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4 UNITED STATES DISTRICT COURT  
5 NORTHERN DISTRICT OF CALIFORNIA  
6 SAN JOSE DIVISION

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8 OPTRONIC TECHNOLOGIES, INC,

9 Orion,

10 v.

11 NINGBO SUNNY ELECTRONIC CO.,  
LTD., et al.,

12 Defendants.

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

**SECOND ORDER RE MOTION IN  
LIMINE AND OTHER PRETRIAL  
MOTIONS**

Re: Dkt. Nos. 258, 321, 324, 329

13 After holding the final pretrial conference on October 10 and 11, 2019, the court issued an  
14 order addressing certain of the motions *in limine* and other pretrial motions (Dkt. No. 403) and  
15 continued the conference to October 16, 2019. This order addresses the four motions that remain  
16 pending: Orion's Motion to Exclude the Testimony of Mr. Redman (Dkt. No. 258), Defendants'  
17 Motion *In Limine* No. 6 (Dkt. No. 321), Defendants' Motion *In Limine* No. 8 (Dkt. No. 324), and  
18 Orion's Motion *In Limine* No. 1 (Dkt. No. 329).

19 ***I. Orion's Motion to Exclude the Testimony of Mr. Redman (Dkt. No. 258)***

20 Orion seeks to exclude the testimony of Defendants' expert Mr. Jeffrey Dean Redman to  
21 the extent that he seeks to rebut the testimony of Dr. J. Douglas Zona, Orion's damages expert. In  
22 an earlier order, the court excluded his testimony offered in rebuttal of Orion's technical expert  
23 Dr. José Sasian. Dkt. No. 314 at 9-10. While Mr. Redman may be well qualified to testify as a  
24 damages expert in some cases, the court finds that he is not qualified to offer rebuttal testimony to  
25 Dr. Zona's specific analyses. The court grants Orion's motion for the reasons discussed below.  
26 Defendants, of course, may still rely on the rebuttal testimony of their other damages expert, Dr.  
27 Celeste Saravia.

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1 Dr. Zona’s testimony is based on econometric analyses that employ regression models to  
2 calculate Orion’s purported damages. The methodology Dr. Zona uses is known as the “dominant  
3 firm” model. Defendants do not dispute that the dominant firm model is a noncontroversial means  
4 of calculating antitrust damages. However, these analyses are outside of Mr. Redman’s  
5 experience and training. He has 35 years of experience as an expert related to financial matters,  
6 has a B.S. in Management, and is a certified fraud examiner. He currently leads his own financial  
7 forensics firm and has previously worked at the financial consulting and accounting firm Ernst &  
8 Young. However, Mr. Redman has no training in econometrics and is neither an economist nor an  
9 accountant. Redman Dep. 29:6-11. He testified that for antitrust cases he could not remember  
10 ever calculating damages, running a regression, or calculating price elasticity or overcharges. *Id.*  
11 at 29:6-11, 48:12-19, 49:6-19, 55:8-10, 66:7-14, 98:10-21.

12 Mr. Redman’s general lack of relevant experience and training is apparent in his failure to  
13 understand Dr. Zona’s specific calculations and analyses. Mr. Redman does not run his own  
14 regression nor criticize Dr. Zona’s application of the model. Rather, he criticizes Dr. Zona for not  
15 using certain, case-specific data to calculate damages for overcharges. Redman Rep. ¶¶ 11, 19-24,  
16 58. But, Mr. Redman does not appear to understand the methods and models that Dr. Zona used.  
17 Mr. Redman concedes that prior to this case he had not heard of the dominant firm model, that he  
18 could not explain the equation Dr. Zona used to calculate the damages rate used in the empirical  
19 model, that he does not understand what “pass through” means, that he is unfamiliar with the  
20 private cartel data Dr. Zona used, and that Dr. Zona’s structural model are “outside [his] area of  
21 expertise.” Redman Dep. at 231:1-13; 241:4-242:13; 251:15-252:18; 255:5-7; 257:16-24; 258:10-  
22 17. Without understanding Dr. Zona’s models and methods, Mr. Redman’s rebuttal cannot be  
23 reliable. Fed. R. Evid. 702.

