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OPTRONIC TECHNOLOGIES, INC. d/b/a
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-SVK

JOINT DISCOVERY STATEMENT RE PLAINTIFF'S REQUEST TO COMPEL PRODUCTION OF DOCUMENTS

Compl. Filed: Nov. 1, 2016
First Am. Compl.: Nov. 3, 2017
Trial Date: None Set

Plaintiff Optronic Technologies, Inc. d/b/a Orion Telescopes & Binoculars ("Plaintiff" or "Orion") and Defendants Meade Instruments Corp. ("Meade"), Ningbo Sunny Electronic Co., Ltd. ("Ningbo Sunny"), and Sunny Optics, Inc. ("Sunny Optics") (collectively, "Defendants") submit this Joint Statement regarding the dispute regarding Defendants' document production described below. Fact discovery closes on June 29, 2018, and no trial date has been set. The parties met and conferred on May 15, 2018.

I. Orion's Position

Orion seeks an order compelling Defendants to produce responsive documents in the possession of Defendants' transactional counsel Sheppard, Mullin, Richter & Hampton, LLC ("Sheppard Mullin") relating to the acquisition of Meade by Sunny Optics and Ningbo Sunny.

This is an antitrust case that alleges a market allocation and price-fixing conspiracy by two telescope manufacturers and their vertically integrated distributors. Orion's First Amended Complaint ("FAC") alleges that Ningbo Sunny acquired Meade by conspiring with its competitors, including Suzhou Synta Optical Technology Co. Ltd., Celestron Acquisition LLC ("Celestron"), Synta Technology Corp., and their principal David Shen (collectively, "Synta"), in violation of Section 1 of the Sherman Act. FAC ¶¶ 41-74. Orion also alleges that the Meade acquisition violated the Clayton Act because, *inter alia*, the acquisition unlawfully concentrated manufacturing capabilities in the hands of Defendants and their co-conspirators. FAC ¶¶ 42, 46-47, 91-95, 120.

Orion requested production of Ningbo Sunny and Sunny Optics documents relating to the Meade acquisition. *See* **Exhibit 1**, Ningbo Sunny RFP Resps. at 11-12, RFP 1; **Exhibit 2**, Meade RFP Resps. at 11-12, RFP 1. Orion also requested production of documents related to Defendants' interrogatory responses, **Exhibit 2** at 35-36, RFP 27, including an interrogatory that asked Meade to identify "all loans and investments in [Meade] by Synta." **Exhibit 3**, Meade Rog Resps. at 23, Rog. 17. Defendants' response denied that any such loans existed. *Id.* Meade's supplemental response adds only that "Meade is not otherwise aware of any information potentially responsive to this interrogatory." **Exhibit 4**, Meade's Suppl. Rog. Resps. at 31-32, Rog. 17.

Meade's representations were not accurate. For example, a recently produced email chain between Peter Ni (CEO of each of Defendants) and Synta personnel proves there was an agreement between Defendants and Synta to facilitate Ningbo Sunny's acquisition of Meade. As explained in the document, they joined forces to maintain their control of the market and "to prevent JOC," a potential third manufacturer, from obtaining Meade's manufacturing facility. In furtherance of the conspiracy, Synta's subsidiary Celestron (a direct competitor of Meade and Orion) made large advance payments to Sunny and/or Meade. *See* **Exhibit 5**. Celestron's CEO admitted that it did so for the express purpose of "facilitating Sunny & Meade[']s capital requirements," *i.e.*, to help

enable the acquisition. He then explained that, following the deal, the parties would need to arrange alternate funding due to his concern that the arrangement would "need to be disclos[ed]" to Celestron's "auditors and . . . bank," which "may have a negative impact on Celestron's relationship with the bank." *Id*. Ni's reply directly acknowledges Defendants' conspiracy:[1]

> At the end of June or beginning of July, I discussed with you about the case of purchasing meade in USA. To prevent JOC to buy MEADE, we decided to purchase MEADE by sunny after discussion. But the premise of this case is CELESTRON / SYNTA should be provided the financial support to SUNNY.

Id. It is thus clear that Defendants' conspiracy was a material part of the Meade acquisition.

