

1 UNITED STATES DISTRICT COURT  
 2 NORTHERN DISTRICT OF CALIFORNIA  
 3 SAN JOSE DIVISION

4 OPTRONIC TECHNOLOGIES, INC,

5 Plaintiff,

6 v.

7 NINGBO SUNNY ELECTRONIC CO.,  
 8 LTD., et al.,

9 Defendants.

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

**ORDER RE MOTION FOR ORDER TO  
 SHOW CAUSE**

Re: Dkt. No. 578

10 Plaintiff Optronics Technologies, Inc. (“Orion”) has moved the Court for an Order to Show  
 11 Cause why Defendant Ningbo Sunny Electronic Co., Ltd. (“Ningbo Sunny”) should not be  
 12 sanctioned under the Court’s inherent authority for making false representations to the Court. The  
 13 Court has considered the parties’ papers and heard their oral arguments. For the reasons discussed  
 14 below, the Court will exercise its inherent power to sanction Ningbo Sunny to punish its bad faith  
 15 conduct.

16 I. Background

17 On November 26, 2019, and after a six-week trial, the jury entered a verdict in Orion’s  
 18 favor on all counts. The jury found that Ningbo Sunny conspired with horizontal and vertical  
 19 competitors to fix the price of telescopes, allocate the market for telescopes and accessories, and  
 20 allocate customers. Dkt. No. 501. It also found that Ningbo Sunny engaged in anticompetitive  
 21 activity, attempted to monopolize, and conspired to monopolize the market for telescopes and  
 22 accessories. *Id.* On December 5, 2019, the Court entered a partial judgment on Orion’s damages  
 23 claims awarding Orion \$50,400,000 after trebling. Dkt. No 518.

24 After the jury returned its verdict, Orion orally moved the Court for an order restraining  
 25 Ningbo Sunny from removing assets—specifically, accounts receivable—from the United States.  
 26 Trial Tr. 2822. The Court set a briefing schedule, Orion filed an application for a temporary  
 27 restraining order (the “First TRO Application”), Ningbo Sunny opposed, and Orion filed a reply.

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1 Trial Tr. 2836-37; Dkt. Nos. 509, 510, 513. The Court held a hearing on the matter on December  
2 5, 2019 (the “December 5 Hearing”) (Dkt. Nos. 514, 520).

3 At the December 5 Hearing, the Court repeatedly asked Ningbo Sunny’s counsel whether  
4 Ningbo Sunny could provide assurance to Orion and the Court that it would not frustrate  
5 enforcement of the judgment by transferring its assets outside of the United States. Dkt. No. 520  
6 at 18:23-25 (“Can you give assurances to counsel and the Court that assets aren’t going to be  
7 shipped offshore such that the relief requested would not be necessary?”), 23:16-18 (“[W]hat kind  
8 assurances can your client give to Plaintiff that they’re not going to engage in the conduct that  
9 [Plaintiff’s counsel] suggests and is fearful of, short of a court order?”), 23:24-24:7 (“I think what  
10 [Plaintiff’s counsel] is saying is that can we just get some assurance that you’re not going to  
11 engage in . . . any type of shenanigans where you’re going to hide assets outside of the country to  
12 avoid judgment? . . . The things that a restraining order would accomplish, can your client just say  
13 we’re not going to do that and we tell the Court we’re not going to do that.”). Ningbo Sunny’s  
14 counsel responded that it sought to continue operations “in the ordinary course of business as we  
15 have,” and that “we may be able to find some way to provide some reassurance to my friends  
16 across the aisle here that that’s what is happening.” Dkt. No. 520 at 26:14-15, 27:3-8. The Court  
17 in turn noted that “there’s historical evidence of how you do business, your payments et cetera to  
18 offsite. . . . As the case goes forward, if there’s deviation in that . . . [then] that’s a little concern,  
19 isn’t it? That would draw some eyes.” *Id.* at 27:11-17. Less than a week later, Ningbo Sunny  
20 filed a declaration from its President Peter Ni, dated December 10, 2019 (the “Ni Declaration”),  
21 that stated, in relevant part, “Ningbo [Sunny] will not transfer any of its cash or other assets  
22 located in the United States to a location outside of the United States other than in the ordinary  
23 course of business while post-trial motions and appeals remain pending.” Dkt. No. 521-1. The  
24 Court then denied that the First TRO Application. Dkt. No. 524.

25 During the December 5 Hearing, Ningbo Sunny also expressed concern that the Court  
26 would lift the Federal Rule of Civil Procedure 62(a) 30-day stay of enforcement of the judgment.  
27 Dkt. No. 520 at 9:12-20. The stay was set to expire on January 5, 2020.

