & Dwight Co. v. Mayer Labs., Inc.*, No. C-10-4429 EMC, 2011 WL 1225912, at *16 (N.D. Cal. Apr. 1, 2011) (collecting Ninth Circuit cases). Taken as a whole, with the new allegations, the FAC establishes a plausible § 1 claim.

A. Defendants Committed *Per Se* Violations

To state a claim under Sherman Act § 1, a plaintiff must allege (1) a contract, combination, or conspiracy (2) intended to harm or restrain trade (3) that actually injures competition and (4) harms plaintiff. *Solyndra Residual Tr., by & through Neilson v. Suntech Power Holdings Co.*, 62 F. Supp. 3d 1027, 1039 (N.D. Cal. 2014) (citing *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir. 2001); *Brantley v. NBC Universal Inc.*, 675 F.3d 1192, 1197 (9th Cir. 2012)). "Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal per se without inquiry into the harm it has actually caused." *Id.* at 1041 n.7 (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 780 (1984)).

The FAC plausibly shows that Defendants committed *per se* violations of § 1. Orion explicitly alleges that Defendants and the Settling Co-Conspirators conspired to horizontally fix prices and allocate the market for beginner to intermediate telescopes. (*E.g.*, FAC ¶¶ 4 (overview of Defendants' unlawful horizontal agreements), 33-38 (alleging, *inter alia*, Defendants and Settling Co-conspirators acted in concert to force buyers to purchase telescope products at non-negotiable prices, to jointly set credit and trade terms, to threaten supply of telescope products, and to divide telescope production and distribution), 73-74 (alleging who, what, when, where, and how of Defendants and Settling Co-conspirators' agreement to block competitor entry into the telescope distribution market), 86-90 (alleging Defendants and Settling Co-conspirators divided telescope supply and agreed upon fixed prices).) Any one of the *per se* violations that Orion alleged standing alone is sufficient to state a Section 1 claim.

1. Defendants Conspired To Fixed Prices

"[A] conspiracy to fix prices is in and of itself a violation of the first section of the [Sherman] Act, 15 U.S.C.A. § 1. No inquiry as to substantiality, directness, effectiveness, or

reasonableness of restraint is permitted." *Local 36 of Int'l Fishermen & Allied Workers of Am. v. U.S.*, 177 F.2d 320, 331 (9th Cir. 1949); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) ("price-fixing agreements are unlawful per se"). Here, Orion alleges – **and Defendants choose to ignore** – coordinated credit manipulation, business coordination, and pricing anomalies that plausibly show price fixing.

a. Defendants' Coordination of Orion's Credit Terms, Alone, Constitutes Price Fixing

Ningbo Sunny and the Settling Manufacturer sent coordinated, identical emails stating "if Orion really buys Hayneedle, this will be the beginning of a hazard," cutting off Orion's credit to help the Settling Manufacturer acquire the Hayneedle assets, and then immediately reinstated Orion's credit after the Settling Manufacturer purchased Hayneedle. (FAC ¶¶ 99-103, 108.) Such conduct by itself is price fixing. *E.g.*, *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648 (1980) (per curiam) (because "credit terms must be characterized as an inseparable part of the price[,]" an "agreement to terminate the practice of giving credit to a customer is thus tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional per se rule against price fixing").

b. Ningbo Sunny Shared Pricing and Other Sensitive Business Information with the Settling Manufacturer

Ningbo Sunny and the Settling Manufacturer also share pricing information. For example, on December 20, 2014, Orion asked Ningbo Sunny's Vice President of Marketing for "quotes on 'pricing, MOQ and lead time for 3 products.'" (FAC ¶ 62.) Joyce Huang, who works for the Settling Manufacturer and *not* Ningbo Sunny, responded by "detail[ing] the price quotes and availability for each requested Ningbo Sunny product." (*Id.* ¶¶ 61, 64.)

This fact, alone, is sufficient to state a plausible price fixing claim. *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F. Supp. 2d 896, 902 (N.D. Cal. 2008) ("the exchange of price information alone can be 'sufficient to establish the combination or conspiracy, the initial ingredient of a violation of § 1 of the Sherman Act'") (quoting *U.S. v. Container Corp. of Am.*, 393 U.S. 333, 335 (1969)); *In re Capacitors Antitrust Litig.*, 106 F. Supp. 3d 1051, 1067 (N.D. Cal.

2015) (allegations that two parties "conducted an exchange of competitively sensitive information" and agreed to exchange in the future is "enough to meet the *Twombly* pleading standard").

Similarly, in *Transpacific Passenger Air Transp. Antitrust Litig.*, No. C 07-05634 CRB, 2011 WL 1753738 (N.D. Cal. May 9, 2011), the Court held that competitors' "access to commercially sensitive information of its competitors," including pricing information through a trade organization, identical pricing and surcharge coordination was sufficient to plausibly show price fixing. *Id.* at *11-13. The Court rejected defendants' contention that the alleged communications were consistent with "lawful independent conduct," because although "[t]he communications discussed herein, as well as numerous others, might well have legitimate explanations[,] … at this stage in the litigation, they seem to show would-be competitors discussing the raising or matching of prices." *Id.* at *14.

