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7 ATTORNEYS FOR PLAINTIFF  
OPTRONIC TECHNOLOGIES, INC.,  
8 d/b/a ORION TELESCOPES & BINOCULARS ®

9  
10 **UNITED STATES DISTRICT COURT**  
11 **NORTHERN DISTRICT OF CALIFORNIA**

12 OPTRONIC TECHNOLOGIES, INC., d/b/a  
Orion Telescopes & Binoculars ®, a California  
13 corporation,

14 Plaintiff,

15 v.

16 NINGBO SUNNY ELECTRONIC CO., LTD.,  
SUNNY OPTICS, INC., MEADE  
17 INSTRUMENTS CORP., and DOES 1 - 25,

18 Defendants.

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

**PLAINTIFF OPTRONIC  
TECHNOLOGIES, INC.'S SUR-REPLY  
IN OPPOSITION TO DEFENDANTS'  
MOTION TO DISMISS PLAINTIFF'S  
FIRST AMENDED COMPLAINT**

**[REDACTED VERSION OF  
DOCUMENT SOUGHT TO BE SEALED]**

1 Plaintiff Optronic Technologies, Inc., d/b/a Orion Telescopes & Binoculars® (“Orion”)  
2 respectfully files this Sur-Reply to permit the consideration of newly discovered materials relevant  
3 to the Court’s adjudication of Defendants’ Motion to Dismiss Plaintiff’s First Amended Complaint  
4 (“FAC”) (ECF No. 44). The evidence is particularly germane to the Court’s consideration of  
5 whether to dismiss the FAC with (or without) leave, and would have been filed with the Court or  
6 incorporated into the FAC if Defendants had timely complied with their discovery obligations.

7 **I. INTRODUCTION**

8 Defendants recently produced Mandarin Chinese email communications between  
9 Defendants and with representatives of its Chinese co-conspirator, Suzhou Synta Optical  
10 Technology Co., Ltd. (“Suzhou Synta”). The emails establish with searing specificity that the  
11 Complaint’s allegations of price fixing, market division, retaliation and joint action not only took  
12 place, but were intended to demonstrate that Defendants engaged in price fixing and market  
13 division, and that they planned to destroy Orion’s business.

14 Defendants withheld these communications until February 28, 2018, the then-extant close  
15 of discovery. The belated production occurred almost a year after Orion’s original document  
16 requests were served on April 10, 2017. This also was three months after Orion’s deadline to file  
17 its FAC and without sufficient time to translate in advance of Orion’s Opposition to the current  
18 Motion to Dismiss despite the fact that Orion’s document requests were served on Defendants on  
19 April 10, 2017. Because the bulk of these emails are written in Mandarin Chinese, Orion only  
20 discovered the import of these documents when it obtained translations of the thousands of emails  
21 produced at the end of February. Had Defendants timely produced them, Orion would have  
22 included them as further evidence of Defendants’ illegal collusion in its FAC (which was filed on  
23 November 3, 2017) or at least presented them with Orion’s Opposition to the pending Motion to  
24 Dismiss (which was filed on March 9, 2018) to support its position that leave to amend should be  
25 granted, if necessary.

26 Orion received the certified translations of these documents on May 4. Orion promptly  
27 wrote Defendants to inform them of Orion’s discovery and to request that Defendants (1) withdraw  
28 and correct their prior filings in support of their motion to dismiss; and (2) confirm that the

1 documents need not be treated as Highly Confidential under the Protective Order (as they had been  
2 designated by Defendants) in light of the fact that they are communications between competitors  
3 that cannot be private. (*See* Declaration of Matthew Borden in Supp. of Pl.’s Admin. Mot. for  
4 Relief from L.R. 7-3(d) and Sur-Reply in Opp’n to Defs.’ Mot. to Dismiss Pl.’s First Am. Compl.  
5 (“Borden Decl.”) Ex. 1.) Defendants refused to withdraw or amend their pleadings, refused to  
6 withdraw their confidentiality designations of the emails, and argued that Orion is prohibited from  
7 bringing these materials to the Court’s attention pursuant to Local Rule 7-3(d). *See* Borden Decl.  
8 Ex. 2.

9 Ordinarily there would be no need to place such evidence before the Court on a motion to  
10 dismiss. However, after delaying discovery of their collusion, Defendants have requested that the  
11 Court dismiss the FAC with prejudice and without leave to amend. In an abundance of caution,  
12 Orion presents the Court with the appended evidence it would have submitted in opposition to the  
13 Motion, and which should be considered now in the event the Court is considering whether to  
14 dismiss with further amendment.

