**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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| SANMINA CORPORATION, | : | |
| | : | 1:19-cv-11710-KPF |
| Plaintiff, | : | |
| | : | Related Case No.: |
| vs. | : | 1:19-cv-11712-KPF |
| | : | |
| DIALIGHT PLC, | : | |
| | : | |
| Defendant. | : | |

**SANMINA CORPORATION'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT**

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## I. SUMMARY OF MOTION

This dispute involves a commercial relationship, governed by an exhaustively negotiated contract, that didn't work out as anyone hoped or expected. The parties reasonably can dispute what went wrong and who is responsible. But Dialight plc's ("Dialight") effort to turn a contract dispute into a tort claim to find a way (any way) around the tight liability limitations agreed to after a protracted and well-counseled negotiation, finds no basis in the facts or law. The bulk of this motion seeks to strip the case back down to the ordinary breach of contract case it always has been. Sanmina Corporation ("Sanmina") also seeks summary judgment on the undisputed portion of its affirmative contract claim (for $5.3 million in long overdue unpaid accounts receivable, plus accrued interest).

By this motion, Sanmina seeks partial summary judgment on Dialight's First and Third Claims for Relief for, respectively, Fraudulent Inducement and Gross Negligence/Willful Misconduct, and on Count One of its First Amended Complaint (known as the "A/R Claim"). Alternatively, as to Dialight's Complaint, Sanmina seeks a ruling that the limitations of liability in the parties' contract, known as the Manufacturing Services Agreement ("MSA"), are fully enforceable.

Sanmina is entitled to judgment on Dialight's First Claim for Fraudulent Inducement, which Dialight pleads to attempt to void the MSA's limitations of liability, because none of the misrepresentations alleged by Dialight are actionable as a matter of law or fact. Judgment in favor of Sanmina on this claim also entitles Sanmina to a ruling that the contractual limitations of liability in the MSA are valid and enforceable.

Dialight also pleaded its Third Claim for Gross Negligence/Willful Misconduct to attempt to avoid the contractual limitations of liability. But that claim would not avoid the contractual limitations of liability even if it survived summary judgment – and it cannot.

Finally, in Count One of its Complaint, Sanmina sued for breach of contract, alleging that Dialight is indebted to Sanmina for products and materials that Dialight ordered, Sanmina delivered, and Dialight refused to pay for. The total due as of the May 2, 2022 filing date of this

Motion, with interest at the contract rate of 1% per month, is $7,784,126.91. As a matter of law, Sanmina is entitled to judgment for the current A/R balance due because Dialight accepted the products. *See* UCC §§ 2-606, 2-607(1).

## II. STATEMENT OF FACTS

### A. Dialight's Decision to Outsource

Sanmina is one of the world's largest contract manufacturers ("CM") with 75 facilities located in 25 countries. [Undisputed Fact ("UF") 1.] Sanmina's Guadalajara factories (or "plants"), which handled the Dialight account, focus on four customer segments: computing; industrial and lighting; telecommunications; and medical and automotive. [UF 5.] Dialight's LED lighting business thus fit well into Sanmina's focus on industrial and lighting businesses.

The parties' contacts began in June 2015, when Dialight hired a new CEO named Michael Sutsko. An outside hire, Sutsko did not have any outsourcing experience and could not identify anyone else at Dialight who did. [UF 6.] He nonetheless immediately[1] embarked on the outsourcing project known as Project Fawkes. [UF 7.]

Sutsko decided to explore outsourcing because, within days of assuming the helm of Dialight, he had to announce a profit warning. He attributed much of the blame for that warning to Dialight's inefficient in-house manufacturing operations. [UF 9.] Those in-house operations were located in Ensenada, Mexico; Newmarket, UK; Roxboro, North Carolina; and Penang, Malaysia. [UF 10.]

Sutsko placed Dialight's head of operations, Preston Wells, in charge of Project Fawkes. [UF 11.] Wells, however, quit sometime before the end of September 2015 (before the first draft of the MSA was even circulated). [UF 12.] Dialight later fired Wells' successor, Dennis Geary. [UF 13.]

Dialight retained Ernst & Young ("E&Y") to evaluate the viability of Project Fawkes[2]

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[1] Sutsko's first day on the job was June 1, 2015; on June 3, 2015, he and John Dullea of Sanmina exchanged emails pertaining to Sutsko's inquiry about Sanmina serving as Dialight's outsourcer. [UF 8.]

[2] In Sutsko's words, E&Y was to "advise on the risks and opportunities" of outsourcing. [UF 15.]

and Robert Freid, who operated Contract Manufacturing Consultants, Inc. ("CMC"), as Dialight's expert in contract manufacturing. [UF 14.]

[redacted][4]

Dialight withheld the E&Y report from Freid, who testified that he had definitely not seen it before he prepared his report, and possibly didn't see it before the MSA was signed. [UF 20.] Freid specifically testified he was unaware of the statement in the E&Y report that is bold-quoted above. [UF 20.]

**B. Negotiation of the MSA**

The parties jointly drafted the MSA. [UF 3-4, 21-35.] Bob Green, a Sanmina Business Development Manager, emailed an initial draft to Sutsko[5] on October 6, 2015. [UF 21.] Internally, Sutsko and Freid exchanged thoughts on revisions that ultimately resulted in Dialight proposing an entirely rewritten MSA to Sanmina. [UF 24.][6] Negotiations covered nearly every aspect of the MSA, including the following:

- Breadth of Choice of Law Provision: Sanmina initially proposed that the MSA would be "construed in accordance with" California law. [UF 25.] Dialight proposed the language that

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3 [redacted]

4 When asked what Dialight had done to improve operations to enable it to outsource, Sutsko responded: "I don't remember. I'm sure a number of things." [UF 18.]