Moreover, Ningbo Sunny and the Settling Manufacturer share other sensitive information and business operations, including: information about Ningbo Sunny's investment in Meade (FAC ¶ 84) and the floor plan and capacity of Ningbo Sunny's manufacturing facility. (*Id.* ¶ 82.) They also required Orion to send payments to Ningbo Sunny to the Settling Manufacturer's bank (*Id.* ¶ 68), and appear to have seconded each other employees. (*Id.* ¶ 74.) Ningbo Sunny and the Settling Manufacturer also manufacture products for one another. (*Id.* ¶ 80.) The Settling Manufacturer was even the one to inform Orion that Ningbo Sunny had restored Orion's credit after the Hayneedle incident. (*Id.* ¶ 108.)

Viewed in their entirety, the alleged communications demonstrate a price-fixing conspiracy even more so than those in *Transpacific Passenger* and *Static Random Access Memory*. The alleged meetings, sharing of staff, identical emails, and coordination of pricing and business operations show that Ningbo Sunny and the Settling Co-Conspirators did not behave in any way like true competitors. Such communications cannot be explained without an anticompetitive agreement among the companies.

c. The Pricing of Ningbo Sunny's Products Reveals Price-Fixing

Defendants' pricing further shows price fixing. In *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109 (N.D. Cal. 2008), the Court held that allegations of "complex and

unusual pricing practices … which cannot be explained by the forces of supply and demand" met the *Twombly* standard to state a price-fixing conspiracy claim. (*Id.* at 1115-16.) In that case, Plaintiffs alleged that before the conspiracy, the TFT-LCD industry was facing a decline in prices given advances in technology and new market entrants, but that due to the conspiracy, the market was then "characterized by unnatural and sustained price stability," "periods of substantial increases in prices," and "compression of price ranges for TFT–LCD products," all of which were "inconsistent with natural market forces." *Id.* The Court held that "[a]llegations of such unusual pricing practices state a cause of action under *Twombly*." *Id.* at 1116.

Here, Orion alleges that Ningbo Sunny's prices are likewise inconsistent with market forces. For example, it alleges that Ningbo Sunny's prices remained high and stable despite massive fluctuations in the value of the Renminbi, would have made Defendants' exports much cheaper in U.S dollars. (*Id.* ¶ 88.) This fact, alone, and especially together with the facts above separately demonstrates a plausible price-fixing claim. *Flat Panel*, 586 F. Supp. 2d at 1115-16.

d. Defendants Do Not Contest or Even Address Most of the Evidence of Price Fixing

Nowhere in the Motion to Dismiss do Defendants challenge the allegations of the identical emails revoking Orion's credit line or Joyce Huang's responses to emails directed not to her company but to Ningbo Sunny. Nor do they meaningfully address the communications among Defendants and the Co-conspirators involving the Meade or Hayneedle deals. Defendants also fail to address any of the Ninth Circuit cases involving horizontal agreements cited by Orion in the FAC at paragraph 4.

In addressing their relationship with the Settling Manufacturer, Defendants only cite two allegations, which involve the October 17, 2015 meeting in which Orion learned that Ningbo Sunny told the Settling Manufacturer that it had invested $10 to $14 million in Meade post-acquisition and the tour on which Ningbo Sunny showed the Settling Manufacturer its production capabilities. (Mot. at 11-12 (citing FAC ¶¶ 81-84).) Cherry-picking these two allegations and disregarding the rest of the FAC, Defendants argue that these allegations are "vague and sporadic" and "are not agreements to restrain trade." (*Id.* at 12.) "However, such an approach is contrary to

the Supreme Court's direction that '[i]n cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.'" *Russell v. Nat'l Collegiate Athletic Ass'n*, No. C 11-4938 CW, 2012 WL 1747496, at *3 (N.D. Cal. May 16, 2012) (quoting *Cont'l Ore*, 370 U.S. at 699).

2. Defendants Conspired To Allocate the Market

Orion also plausibly alleges that Defendants allocated the market, which is *per se* illegal. *Copperweld Corp.*, 467 U.S. at 780; *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991) ("A market allocation agreement between competitors at the same market level is a classic *per se* antitrust violation."). "Such agreements are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other." *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990) (reversing summary judgment for defendants where companies previously competed with each other in same territorial market but then agreed to divide markets). As noted in the out-of-circuit cases Defendants cite, the illegality is not the failure to compete, but the *agreement to not compete* – which is exactly what the FAC alleges. *See Erie Cty., Ohio v. Morton Salt, Inc.*, 702 F.3d 860, 871 (6th Cir. 2012) ("Not to compete with a fellow oligopolist is one thing; to actively assist the fellow oligopolist to preserve its oligopoly is quite another."); *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 627 (7th Cir. 2010) (Section 1 "just forbids [sellers] agreeing or conspiring not to compete.").[1]