28 After hearing from the parties the Court did not lift the stay.

1 At the time that Ningbo Sunny filed the Ni Declaration, it knew that Celestron—one of  
2 Defendants’ co-conspirators that settled with Orion pre-suit—owed Ningbo Sunny approximately  
3 \$4 million in accounts receivable. *See* Borden Ex. 1 at 3-7.<sup>1</sup> Per the supply agreements between  
4 Celestron and Ningbo Sunny, Celestron has a standard 100-day window to make payments.  
5 Borden Exs. 5 at 4, 6 at 8. On January 1, 2020, James Qiu,<sup>2</sup> an executive at Ningbo Sunny, sent  
6 an email to Celestron stating, “[o]ur factory has a very tight cash flow at the moment. We are  
7 foaced [*sic*] with bank loan collection and suppliers demand payment recently. Could you pay as  
8 much payment as possible this week? Thank you in advance for your supports!” Borden Ex. 1 at 2  
9 (the “Qiu Email”). According to a remittance produced by Celestron (the “Remittance”), the next  
10 day Celestron paid \$4,184,057.70 to Ningbo Sunny’s account with the Agricultural Bank of  
11 China. *Id.* at 3.

12 Four days later, Orion brought its second application for an order restraining Ningbo  
13 Sunny from removing assets from the United States (the “Second TRO Application”). Dkt. No.  
14 537. Ningbo Sunny opposed the motion arguing that Orion had not shown any need for the TRO  
15 and emphasizing the Ni Declaration. Dkt. No. 548 at 6. The Court denied the Second TRO  
16 Application finding that Orion had not shown more than speculation that Ningbo Sunny would  
17 improperly remove assets from the United States. Dkt. No. 559 at 5.

18 In the course of post-judgment discovery, Orion propounded a request for “[d]ocuments  
19 concerning all payments made to each Defendant by or on behalf of its respective customers or  
20 distributors located in the United States.” Borden Ex. 4 at 8. On January 30, 2020, Ningbo Sunny  
21 produced documents in response. While Ningbo Sunny produced over 70 emails between Qiu and  
22 Celestron dated on or after January 1, 2020, it did not produce the Qiu Email or the Remittance.  
23 Borden Decl. ¶ 5; Reply Borden Decl. ¶ 2 & Ex. 1. Celestron though produced both documents on  
24 February 10, 2020. Borden Decl. ¶ 2.

## 25 II. Discussion

26 “Federal courts possess certain inherent powers, not conferred by rule or statute, to manage

27 <sup>1</sup> Pincites to the exhibits attached to the Borden Declaration go to the ECF-generated pagination.

28 <sup>2</sup> Also spelled “Chiu.” Opp’n at 2.

1 their own affairs so as to achieve the orderly and expeditious disposition of cases. That authority  
 2 includes the ability to fashion an appropriate sanction for conduct which abuses the judicial  
 3 process.” *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017) (quotations and  
 4 citations omitted). The Ninth Circuit has held that a specific finding of “bad faith” is required  
 5 before a district court imposes sanctions under its inherent authority. *See, e.g., Christian v.*  
 6 *Mattel, Inc.*, 286 F.3d 1118, 1131 (9th Cir. 2002); *Fink v. Gomez*, 239 F.3d 989, 992 (9th Cir.  
 7 2001). Courts must exercise discretion and restraint when fashioning such a sanction so that the  
 8 sanction is appropriate for the misconduct. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991).  
 9 Before exercising its inherent powers to sanction a party, a court must provide that party with the  
 10 opportunity to explain its conduct. *See In re DeVille*, 361 F.3d 539, 548 (9th Cir. 2004).

11 As an initial matter, this Court finds that by setting a briefing schedule in advance of a  
 12 hearing on the instant motion, the Court has provided Ningbo Sunny with sufficient notice of  
 13 Orion’s allegations of misconduct and of the Court’s sanctioning authority, and with adequate  
 14 opportunity—both in writing and through oral argument—to respond. *See id.* Due process is  
 15 satisfied in this matter, so that the Court now considers whether to issue sanctions rather than  
 16 whether to issue an order to show cause. *Cf. id.*

17 Turning to the substance, Orion argues that Ningbo Sunny’s request that Celestron pay its  
 18 \$4 million debt just days before the Rule 62(a) stay was set to expire shows that the Ni  
 19 Declaration was made in bad faith. In opposition, Ningbo Sunny’s main argument is that the early  
 20 payment was within the ordinary course of business so that the Ni Declaration was not false.  
 21 Ningbo Sunny does not make any arguments concerning the exercise of the Court’s inherent  
 22 authority.