Having discovered this email, Orion wrote Defendants on May 7 seeking confirmation that their document productions would include responsive material regarding the Meade transaction in the possession of Defendants' transactional counsel at Sheppard Mullin, who also serves as Defendants' counsel in this action.[2] The parties met and conferred on May 15. Defendants have refused to produce any responsive information or evidence in Sheppard Mullin's possession, alleging that the firm was not an identified "custodian" for production purposes. But that is immaterial, as Defendants agreed in writing that the parties must produce responsive documents of which they are aware, even if they are outside the custodial search process (highlights added)[3]:

> Finally, we agree that if either party has knowledge of responsive documents outside the custodial search and review process, it should produce them. The agreed-upon search terms and custodians will fulfill each side's obligation to search for and review custodial documents.

Accordingly, responsive documents held by Sheppard Mullin must be produced, as Defendants cannot argue that they were unaware of documents maintained by Defendants' counsel.

Defendants contend that this discovery is irrelevant, but Orion is entitled to test

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[1] This email contradicts Defendants' response to Meade Interrogatory 17: Just as a seller who provides interest-free credit for purchases is providing a loan, a buyer who provides interest-free advance payments is also providing a loan—particularly where the buyer expressly does so to support the seller. Orion accordingly requests that the Court order Defendants to supplement their response to explain, in detail, the Synta-Sunny financing arrangements discussed in this email, including when and how they were negotiated, and to produce any related documents.

[2] Sheppard Mullin attorneys negotiated and executed the Meade deal, including filing FINRA disclosures that reveal simultaneous communications with Defendants and Synta principals, including before public disclosure of the deal. *See* FAC Ex. 1 (ECF No. 41-1).

[3] Defendants misleadingly imply at 4:16-19 *infra* that this agreement was superseded by a later agreement. That's false. In fact, the email quoted by Orion *is itself* the agreement that the parties reported to the Court in ECF No. 77. Orion agrees that this agreement should be enforced.

Defendants' self-serving characterization of these documents, and the evidence of Defendants' conspiracy vis-à-vis the Meade acquisition establishes good cause for this discovery. *See* Fed. R. Civ. P. 26(b)(1). Defendants misleadingly cite dicta in *United States v. Chevron* suggesting that documents in the possession of counsel are presumed immune from discovery; but *Chevron* rejected that presumption as erroneously shifting the burden of proof away from the party claiming privilege. 1996 WL 264769 at *4. Indeed, courts regularly order discovery of due diligence and other transaction-related materials. *See, e.g.*, *Waymo v. Uber*, 2017 WL 2694191, at *5 (N.D. Cal. June 21 2017) (ordering production of due diligence materials exchanged by adverse parties in transaction); *see also Kattawar v. Logistics & Distribution Servs., Inc.*, 2015 WL 11752984, at *6 (W.D. Tenn. Mar. 27, 2015) (compelling production from transactional counsel).[4]

Orion therefore respectfully asks that the Court compel production of documents relating to the Meade transaction in Sheppard Mullin's possession, along with a detailed privilege log.

II. Defendants' Position

Less than two months ago, the parties met and conferred and agreed on the search terms and custodians they would use to generate their respective document productions. The parties memorialized their agreement in a joint statement to the Court. *See* ECF No. 77 (4/13/18 Joint Discovery Status Report) ("The parties have also reached agreement on the search terms and custodians to be used by each side for purposes of reviewing and producing responsive custodial documents."). The parties further stipulated to a deadline for completing all document productions by May 15, 2018, which the Court approved. *See* ECF No. 81.

Pursuant to the parties' agreement, Defendants collected almost one million documents from 16 agreed-upon custodians, and then ran more than one hundred English and Chinese search terms requested by Orion. This expensive and time-consuming process resulted in a document production by Defendants totaling more than 590,000 documents.

Both sides completed their document productions in compliance with the Court's May 15 deadline. Defendants are now actively preparing to take and defend the eleven party and non-party

[4] Defendants mischaracterize both *Kattawar* and *Krieger*, as the portions of these cases Defendants quote relate to *depositions*, not document discovery. 2015 WL 11752984 at *4; 160 F.R.D. at 588.

depositions scheduled to occur between now and the close of all fact discovery on June 29, 2018 (with the first of those depositions to occur in three days).

Orion's demand that Defendants undertake extensive additional custodial document searches and productions comes much too late, and is an improper end-run around the parties' custodian agreement. During the parties' negotiations, Orion knew that Sheppard Mullin served as transactional counsel in connection with the Meade acquisition, including the identities of those attorneys. Orion knew this because almost a year ago, on June 30, 2017, Defendants produced all of the final, signed agreements and letters relating to the Meade acquisition (NSE 12-1298), along with an index (NSE 12-16). These documents clearly identify the outside counsel involved. *See, e.g.,* FAC Ex. 1 (identifying individual attorneys by name). Yet Orion never once raised any request for outside counsel discovery during the parties' negotiations.