This is not a case of two competitors "unilaterally decid[ing] to make different products," as Defendants suggest. (Mot. at 10.) Rather, the FAC specifies that Ningbo Sunny and the Settling Manufacturer formed an agreement "not to compete in the supply market" after which "the Settling Manufacturer transferred the specifications, dies and molds used to make certain of Orion's lower-end models to Ningbo Sunny." (FAC ¶¶ 34-35.)[2]

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[1] These cases are inapplicable. In *Erie*, the plaintiff had failed to plead any facts that plausibly raised an inference of unlawful agreement. Here, in contrast, Orion alleges that Defendants told Orion that they intended to divide the market and cooperated in transferring the equipment and intellectual property necessary to do so. (FAC ¶¶ 34-35.). In *In re Text Messaging*, the Court held that the complaint sufficiently alleged a conspiracy under *Twombly*.

[2] The FAC repeatedly alleges that Ningbo Sunny and the Settling Manufacturer had an illegal agreement. (*E.g.*, FAC ¶¶ 2 ("Ningbo Sunny and the Settling Manufacturer agreed to divide the market whereby Ningbo Sunny produces low to medium end telescopes and the Settling

Orion alleges, *inter alia*, that Ningbo Sunny, Meade, and the Settling Manufacturer used to produce low-end telescopes before the alleged conspiracy (*id.* ¶¶ 2, 52, 55); that Ningbo Sunny told Orion that it would take over the manufacturing of low-end models while the Settling Manufacturer would supply advanced models (*id.* ¶ 35); that the Settling Manufacturer transferred specifications of Orion's lower-end models to Ningbo Sunny (*id.*); that Ningbo Sunny and the Settling Co-conspirators met and discussed Ningbo Sunny's potential acquisition of Meade and coordinated the placement of staff (*id.* ¶ 74); and that, as a result of the agreement to allocate the market, Orion is limited to Ningbo Sunny for lower-end models and to the Settling Manufacturer for higher-end models (*id.* ¶¶ 35, 44, 52, 117, 119). Such allegations are not a failure to compete but an illegal agreement to not compete. *Brown*, 936 F.2d at 1044-45.

3. Defendants Refused to Manufacture Products

Defendants also ignore that the FAC expressly alleges that Ningbo Sunny refused to manufacture specific telescope products. (*E.g.*, FAC ¶¶ 34-35, 43-44.) This is also a per se violation of § 1. *E.g.*, *U.S. v. Andreas*, 216 F.3d 645, 667 (9th Cir. 2000) ("output restrictions have long been treated as per se violations").

4. Defendants Refused to Deal with Orion

The FAC further alleges that Defendants and the Settling Co-Conspirators jointly threatened to refuse to trade with Orion should it pursue antitrust claims and that Ningbo Sunny stopped doing so in retaliation for the filing of this litigation. (FAC ¶¶ 34, 43, 111-16.) This is also a per se violation of § 1. *E.g.*, *Fashion Originators' Guild of Am. v. Fed. Trade Comm'n*, 312 U.S. 457, 465 (1941) (per se violation where group of conspirators "subjects all retailers and manufacturers who decline to comply with the Guild's program to an organized boycott").

B. The FAC Explains Why Ningbo Sunny Conspired with the Settling Manufacturer

In granting Defendants' initial Motion to Dismiss, the Court held that it was implausible that Ningbo Sunny would collude with the Settling Manufacturer because it already had market

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Manufacturer makes the higher end models."), 90 ("Defendants have orchestrated to eliminate competition by stopping 'head to head' competition between the two manufacturers and their respective distributors.").)

power. (Order at 12.) However, as clarified in the FAC, the only reason that Ningbo Sunny has market power is that it unlawfully colluded with the Settling Manufacturer to gain market power and thereafter keep competitors out. (FAC ¶¶ 33 n.1, 33-42, 55.) Absent such concerted dealings between competitors, Ningbo Sunny would hold no monopoly power. (*Id.* ¶¶ 33 n.1, 55.)

The FAC further explains that before the conspiracy, the telescope distribution market was not highly concentrated and that the Settling Manufacturer produced the same products as those produced by Ningbo Sunny. (FAC ¶¶ 49, 55.) However, after the start of the conspiracy, Defendants and the Settling Co-Conspirators control the vast majority of manufacturing and distribution, and the Settling Manufacturer no longer produces the lower-end telescope models it used to produce. (*Id.* ¶¶ 48-49, 54-55.) As a result of Ningbo Sunny and the Settling Manufacturer agreeing to allocate the market, Ningbo Sunny gained market power in the beginner to low-intermediate market. (*Id.* ¶¶ 33 n.1, 55.) Without the illegal agreement, "the Settling Manufacturer could, and would, use its facilities, equipment and knowhow to produce the same products Ningbo Sunny manufactures, as it had done prior to its illegal agreement with Ningbo Sunny." (*Id.* ¶ 55.)