23 The evidence is contrary to Ningbo Sunny’s argument. The “ordinary course of business”  
 24 means “[t]he normal routine in managing a trade or business.” *Nimkoff Rosenfeld & Schechter,*  
 25 *LLP v. RKO Properties, Ltd.*, 2011 WL 8955840, at \*5 (S.D.N.Y. Apr. 7, 2011) (quoting Black’s  
 26 Law Dictionary 404 (9th ed.2009)). The evidence in this case strongly suggests that the transfer  
 27 indicated by the Qiu Email and the Remittance was outside the ordinary course of business. First,  
 28 the very fact that Ningbo Sunny had to request the payment suggests that it was not within “the

1 normal routine” of Ningbo Sunny and Celestron. Second, the Remittance shows most of the  
 2 money paid was not yet due; rather Ningbo Sunny requested *early* payment. Borden Exs. 1 at 3-7,  
 3 5 at 4, 6 at 8. The declaration of Qiu and the attached exhibits—filed by Ningbo Sunny in support  
 4 of its opposition—also show that the Qiu Email and the requested early payment was outside the  
 5 ordinary course of business. Qiu declares that Celestron paid Ningbo Sunny between \$7.7 million  
 6 and \$4.2 million during the months of January and February in 2016, 2017, 2018, and 2019. Qiu  
 7 Decl. ¶ 5; Qui Ex. A. But in those years, the total payments were made through several smaller  
 8 installments over several weeks going as late as the end of February. Qiu Decl. ¶ 5; Qui Ex. A.  
 9 The Qiu Email directed the entire amount due be paid within a week. Borden Ex. 1 at 2.  
 10 Similarly, in Qiu’s January 28, 2019 email to Celestron, he requested partial payment of  
 11 Celestron’s overdue debts. Qiu Ex. B. This year, by contrast, he requested full payment of all  
 12 debts, even those that were not yet due. Borden Ex. 1. The evidence indicates that the historical  
 13 practice between Ningbo Sunny and Celestron did not include requests for full, early payment of  
 14 all debts within a week of notice. Ningbo Sunny’s conduct was outside the normal course of  
 15 business.

16 Significantly and most troubling, Ningbo Sunny’s failure to produce both the Qiu Email  
 17 and the Remittance in discovery is evidence of consciousness of guilt—that Ningbo Sunny  
 18 understood that the documents would show it’s conduct contradicted the Ni Declaration. In a  
 19 footnote, Ningbo Sunny argued that it construed the time period encompassed by Orion’s  
 20 document request as ending on the day it was served—December 31, 2019. Opp’n at 4 n.1. But  
 21 that argument is belied by the fact that Ningbo Sunny produced over 70 emails between Qui and  
 22 Celestron dated after January 1, 2020. Borden Reply Decl. ¶ 2 & Ex. 1.

23 The Court finds that the totality of the circumstances and the evidence show that Ningbo  
 24 Sunny made the Ni Declaration in bad faith. The Court “does not countenance evasive and  
 25 misleading representations to the Court.” *Madrid v. Woodford*, 2004 WL 2623924, at \*13 n.11  
 26 (N.D. Cal. Nov. 17, 2004) (issuing order to show cause why party should not be sanctioned under  
 27 the court’s inherent power). Ningbo Sunny affirmatively relied on the Ni Declaration in opposing  
 28 the First and Second TRO Applications, and the Court had no reason to question the veracity of

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1 the Ni Declaration nor counsel’s representations and filings. Sanctions are appropriate.

2 III. Conclusion

3 For the reasons discussed above, the Court will exercise its inherent authority to sanction  
4 Ningbo Sunny. The Court orders as follows:

5 1. No later than March 23, 2020, Ningbo Sunny shall pay Orion the \$4,184,057  
6 Defendant received from Celestron.

7 2. Ningbo Sunny is enjoined from transferring assets outside the United States until  
8 such time as either (1) Orion collects the judgment money owed by Ningbo Sunny, or (2) Ningbo  
9 Sunny posts a bond sufficient to satisfy the Court’s judgment.

10 3. No later than March 16, 2020, Ningbo Sunny shall provide to Orion a declaration,  
11 which is signed and made under penalty of perjury, describing the actions it has taken to ensure  
12 that it complied with its post-judgment discovery obligations.

13 4. Orion may serve expedited discovery, with responses due one week after service, to  
14 determine what, if any, other improper transfers Ningbo Sunny caused or accepted, or whether  
15 anyone else aided or abetted these transfers.

16 5. No later than March 16, 2020, Ningbo Sunny shall identify all planned and actual  
17 sales of product made by Ningbo Sunny into the United States, whether directly or through an  
18 intermediary such as Celestron.

19 6. Orion may register the Court’s Judgment in federal districts outside of California  
20 under 28 U.S.C. § 1963.

21 7. Ningbo Sunny shall pay reasonable attorney’s fees and costs incurred by Orion in  
22 connection with this motion. No later than March 20, 2020, Orion shall submit an application for  
23 such fees and costs.

24 **IT IS SO ORDERED.**

25 Dated: March 9, 2020



EDWARD J. DAVILA  
United States District Judge