24 In *Virginia Vermiculite Ltd. v. W.R. Grace & Co.–Conn*, a district court excluded damages  
25 testimony in an antitrust case because the expert lacked the requisite expertise. 98 F. Supp. 2d  
26 729, 732 (W.D. Va. 2000). The court noted that the witness at issue had experience with  
27 determining markets for investment purposes, but that did not transfer to determining markets for  
28 antitrust analyses: “Though related to a relevant market determination in an antitrust issue, there  
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1 are differences between an analysis for business investment and an analysis for antitrust  
2 purposes.” *Id.* The court further noted that the at-issue witness “lack[ed] a clear understanding of  
3 basic economic principles. For instance, [the witness] admitted he was unfamiliar with the  
4 dominant firm theory in economics.” *Id.* at 734. In *Rothe Dev., Inc. v. Dep’t of Def.*, the district  
5 court excluded the testimony of a witness seeking to rebut two expert reports from economists,  
6 one of which used regression analyses. 107 F. Supp. 3d 183, 203 (D.D.C. 2015), *aff’d sub nom.*  
7 *Rothe Dev., Inc. v. United States Dep’t of Def.*, 836 F.3d 57 (D.C. Cir. 2016). The court noted that  
8 the witness had never run a regression before, and found that “[b]ased on [the witness’s] own  
9 admissions regarding his lack of training, education, knowledge, skill, and experience in any  
10 statistical or econometric methodology, [he] is plainly unqualified to testify as an expert with  
11 respect to [the opposing experts’] reports.” *Id.*; *see also In re Worldcom, Inc.*, 371 B.R. 33, 42  
12 (Bankr. S.D.N.Y. 2007) (excluding testimony of a witness because “[t]here is no nexus between  
13 his credentials and the subject matter of his testimony.”).

14 Mr. Redman has impressive credentials, but he is not qualified to rebut Dr. Zona’s  
15 testimony because it addresses issues outside of Mr. Redman’s expertise and understanding. The  
16 court grants the motion to exclude Mr. Redman’s testimony offered in rebuttal of Dr. Zona.

17 ***II. Defendants’ Motion In Limine No. 6 (Dkt. No. 321)***

18 Defendants seek an order to prevent Orion from offering evidence or argument related to  
19 punitive damages. Orion does not dispute that it may not seek punitive damages on its claims  
20 under federal law or California’s Unfair Competition Law. The parties disagree as to whether  
21 punitive damages are available to Orion on its claim under California’s Cartwright Act.

22 As an initial matter, Orion objects to this motion on the ground that it is a motion for  
23 summary judgment masquerading as a motion *in limine*. Federal courts in California, though,  
24 have considered whether to allow the introduction of evidence going to remedies—including  
25 punitive damages—in motions *in limine*. *See, e.g., Carpenter v. Forest Meadows Owners Ass’n*,  
26 2011 WL 3207778, at \*15-19 (E.D. Cal. July 27, 2011). The court finds this motion is properly  
27 before the court.

28 The Cartwright Act allows a victorious plaintiff to obtain treble damages, injunctive relief,  
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1 and reasonable attorneys’ fees. Cal. Bus. & Prof. Code § 16750(a). This array of remedies arises  
 2 from the Cartwright Act’s “focus[] on the punishment of violators for the larger purpose of  
 3 promoting free competition.” *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 783 (2010). “Private  
 4 damage awards are just a tool by which the[] procompetitive purposes [of the Cartwright Act] are  
 5 carried out: The main purpose of the anti-trust laws is to protect the public from monopolies and  
 6 restraints of trade, and the individual right of action for treble damages is incidental and  
 7 subordinate to that main purpose.” *Id.* (citations and quotations omitted). Under the Cartwright  
 8 Act, the award of treble damages is “mandatory.” *Uneedus v. Cal. Shoppers, Inc.*, 86 Cal. App. 3d  
 9 932, 942 (1978).