Ningbo Sunny's dominance also has been solidified by the market conditions it and the Settling Manufacturer created. With Ningbo Sunny owning Meade and the Settling Manufacturer owning the other major distributor, nobody has been willing to sink the large costs of building a facility to manufacture telescopes to capture the relatively small amount of sales in the rest of the market, especially with Ningbo Sunny and the Settling Manufacturer working in concert to keep other participants out and holding the valuable IP rights necessary to sell telescopes. (FAC ¶¶ 37-42.) This problem is illustrated by the Meade acquisition, where a competitor tried to enter the market, and Ningbo Sunny and the Settling Manufacturer worked together to prevent it from doing so. (*Id.* ¶¶ 70-74.)

Orion's allegations are plausible and supported by documentation, including Defendants' own admissions to the U.S. government about the Meade acquisition. Defendants have not articulated a contrary explanation, and even if they had, it would not be grounds for dismissal at the pleading stage. *In re Animation Workers Antitrust Litig.*, 123 F. Supp. 3d 1175, 1211 (N.D. Cal. 2015) ("As Plaintiffs have put forth an alternative plausible explanation, the Court is not persuaded

by Sony's bare assertion that Plaintiffs' claim is 'economically implausible' as a matter of law."); *Cascades Comput. Innovation LLC v. RPX Corp.*, No. 12-CV-1143 YGR, 2013 WL 6247594, at *7 (N.D. Cal. Dec. 3, 2013) (denying motions to dismiss) ("Plaintiff's complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that plaintiff's explanation is *im* plausible.") (emphasis in original).

Defendants argue that the word "already" in Paragraph 99 of the original complaint shows that the FAC is implausible. (Mot. at 14.) But as clarified in the FAC, that paragraph simply alleged that Defendants' market power resulted from conspiring with the Settling Co-Conspirators. (*E.g.*, FAC ¶ 33 n.1.) Defendants also emphasize terms such as "monopoly pricing" and other allegations of high prices. (Mot. at 16.) This argument similarly ignores that Orion alleges that the high prices *result* from the conspiracy between Ningbo Sunny and the Settling Con-Conspirators. (*E.g.*, FAC ¶¶ 44 ("charged monopoly prices **because** they have agreed to divide the supply market between themselves to eliminate any competition"), 117 ("**As a result**, output has been restricted, and the prices of telescopes have been fixed, raised, stabilized, or maintained at artificially inflated levels"), 121 ("**As a result** of the conduct alleged herein, Defendants have stifled competition") (each with emphasis added). Indeed, "[a]bsent such concerted dealings between would-be competitors, Ningbo Sunny would hold no monopoly power." (*Id.* ¶ 33 n.1 (clarifying Ningbo Sunny obtained monopoly power *because* of its collusion with the Settling Manufacturer).)

C. The FINRA Documents Underscore the Plausibility of Orion's Claims

Defendants devote four pages of their brief trying to downplay the FINRA documents attached to the FAC. (Mot. at 4-8.) The FINRA documents (virtually the only material produced by Defendants at the time the FAC was filed) show that Ningbo Sunny had disclosed its plans to purchase Meade to the Settling Manufacturer – its competitor – long before the deal was ever publicly announced. (FAC ¶ 74 & Dkt No. 41-1.) This is not what competitors do absent an anticompetitive agreement. Moreover, these events are an example of Ningbo Sunny cooperating with the Settling Co-Conspirators to prevent others from entering the market – one of the barriers to entry detailed in the FAC.

Ningbo Sunny states that it "may have wanted" to give the Settling Manufacturer notice before the rest of the market learned of the acquisition, but it does not articulate any legitimate business reason for doing so. (Mot. at 5.) Even if it had, providing an alternative explanation for sharing sensitive business information does not, at the pleading stage, render a claim implausible. *Animation Workers*, 123 F. Supp. 3d at 1209 (refusing to dismiss *per se* wage-fixing claims simply because "defendants offered a competing interpretation of the plaintiffs' conspiracy allegations").

D. Defendants Improperly Attempt to Misread Orion's Allegations in Isolation

Defendants improperly attempt to misread the pleadings in isolation and out of sequence. This is contrary to the Supreme Court's instruction that "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *Cont'l Ore*, 370 U.S. at 699 (internal citations, parentheticals, and quotation marks omitted); *Russell*, 2012 WL 1747496, at *3 ("analyz[ing] these allegations in isolation and separately as to each of Plaintiffs' Sherman Act claims … is contrary to the Supreme Court's direction").