Orion highlights the parties' agreement that responsive *non-custodial* documents were not covered by the parties' negotiations regarding custodians and search terms, but *the documents Orion currently seeks are undisputedly custodial documents*. To search for and review these documents, Defendants would need to look through the *custodial email accounts* of Sheppard Mullin attorneys, each containing tens of thousands of irrelevant emails. Moreover, even if these documents could be characterized as "non-custodial," *the parties also reached an express agreement on non-custodial documents*—and once again, Orion never once raised the issue of outside counsel discovery during that process. *See* ECF No. 77 ("The parties have likewise agreed on the non-custodial documents (e.g. transactional data) they will search for and produce, to the extent maintained in the ordinary course of business."). The Court should enforce the parties' agreements regarding the scope of discovery.

Even putting aside the procedural unfairness of Orion's attempt to reopen the document production process, Orion cannot explain why documents and communications created by Defendants' outside counsel have any relevance to this case. Orion does not allege that Sheppard Mullin attorneys participated or acted in furtherance of any unlawful conspiracy, or that the drafting of the underlying contracts was somehow unlawful. Similarly, to the extent Orion seeks to challenge the Meade acquisition under Section 7 of the Clayton Act, that claim turns entirely on the *competitive*

effects of the acquisition, not on outside counsel's communications and drafting. *See* 15 U.S.C. § 18 (prohibiting certain mergers only where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.").

And even if Orion could explain how outside counsel's documents are relevant, it is likely that most, if not all, of the documents will be protected by the attorney-client privilege or attorney work product doctrine. *See United States v. Chevron Corp*., 1996 WL 264769, *8-9 (N.D. Cal. Mar. 13, 1996) (finding "presumption that all communications to outside counsel are primarily related to legal advice…logical since outside counsel would not ordinarily be involved in the business decisions of a corporation"; declining to apply presumption to *in-house* counsel documents). It would be unduly burdensome and not proportional to the needs of the case to require Defendants to undertake the expensive process of sifting out the few, if any, nonprivileged documents in these custodial files.

Numerous courts have recognized that discovery targeting opposing counsel "should be permitted only in limited circumstances" because of an inherent "potential for abuse." *See American Casualty Co. v. Krieger*, 160 F.R.D. 582, 588 (S.D. Cal. 1995). Orion's cited authorities only serve to underscore that point. *Waymo*, 2017 WL 2694191 at *5, bears no resemblance to this case: there, a third-party "forensic expert" retained by one of the parties was ordered to produce a "Due Diligence Report" investigating the employees of an acquisition target. In *Kattawar*, 2015 WL 11752984 at *4 & n. 3, the court joined other courts in holding that document requests targeting opposing counsel generally should only be permitted where "no other means exist to obtain the information," "the information is relevant and nonprivileged," and "the information is crucial to the preparation of the case," but broke from those cases by declining to apply those requirements where the law firm in question did not serve as "trial or litigation counsel." *Id.* at *5. By contrast, here Sheppard Mullin *is* Defendants' trial and litigation counsel. Orion does not even try to argue that the strict requirements of *Kattawar* (and many other cases) are satisfied here.[5]

[5] Regarding Interrogatory No. 17, Defendants explained during the meet and confer process that payments from Celestron were for telescope purchases; they were not "loans" or "investments."

Dated: May 22, 2018

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By *_/s/ Leo D. Caseria_*
LEO D. CASERIA

Attorneys for NINGBO SUNNY ELECTRONIC CO., LTD., SUNNY OPTICS, INC., and MEADE INSTRUMENTS CORP.

Dated: May 22, 2018

BRAUNHAGEY & BORDEN, LLP

By *_/s/ J. Noah Hagey_*
J. NOAH HAGEY

Attorneys for Plaintiff OPTRONIC TECHNOLOGIES INC. d/b/a Orion Telescopes & Binoculars®

ATTESTATION

Pursuant to Civil Local Rule 5-1(i)(3), I, J. Noah Hagey, attest that all signatories listed, and on whose behalf the filing is submitted, concur in the filing's content and have authorized the filing.

*_/s/ J. Noah Hagey_*
J. NOAH HAGEY

Attorney for Plaintiff OPTRONIC TECHNOLOGIES INC. d/b/a Orion Telescopes & Binoculars®