## 15 **II. FACTUAL BACKGROUND**

16 To aid the Court’s review, Orion briefly contextualizes relevant allegations in Orion’s  
17 Complaint and First Amended Complaint before turning to the newly discovered documents.

### 18 **A. Orion’s Allegations in its Original Complaint**

19 Orion’s original Complaint alleged that Defendants Ningbo Sunny Electronic Co., Ltd. and  
20 Sunny Optics, Inc. (collectively, “Ningbo Sunny”) and Suzhou Synta Optical Technology Co., Ltd.  
21 (“Suzhou Synta”)<sup>1</sup> conspired to fix telescope prices and allocate the manufacturing market between  
22 themselves. (Compl. ¶¶ 39-40, 72, 91-93, 101.) The Complaint explained that Suzhou Synta and  
23 Ningbo Sunny did not compete with one another and that as a result, both of them charged  
24 supracompetitive prices. The Complaint further alleged that this market structure was not an  
25 accident; it was a result of Suzhou Synta and Ningbo Sunny colluding to divide the market.  
26  
27

28 <sup>1</sup> As Defendants are aware, Suzhou Synta is referred to throughout Orion’s Complaint and First Amended Complaint as a “Settling Manufacturer.”

1 The Complaint cited, as one example of Ningbo Sunny and Suzhou Synta’s collusion, that  
2 the two competitors had conspired to fix “the credit terms offered” on their products, and  
3 “coordinate[d] negotiations regarding customer credit terms – a key component of pricing.”  
4 (Compl. ¶¶ 43(c), 51.) The Complaint specifically alleged that Ningbo Sunny and Suzhou Synta  
5 conspired to retaliate against Orion for bidding on several URLs owned by Hayneedle.com,  
6 including telescopes.com and binoculars.com (the “Hayneedle Assets”), and lifted the collusive  
7 retaliatory credit terms only when Suzhou Synta succeeded in purchasing the Hayneedle Assets.  
8 (*Id.* ¶¶ 73-87.) Orion based these allegations on the fact that Orion’s CEO, Peter Moreo, received  
9 virtually identical emails from both Ningbo Sunny and Suzhou Synta denying Orion their usual  
10 credit terms within the span of a few hours. The emails were so similar that they include identical  
11 typographical errors. (*Id.*)

12 As set forth below, although Defendants argued to the Court that Orion’s allegations of  
13 collusion were commercially implausible, they were, in fact, true.

14 **B. Despite Actual Knowledge that Orion’s Allegations Were True, Defendants  
15 Represented to the Court that Other Scenarios Could Be True**

16 Defendants’ First Motion to Dismiss attacked Orion’s § 1 claims by arguing that “Plaintiff’s  
17 allegations that Ningbo conspired to fix prices and allocate markets at the manufacturing level  
18 make no economic sense. . . . [I]t makes no economic sense that Ningbo would conspire with a  
19 competitor to accomplish something it already had the power to do on its own.” (ECF. No. 17 at  
20 12.)

21 With regard to the Hayneedle transaction, Defendants specifically argued that “the  
22 creditworthiness of Orion is something that Ningbo and its competitor would have independently  
23 perceived and acted upon through their own dealings with Orion, without resorting to an unlawful  
24 agreement.” (*Id.* at 11:21-23.) Defendants further represented that “it makes no sense for Ningbo[  
25 Sunny] to participate in the Hayneedle scheme if it did not benefit from it.” (*Id.* at 16 n.8.)

26 The Court relied on Defendants’ representations in granting the First Motion to Dismiss. In  
27 specific, the Court’s Order adopted Defendants’ argument that it was not plausible that Defendants  
28 had conspired with Suzhou Synta because it made no economic sense for Defendants to collude

1 with Suzhou Synta. (ECF No. 38 at 12-13.) The Court accepted Defendants’ theory that  
2 Defendants’ conduct related to the Hayneedle transaction was not necessarily collusive, expressly  
3 stating that “the allegations concerning the failed Hayneedle transaction [are not] substantial  
4 enough to plausibly demonstrate an anticompetitive conspiracy” because they “just as easily  
5 suggest the rational exercise of leverage against a competitor.” (*Id.* at 13:17-25.)

6 In response to Orion’s FAC, Defendants again have made the same arguments. The Second  
7 Motion to Dismiss quotes from the portions of the Court’s Order based on Defendants’ original  
8 motion. (ECF. No. 44 at 13:18-22.) Similarly, Defendants’ reply contended that “Plaintiff’s  
9 arguments relating to credit issues in connection with the Hayneedle transaction are based on  
10 allegations that are *completely unchanged* from the original dismissed Complaint,” and further  
11 asserting that “[t]he Court already considered and dismissed these exact same allegations.” (ECF.  
12 No. 75 at 5:4-7 (emphasis added).)