The factual allegations in the FAC tell a coherent story, viz., that Ningbo Sunny conspired with the Settling Manufacturer to fix prices and divide the market. As detailed above, the FAC identifies emails showing price fixing by Defendants and the Settling Co-conspirators. *See supra* Section I.A.1. This is buttressed by other allegations, showing, *inter alia*, that: (1) Ningbo Sunny and the Settling Co-conspirators discussed Ningbo Sunny's potential offer to buy Meade before it was public, (2) Ningbo Sunny immediately staffed Meade with executives from the Settling Co-Conspirators, who had been communicating with Ningbo Sunny about the acquisition before it occurred, (3) Ningbo Sunny required Orion to remit payment for Ningbo Sunny's goods to the Settling Manufacturer's bank, (4) Ningbo Sunny shares information about its pricing with the Settling Manufacturer, and (5) Ningbo Sunny's prices are divorced from market conditions.

Together, such allegations satisfy Rule 12. *E.g.*, *Cascades Comput.*, 2013 WL 6247594, at *7 (the standard at the motion to dismiss stage is "not that plaintiff's explanation must be true or even probable" but that the complaint "need only 'plausibly suggest an entitlement to relief'").

"Indeed, '[i]f there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6). Plaintiff's complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that plaintiff's explanation is *im* plausible." *Id.* (quoting *Starr v. Baca*, 652 F.3d 1202, 1216-17 (9th Cir. 2011)).[3]

II. ORION HAS STATED A CLAIM UNDER SHERMAN ACT § 2

The only issue with Orion's § 2 allegations found by the Order on the first motion to dismiss was that Orion had not detailed the barriers to entry that exist in the market. (Order at 15.) The FAC has cured that issue and otherwise stated a plausible claim.

Defendants incorrectly repeat their argument that Orion has not sufficiently alleged barriers to entry and expansion (Mot. at 18-20) and contend that no plausible anticompetitive conduct has been alleged (*id.* at 21-24). Similar to their arguments challenging Orion's § 1 claim, Defendants' arguments here separate each of Orion's allegations to ignore their overall anticompetitive effects and make blanket statements to explain away those effects. Such arguments fail.

A. Defendants Attempted to and Did Monopolize the Beginner to Intermediate Telescope Market

To state a claim for attempted monopolization, Plaintiff must allege "(1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability of achieving monopoly power; and (4) causal antitrust injury." *United Energy Trading, LLC v. Pac. Gas & Elec. Co.*, 200 F. Supp. 3d 1012, 1020 (N.D. Cal. 2016) (quoting *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1432–33 (9th Cir. 1995)). To state a monopolization claim, Plaintiff must allege "(1) [p]ossession of monopoly power in the relevant market; (2) willful acquisition or maintenance of that power; and (3) causal antitrust injury." *Free FreeHand Corp. v. Adobe Sys. Inc.*, 852 F. Supp. 2d 1171, 1179

[3] Despite Defendants' repeated citations, this is not the case of *Name.Space* in which the defendant was directed by the Department of Commerce to manage the domain name system and therefore set up an application process for assigning top level domains and in which the plaintiff in bringing a Sherman Act claim generally alleged, *inter alia*, that the application price rose. *Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers*, 795 F.3d 1124, 1129-30 (9th Cir. 2015) ("there are no allegations that the selection process was rigged … no specific allegations of wrongdoing that would indicate that the board members acted with an improper motive").

(N.D. Cal. 2012) (quoting *SmileCare Dental Group v. Delta Dental Plan of Cal., Inc.*, 88 F.3d 780, 783 (9th Cir. 1996)). "There is no requirement that these elements of the antitrust claim be pled with specificity." *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008).

The FAC alleges that Defendants attempted to acquire and *did* acquire monopoly power in the beginner to intermediate telescope market – which is the lynchpin of Defendants' challenge to Orion's § 1 claims. "Under the theory of monopoly broth, '[t]here are kinds of acts which would be lawful in the absence of monopoly but, because of their tendency to foreclose competitors from access to markets or customers or some other inherently anticompetitive tendency, are unlawful under Section 2 if done by a monopolist.' The Ninth Circuit has … stated that it is not 'proper to focus on specific individual acts of an accused monopolist while refusing to consider their overall combined effect.'" *FreeHand*, 852 F. Supp. 2d at 1180 (citations omitted).

In its prior Order, the only issue the Court found regarding the § 2 claim was barriers to entry and expansion. (Order at 15.) As detailed below, that issue, along with Defendants' argument that Orion has not plausibly alleged anticompetitive conduct, are addressed below.