10 The court finds that because treble damages are mandatory, punitive damages are  
 11 precluded under the Cartwright Act. Under California law, punitive damages, like treble damages,  
 12 are a “way of punishing the defendant.” Cal. Civ. Code § 3294(a). “[W]here a statute provides a  
 13 remedy that is punitive in nature, a plaintiff may not recover punitive damages in addition to the  
 14 punitive statutory damages.” *Doran v. Embassy Suites Hotel*, 2002 WL 1968166, at \*2 (N.D. Cal.  
 15 Aug. 26, 2002). In *Turnbull & Turnbull v. ARA Transp., Inc.*, the Court of Appeal held that where  
 16 a plaintiff was entitled to mandatory treble damages on predatory pricing claims based on  
 17 California’s Unfair Practices Act, that plaintiff was “not entitled to both remedies,” —*i.e.*, punitive  
 18 and treble damages—and could only receive the mandatory treble damages. 219 Cal. App. 3d  
 19 811, 826-27 (1990), *reh’g denied and opinion modified* (May 19, 1990). If Orion prevails on its  
 20 Cartwright Act claim, then it will be entitled to mandatory treble damages; thus, punitive damages  
 21 would not be available to Orion. Defendants’ motion *in limine* No. 6 is granted.

22 **III. Defendants’ Motion In Limine No. 8 (Dkt. No. 324)**

23 Defendants style their *Limine* Motion No. 8 as a motion to “preclude questioning or  
 24 testimony that simply reads a document into the record,” but their intention appears to be to  
 25 preclude the examination of the President of Defendant Meade, Victor Aniceto, on a particular  
 26 document. Orion contends that an alleged third-party coconspirator has taken equity in Meade and  
 27 that Mr. Aniceto received a document created by Meade’s finance director that shows this equity  
 28 interest. Orion questioned Mr. Aniceto about this document during his deposition. When

1 Defendants' counsel questioned him about the document, Mr. Aniceto testified that he had not  
2 read the document in question prior to his deposition. Now Defendants seek an order precluding  
3 Orion from introducing the portions of his deposition testimony relating to the document and  
4 prohibiting both parties from eliciting live testimony from a witness regarding documents of  
5 which the witness has no personal knowledge.

6 This motion is premature and overly broad. "A witness may testify to a matter only if  
7 evidence is introduced sufficient to support a finding that the witness has personal knowledge of  
8 the matter. Evidence to prove personal knowledge may consist of the witness's own testimony."  
9 Fed. R. Evid. 602. Orion may call Mr. Aniceto and Orion may attempt to lay a foundation to  
10 support questioning him on the document at issue. The court will consider any objections to this  
11 line of questioning at trial.

12 ***IV. Orion's Motion In Limine No. 1 (Dkt. No. 329)***

13 Before initiating this litigation, Orion entered into a Settlement Agreement with a  
14 collection of businesses (the "Synta Entities"), which manufacture and distribute telescopes. On  
15 the same day that they executed the Settlement Agreement, September 14, 2016, they also  
16 executed a Supply Agreement for Orion to purchase telescopes from the Synta Entities with the  
17 benefit of "Most Favored Customer Pricing." Ex A at 12; Ex. B at 5, 18. In this litigation, Orion  
18 alleges the Synta Entities conspired with Defendants to violate antitrust laws. Orion seeks an  
19 order that (1) the parties may discuss the fact of the Settlement Agreement and may identify the  
20 parties to the Settlement Agreement, and (2) the parties may not discuss the terms or substance of  
21 the Settlement Agreement. Defendants agree that the existence and signatories of the Settlement  
22 Agreement should be admitted, but they oppose the motion so far as the motion seeks to exclude  
23 the substance of the Settlement Agreement and the Supply Agreement. The court has considered  
24 the parties' papers and heard two days of oral argument on this issue. The court orders as follows.

25 To begin, at the hearing on October 16, 2019, the parties agreed that they would stipulate  
26 to a statement that the court will read to the jury that will disclose the fact of the Settlement  
27 Agreement, the parties to the Settlement Agreement, and the date of the Settlement Agreement.  
28 The parties shall file this stipulation with the court on or before noon on October 21, 2019. The  
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1 purpose of this statement is to prevent and/or cure any juror confusion as to why the Synta Entities  
2 are not at trial.

3 Before the court, Defendants largely abandoned their position that the court should admit  
4 almost all of the Settlement Agreement, in addition to the Supply Agreement. Instead, they argue  
5 that the Supply Agreement—specifically section 4—should be admitted. Orion contends that the  
6 Supply Agreement cannot escape the gravitational pull of Rule 408. Rule 408 provides:

7 (a) Prohibited Uses. Evidence of the following is not  
8 admissible--on behalf of any party--either to prove or disprove the  
9 validity or amount of a disputed claim or to impeach by a prior  
10 inconsistent statement or a contradiction:

11 (1) furnishing, promising, or offering--or accepting,  
12 promising to accept, or offering to accept--a valuable consideration  
13 in compromising or attempting to compromise the claim; and

14 (2) conduct or a statement made during compromise  
15 negotiations about the claim--except when offered in a criminal case  
16 and when the negotiations related to a claim by a public office in the  
17 exercise of its regulatory, investigative, or enforcement authority.