13 In their renewed Motion to Dismiss, Defendants also made representations regarding the  
14 FINRA documents Plaintiffs attached to the FAC. Those documents disclose that Ningbo Sunny  
15 told its competitors Suzhou Synta and Celestron about Ningbo Sunny’s intent to acquire Meade  
16 before Ningbo Sunny even bid on purchasing Meade. In asserting that this fact did not give rise to  
17 an inference of conspiracy, Defendants stated, “Ningbo may have wanted to give customers,  
18 distributors, suppliers, contract manufacturers, or vendors advance notice for business reasons that  
19 it was contemplating or working toward the acquisition of Meade” and made additional arguments  
20 about how it made “no sense” for Synta to be involved. (ECF. No. 44 at 5.)

### 21 **C. The Newly Discovered Documents Contradict Many of Defendants’ Arguments**

22 As set forth below, Defendants’ recently-produced emails show that they engaged in the  
23 anti-competitive conduct alleged by Orion.

24 ***Hayneedle Conspiracy.*** On February 28, 2018—more than ten months after Orion  
25 propounded its requests for production—Defendants produced a handful of emails in Mandarin  
26 Chinese that related to the Hayneedle transaction (the “Hayneedle Emails”).<sup>2</sup> The Hayneedle  
27

28 <sup>2</sup> Defendants withheld these documents until the last day of the then-extant discovery deadline.

1 Emails demonstrate that Ningbo Sunny [REDACTED]

2 [REDACTED]

3 The Hayneedle Emails show that [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 (See Declaration of Thomas Shou (“Shou Declaration”) at Ex. 2.) [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 (*Id.* (emphasis added).)

16 The next day, as detailed in the Complaint and FAC, Peter Moreo received an email from  
17 James Chiu virtually identical to the one he received from David Shen stating that Ningbo Sunny  
18 would no longer extend credit to Orion.

19 ***Joint Pricing Strategy.*** [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 (Shou Declaration at Ex. 8.)

28

1 These emails and others show that Defendants [REDACTED]  
2 [REDACTED]

3 [REDACTED] These emails directly contradict  
4 Defendants’ arguments to the Court that “the creditworthiness of Orion is something that Ningbo  
5 and its competitor could have independently perceived and acted upon” and that “it makes no sense  
6 for Ningbo[ Sunny] to participate in the Hayneedle scheme if it did not benefit from it.” (ECF No.  
7 17 at 11-12.)

8 ***Collusion to Acquire Meade.*** Defendants’ arguments about the FINRA documents are also  
9 contradicted by their recently-produced emails. One email from [REDACTED]

10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]

14 (Borden Decl. Ex. 3 (emphasis added).)

15 This written correspondence contradicts Defendants’ prior arguments to the Court,  
16 including that Ningbo Sunny never sought to collude in the Meade acquisition with Celestron and  
17 Suzhou Synta and that doing so would be commercially irrational. Same for Defendants’  
18 statements to the Court and others that Defendants did not work with Celestron and Suzhou Synta  
19 to prevent JOC from entering the market.

20 ***Defendants’ Admitted Price Fixing and Market Division in Other Markets Where the***  
21 ***Parties Compete.*** Defendants’ production also confirms that Suzhou Synta and Defendants  
22 conspired to divide markets throughout the world.

23 In one email chain, [REDACTED]  
24 [REDACTED]  
25 [REDACTED] (Shou Declaration at Ex.  
26 10.) [REDACTED]  
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[REDACTED]

[REDACTED] (*Id.*)

**III. ARGUMENT**

To survive motion to dismiss under *Twombly*, a complaint must provide “enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Orion respectfully submits that the documents described above and filed herewith demonstrate that Orion’s FAC has, by definition, satisfied that standard.

In the alternative, these documents at minimum show that justice requires granting Orion leave to amend. *See Arizona Students’ Ass’n v. Arizona Bd. of Regents*, 824 F.3d 858, 871 (9th Cir. 2016) (“When justice requires, a district court should ‘freely give leave’ to amend a complaint.”) (quoting Fed. R. Civ. P. 15(a)(2)); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962) (identifying factors that may justify denying leave to amend).

**IV. CONCLUSION**

Orion respectfully requests that the Court deny Defendants’ Motion to Dismiss Orion’s First Amended Complaint, or in the alternative grant Orion leave to amend.

Dated: May 8, 2018

BRAUNHAGEY & BORDEN LLP

By: /s/ Matthew Borden  
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