B. High Barriers to Entry and Expansion Exist

Courts have found sufficient allegations of market power where plaintiffs have alleged high market share, the power to exclude competition, the high capital investment costs needed to enter the market, the lack of companies willing to enter the market, the impracticality of establishing one's own services normally done by another, or the exploitation of one's unique relationships with customers. *See, e.g.*, *Newcal Indus.*, 513 F.3d at 1049-50 (reversing dismissal of antitrust claim where, *inter alia*, alleged market power was based on party's unique market position and its close relationships with customers); *United Energy Trading*, 200 F. Supp. 3d at 1018-21 (holding sufficient, *inter alia*, allegations that PG&E has 70-90% market share, that competitors cannot "practically or reasonably establish" their own billing services while still offering competitive prices, and that PG&E's "schemes have made entry and expansion in the market unprofitable due to the increased costs of marketing, customer retention, and the significant carrying costs"); *Westlake Servs., LLC v. Credit Acceptance Corp.*, 2016 WL 3919487, at *9 (C.D. Cal. Apr. 6, 2016) (holding sufficient, *inter alia*, allegations that defendant has more than 85% market share,

has "power to control prices and/or to exclude competition in the relevant market, and that it has in fact excluded competition by enforcing its [fraudulently obtained patent] rights," that "there are significant barriers to market entry, including CAC's intellectual property rights, substantial up-front capital investment required to penetrate the relevant market, and the requirement of access to a nationwide sales and distribution network").

Here, similar to the cases cited above, Orion sufficiently alleges Defendants' market power particularly in light of the unique market that Defendants and the Settling Co-Conspirators have together constructed in the low to intermediate telescope market.[4] First, Orion alleges that Ningbo Sunny and the Settling Manufacturer conspired so that Ningbo Sunny could obtain monopoly power. (FAC ¶ 33 n.1.) As discussed above, Ningbo Sunny and the Settling Co-conspirators conspired so that Ningbo Sunny could obtain over 75% market share. (Section I.B, *supra* (detailing conspiracy); FAC ¶¶ 48 ("Defendants and the Settling Coconspirators leveraged their control over telescope supply to completely dominate U.S. telescope distribution."), 54-55 (Ningbo Sunny "controls 75% of the market for manufacturing low to intermediate telescopes" due to unlawful agreements).)

Second, Orion alleges that Defendants' conspiracy created a dysfunctional market that added to the already high barriers to entry and expansion. Defendants ignore and overgeneralize the allegations in the FAC, which together support high barriers to entry and expansion. (Mot. at 18-20.) For example, Orion alleges that (1) telescope manufacturing has high investment costs given the inherent need for highly technical components and software (FAC ¶¶ 23, 38, 40), (2) telescope manufacturing requires key intellectual property rights such as rights to software enabling users to automatically find celestial objections, which are demanded by beginning users (*id.* ¶¶ 23, 40, 94, 120), and (3) it is impracticable or unreasonable from a business standpoint to

[4] Defendants erroneously assert that "Orion lumps together all telescopes and does not focus specifically on alleged barriers to entry in the lower-priced segment." Mot. at 20. Here, Plaintiffs specifically allege the relevant market for beginner to intermediate consumers and the barriers to that market. *E.g.*, FAC ¶¶ 26 ("the relevant market in this action is for telescopes for beginner to intermediate consumers"), 50-52 (allegations involving relevant products), 115-122 (alleging, *inter alia*, Defendants' conduct harming Plaintiff and competition in relevant market).

build a manufacturing factory because the market is small and there are not enough independent distributors to whom to profitably sell products (*id.* ¶¶ 31, 34, 38, 41, 43, 44, 46).

Indeed, such high barriers to entry and expansion are made more difficult given the collusion among Defendants and the Settling Co-conspirators. In an already small market, Ningbo Sunny and the Settling Manufacturer's collusion make it unreasonable for competitors to enter the market or expand output. (FAC ¶ 31-44.) As the primary telescope manufacturers for the U.S. telescope market, Ningbo Sunny and the Settling Manufacturer are vertically integrated with the largest distributors, including one of the Settling Distributors and Meade through various acquisitions. (*Id.* ¶¶ 38, 46-47.) Through these acquisitions and their conspiracy to fix prices and allocate the market (*see supra* Section I.A), Defendants have obtained and maintain special relationships with the Settling Co-conspirators that they exploit to restrain trade by conspiring to divide the market, engaging in below-cost pricing, blocking acquisitions, refusing to deal, restricting supply, and taking from the market valuable intellectual property and manufacturing capabilities. (*E.g.*, FAC ¶¶ 35 (conspiring to divide the market), 39 (selling products below cost to Settling Co-conspirators), 74-75 (blocking low-end telescope manufacturer from entering distribution market by conspiring to have Ningbo purchase Meade), 94 (acquiring intellectual property and manufacturing capabilities), 111-13 (refusing to deal with Orion).) Defendants and the Settling Co-Conspirators through their collusion have also transformed the market structure of telescope distribution to one that is highly concentrated. (*Id.* ¶¶ 48-49.)

As a result of both natural and constructed high barriers to entry and expansion, there have been no new manufacturers that can compete with Ningbo Sunny and no new distributors that would make building a facility profitable. (FAC ¶¶ 42-43 ("No new manufacturers of any significance have entered the market in at least the last 10 years. With Ningbo Sunny's recent acquisition of Meade, which also had manufacturing capabilities (and will now not sell to Orion), the number of sources of supply essentially diminished to two: Ningbo Sunny and the Settling Manufacturer."), 112 ("Through their domination of the supply chain and unlawful agreements with the Settling Coconspirators, Defendants (acting in concert with the Settling Coconspirators)

have effectively prevented new market entrants at the distribution level").) The FAC sufficiently alleges market power, including barriers to entry and expansion, to support its § 2 claim.