18 (b) Exceptions. The court may admit this evidence for  
19 another purpose, such as proving a witness's bias or prejudice,  
20 negating a contention of undue delay, or proving an effort to obstruct  
21 a criminal investigation or prosecution.

22 Defendants seek to introduce the Supply Agreement as evidence showing that the alleged  
23 conspiracy between them and the Synta Entities ended on its effective date because the Supply  
24 Agreement provides for Orion to purchase telescopes directly from the Synta Entities at “Most  
25 Favored Customer Pricing,” as detailed in Section 4 of the Supply Agreement.

26 Defendants argue that the Supply Agreement does not fall within the scope of Rule 408  
27 because it is a forward-looking business contract. This is a close issue, but after thoughtful  
28 consideration, the court agrees with Defendants. The Supply Agreement does not fall within the  
scope of the plain text of Rule 408. The Settlement Agreement and the Supply Agreement are  
separate documents. The Settlement Agreement was executed by ten separate entities, while the  
Supply Agreement applies only to Orion, Suzhou Synta Optical Technology Co. Ltd., and  
Nantong Schmidt Opto-Electrical Technology Co. Ltd. *Compare* Ex. A at 11-13 *with* Ex. B. at  
18. The Supply Agreement, standing alone, is only a business document. It makes no reference to  
the Settlement Agreement, nor any legal threats or disputes between the Synta Entities and Orion.

Admitting the Supply Agreement therefore would not be admitting “[e]vidence of . . . furnishing,

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1 promising, or offering--or accepting, promising to accept, or offering to accept--a valuable  
2 consideration *in compromising or attempting to compromise the claim.*” Fed. R. Evid. 408(a)(1)  
3 (emphasis added); *cf. Union Carbide Corp. v. Montell N.V.*, 28 F. Supp. 2d 833, 841 (S.D.N.Y.  
4 1998) (finding Rule 408 did not apply because, in part, “[s]uch discussions and documents  
5 comprised business communications rather than settlement negotiations.”). Orion contends that  
6 the Settlement Agreement incorporates the Supply Agreement so that “the execution and  
7 performance” of the Supply Agreement is a “material term and condition” of the Settlement  
8 Agreement and is “consideration to Orion.” Ex. A at 1. But that provision *of the Settlement*  
9 *Agreement* neither transforms the *Supply Agreement* into evidence of the compromise, nor  
10 integrates the two documents to the extent that they are inseparable. The jury may consider the  
11 Supply Agreement as part of the business relationship between Orion and the Synta Entities—  
12 which existed prior to the Settlement Agreement—without it acting as evidence of the  
13 compromise between Orion and the Synta Entities.

14 Moreover and as discussed before the court, the practicalities of excluding the Supply  
15 Agreement weigh in favor of its admission. Orion agreed that, should the Supply Agreement be  
16 excluded, it would be “fair” for Defendants to question Orion’s witnesses as to the historical  
17 prices—and any changes thereof—that Orion has paid for telescopes from the Synta Entities—  
18 both before and after the execution of the Settlement and Supply Agreements. Orion also agreed  
19 that Defendants would be free to admit any pricing documents that are outside of the Settlement  
20 Agreement. Defendants argued that Orion’s witnesses may testify that they do not remember the  
21 details of Orion’s pricing and business relationship with the Synta Entities, to which the court  
22 observed that Defendants would be able to use the Supply Agreement to refresh their memories  
23 without introducing it as evidence. This convoluted process would raise form over substance and  
24 would likely confuse the jury.

25 The court finds that Rule 408 does not bar the introduction of the Supply Agreement as  
26 evidence of the historical business relationship between Orion and the Synta Entities. The court,  
27 though, finds that Defendants have not presented a permissible reason for introducing the  
28 Settlement Agreement or any other evidence of the compromise between Orion and the Synta

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Entities. The parties shall meet and confer as directed above.

**IT IS SO ORDERED.**

Dated: October 17, 2019



EDWARD J. DAVILA  
United States District Judge