C. Defendants Engaged in Anticompetitive Conduct

Defendants make four general arguments in an attempt to assert that Orion has not alleged plausible anticompetitive conduct. (Mot. at 21-24.) As detailed below, these arguments do not help their cause. First, Defendants repeat their argument that Orion's alleged conspiracy is not plausible and therefore Orion's Section 2 claim is not plausible. (Mot. at 21.) This argument is debunked given that the allegations as a whole support a conspiracy among Defendants and the Settling Co-conspirators to fix prices and allocate the market. (*See* Section I, *supra*.)

Second, Defendants assert that charging monopoly prices is not an antitrust violation. (Mot. at 22 (quoting *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407, (2004)).) In *FreeHand*, the Court expressly rejected such an argument that also relied on *Trinko*:

> Adobe's claim that an alleged monopolist is "entitled" to raise prices relies on a quotation from a Supreme Court opinion that discussed the lawfulness of raising prices when a monopoly is acquired lawfully. … Although the [Supreme] Court stated that the "mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system," **the Court made clear that "monopoly power is unlawful [if] it is accompanied by an element of anticompetitive *conduct.*"**

FreeHand, 852 F. Supp. 2d at 1181 (quoting *Trinko*, 540 U.S. at 407) (emphasis added). The Court held in that case that Adobe was *not* lawfully entitled to raise prices in view of its alleged anticompetitive conduct, which included acquiring monopoly power through acquisition, discontinuing a product, and directing that product's customers to Adobe. *Id.* ("Thus, in the context of the facts as pled, and read in the light most favorable to Plaintiffs, Adobe, as a monopolist engaging in other alleged anticompetitive conduct to maintain that monopoly, would not be lawfully entitled to raise prices."). Here, as alleged in the FAC, Ningbo Sunny obtained monopoly power through its collusion with the Settling Co-Conspirators, which included, *inter alia*, acquiring Meade (the last major independent distributor aside from Orion), fixing prices, and dividing the market. (FAC ¶¶ 33 n.1, 34-36, 46-47; *see* Section I, *supra*.) Thus, similar to the defendant in *FreeHand*, Defendants here were not lawfully allowed to charge monopoly prices given their anticompetitive conduct.

Defendants' third argument again relies on *Trinko* for the general proposition that "no one, not even a monopolist, has a general duty to do business with another entity." (Mot. at 22 (citing *Trinko*, 540 U.S. at 408).) However, Defendants again fail to recognize (or intentionally ignore) the Supreme Court's qualifying words. As the Court made clear, "'[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.' Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2." *Trinko*, 540 U.S. at 408 (quoting *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985)); s*ee also Packaging Sys., Inc. v. PRC-Desoto Int'l, Inc.*, 268 F. Supp. 3d 1071, 1080–81 (C.D. Cal. 2017) ("This rule [that businesses are free to choose the parties with whom they deal], however, is not absolute."). Here, Orion alleges that Ningbo Sunny abruptly began refusing to deal with Orion after the original complaint was filed. (FAC ¶ 111.) Like the parties in *Aspen Skiing*, Orion and Ningbo Sunny have previously done business together where Orion would rely on Ningbo Sunny for certain telescope products. (*Id.* ¶¶ 28, 31, 43, 62.) Yet, starting in late 2016, Ningbo Sunny abruptly refused and continues to refuse to accept Orion's purchase orders. (*Id.* ¶¶ 112-14.) Orion makes up about 15% of U.S. sales in telescope distribution – it makes no economic sense why Ningbo Sunny would ignore or turn down such business especially where Orion has no alternative source of supply for several products that Ningbo Sunny manufactures. (*Id.* ¶¶ 43, 45, 48.)[5]

Defendants' last argument against Orion's § 2 claim relies merely on semantics. (Mot. at 23 (quoting FAC ¶ 133 and adding emphasis to "Settling Coconspirators" and "telescopes in the United States").) Orion does not allege monopolization or attempted monopolization based on a shared or joint monopoly. (FAC ¶ 33 n.1 ("Absent such concerted dealings between would-be competitors, Ningbo Sunny would hold no monopoly power."), 33 ("Ningbo Sunny and the

[5] To the extent Defendants' argument hinges on whether Ningbo Sunny's decision to refuse to deal with Plaintiff is a valid business decision, such an argument is not appropriate for this stage of the proceeding. *FreeHand*, 852 F. Supp. 2d at 1182 ("[T]he existence of valid business reasons in antitrust cases is generally a question of fact not appropriate for resolution at the motion to dismiss stage." (quoting *Tucker v. Apple Comput., Inc.*, 493 F. Supp. 2d 1090, 1101 (N.D. Cal. 2006) (citing *SmileCare Dental Group*, 88 F.3d at 786))).

Settling Manufacturer *each* have a monopoly over the respective products each sells Orion." (emphasis added).) Defendants' argument based on a shared or joint monopoly thus fails.

III. ORION HAS STANDING UNDER CLAYTON ACT § 7

The Court's prior Order stated that Orion had not plausibly identified an antitrust injury resulting from Ningbo Sunny's acquisition of Meade because the complaint failed to show how the effect on competition would have been any different had another competitor acquired Meade. (Order at 11.) The FAC addresses this issue by showing that had Defendants not acquired Meade, it would have ended up in the hands of a company that has not conspired with Defendants and the Settling Co-Conspirators. (FAC ¶¶ 74-79.) And it further explains that Orion, itself, was one of the bidders. (*Id*. ¶¶ 94, 120.)

Defendants' acquisition of Meade injured the market by preventing a non-conspirator from owning Meade's critical IP. (FAC ¶¶ 77-79, 94, 120.) Distributing the IP owned by Meade to a company that was not in collusion with Defendants would have helped eliminate one of the barriers to entry into manufacturing. Defendants' acquisition of Meade also barred a non-conspirator with its own manufacturing facility from owning Meade's manufacturing capabilities. (*Id*. ¶¶ 46-47, 118, 120.) This would have increased competition by creating a potentially viable third source for manufacturing that could actually compete against Ningbo Sunny and the Settling Manufacturer. Enabling competition and preventing a monopolist from further entrenching itself and increasing its monopoly is the exact type of injury the antitrust laws are supposed to protect against. *Glen Holly Entm't, Inc. v. Tektronix Inc.*, 343 F.3d 1000, 1009-11 (9th Cir. 2003).

Moreover, Orion's Section 7 claim is based on Ningbo Sunny's acquisition of Meade as a result of the collusion between Ningbo Sunny and the Settling Manufacturer. (FAC ¶ 133.) The FTC had previously blocked the Settling Manufacturer from acquiring Meade in 2002 given that the acquisition would "violate the FTC Act and Section 7 of the Clayton Act," "eliminate substantial actual competition," "likely result in anticompetitive activity in the two markets at issue," and "that entry into the relevant telescope markets sufficient to deter or counteract the anticompetitive effects of the proposed acquisition is unlikely to occur." (*Id.* ¶ 91.) Yet, despite such findings, Ningbo Sunny colluded with the Settling Manufacturer to acquire Meade without

full disclosure to the FTC (*id.* ¶¶ 92-93), and the FAC alleges the same types of competitive harms the FTC sought to avoid in trying to prevent the merger. (*E.g.*, FAC ¶¶ 37-42, 94-95.) Taken in conjunction with the new allegations in the FAC, these facts further establish a viable claim for antitrust injury at the pleading stage. *See Purex Corp. v. Procter & Gamble Co.*, 596 F.2d 881, 888 (9th Cir. 1979) (reversing dismissal for failure to show antitrust injury based on FTC findings and failure to view allegations as a whole).

IV. ORION HAS STATED CLAIMS UNDER CALIFORNIA LAW

Orion has sufficiently stated claims for unfair competition and collusion to restrain trade under Cal. Bus. & Prof. Code §§ 17200 *et seq.* and Cal. Bus. & Prof. Code §§ 16700 *et seq.*, respectively. Because Defendants only challenge Orion's state law claims on the basis of its federal antitrust claims – which Orion has sufficiently pled as discussed above – Defendants' motion to dismiss the state law claims should be denied. *See, e.g., Killian Pest Control, Inc. v. HomeTeam Pest Def., Inc.*, No. 14-CV-05239-VC, 2015 WL 13385918, at *5 (N.D. Cal. Dec. 21, 2015) ("Because [the] Sherman Act section 2 claim survives, [the] state-law antitrust claims also survive. Likewise, [the] California Unfair Competition Law claim survives because [defendant's] allegedly unlawful conduct consists solely of the antitrust violations, and so the UCL claim stands or falls with those antitrust claims."); *Solyndra*, 62 F. Supp. 3d 1027, 1046 (N.D. Cal. 2014) ("Plaintiff has sufficiently stated a claim for violation of the Sherman Act. For the same reasons, Plaintiff has also sufficiently stated a claim for relief under the Cartwright Act."); *Dang v. San Francisco Forty Niners*, 964 F. Supp. 2d 1097, 1115 (N.D. Cal. 2013) (holding Plaintiff stated viable causes of action under Cal. Bus. & Prof. Code §§ 17200 *et seq.* where plaintiff stated viable federal and state antitrust claims). Accordingly, Orion's state law claims survive dismissal.

CONCLUSION

For the foregoing reasons, Defendants' Motion should be denied.[6]

[6] If the Court finds any defects in the FAC, this should not be the final frontier. Leave to amend is freely granted, especially where all the evidence is exclusively within Defendants' control, and they had produced but one email at the time the FAC was written. *See, e.g., Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962) ("summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators").

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