5 Mr. Green's email also went to Dialight's then-CFO (and current CEO) Fariyal Khanbabi, its consultant Robert Freid, and someone named Robert Jaegly. [UF 22.]

6 Exhibit 23, which was the Dialight draft proposed back to Sanmina bears the legend "WSGR" (referring to Wilson Sonsini Goodrich & Rosati), the law firm that advised Dialight in the negotiation of the MSA. [UF 23.]

was ultimately used, stating that the "formation, construction, and performance" of the MSA would governed by New York law. [UF 26.]

- Floorspace and Manpower Issues: Freid added a recital in an internal Dialight draft that would have required Sanmina to provide 80,000 square feet of manufacturing floor space and 900 direct laborers. [UF 27.] Dialight never made such a proposal to Sanmina [UF 27] and it is not in the final MSA.

- The MSA *Always* Deferred Identifying Dialight's Floorspace Until After the MSA Was Executed: Dialight contends that Sanmina misled Robert Freid as to the location of floorspace "likely" to be dedicated to Dialight. All drafts agree, and the final agreement states, that no such allocation would be made until 21 days *after execution of the MSA*. [UF 28.][7]

- The Drafts Make Clear that the MSA is a Contract for the Sale of Goods: Sanmina's initial draft spoke only about Sanmina selling products to Dialight. [UF 29.] Freid prepared an internal draft stating that Sanmina would provide "Products" and "Services."[8] [UF 30.] The "Services" language was not proposed to Sanmina [UF 30], and the final MSA states that Sanmina would provide only those services "necessary to deliver . . . Products." [UF 30.]

- Deadlines for Acceptance and Rejection Were Negotiated; the Concept Was Never in Dispute: Dialight's interrogatory responses argue that it was not reasonable for Dialight to have a deadline to inspect products. Dialight, however, never tried to negotiate out of the MSA a deadline for deemed acceptance; it simply proposed 30 days, but ultimately agreed to 15 business days. [UF 31.]

- The Limitation of Liability Provisions Were Negotiated: Sanmina's initial MSA draft included limitations of liability substantially the same as the final, barring either party from recovering "indirect, consequential, incidental, punitive, or special damages . . ." and including a liability cap containing blanks for the dollar amounts. [UF 32.] Dialight's draft proposed

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7 Sanmina's initial draft was silent on the issue. [UF 28.]

8 The Freid Draft states: "'Services' means any design, engineering, prototyping, technical assistance, consulting, out-of-warranty repair and/or other services provided or to be provided by SANMINA pursuant to any Order."

eliminating the liability cap but retaining the prohibition on "special, incidental, indirect [or] consequential damages . . . ." [UF 33.] The final version of the document included both the limitation of liability and the liability cap. [UF 34.]

- Dialight's Credit Terms Were Rejected: Dialight proposed credit terms that Sanmina rejected. [UF 35.]

**C. Structure of the Parties' Relationship Under the MSA**

As the MSA explains, in order for Sanmina to manufacture Dialight's products, Dialight needed to provide, *inter alia*, complete and accurate specifications and forecasts of anticipated orders – two things that E&Y warned Dialight it could not do. The forecasts were particularly important because Sanmina needed to order parts so it could manufacture the lighting fixtures. Many of those parts had long "lead times" – meaning that they often needed to be ordered weeks or months in advance of the orders Dialight placed. [UF 36.]

The MSA addresses these issues as follows:

- Dialight provides Sanmina with rolling 12-month forecasts every month and Sanmina was required to "make purchase commitments to its Materials suppliers" based on those forecasts. [UF 37.] Sanmina did so. [UF 37.]
- Sanmina also could only order "safety stock" (i.e., excess materials for just-in-case use) if "requested and authorized by Dialight." [UF 38.]
- If Dialight failed to consume materials Sanmina ordered per forecast, Dialight had to pay for them. [UF 39.] This obligation underlies Sanmina's E&O claim, which is not the subject of this Motion.
- To effectuate a sale, Dialight issued purchase orders ("POs") that Sanmina could accept or reject. If Sanmina did not accept it, the PO was deemed rejected. [UF 40.]
- The products were to be manufactured in accordance with Dialight-provided written "Product Specifications." [UF 41.]
- Although Sanmina was obligated to "use commercially reasonable efforts" to deliver products timely, it had no liability "for any failure to meet Dialight delivery dates and/or

any failure to give notice of anticipated delays." [UF 42.][9]

- Shipments from Sanmina were deemed accepted if not rejected within 15 business days. [UF 44.]

Collectively, these provisions establish that Sanmina was obligated to order materials according to Dialight's forecasts [MSA § 1.5]; that Sanmina could only add safety stock if Dialight requested it in writing [§§ 1.5, 4.2, 20.2]; that Sanmina was required to follow Dialight's written Product Specifications [§ 14.1]; and that Sanmina could order parts only from Dialight's approved vendors [§§ 5.1, 5.2.]. Much of the chaos that ensued – as E&Y warned – stemmed from Dialight's wildly inaccurate product forecasts and incomplete and inaccurate Product Specifications. The accuracy of Dialight's specifications and forecasts, and whether Sanmina breached the contract, will be a matter for trial. But, as discussed below, there is no competent evidence that Sanmina's performance was tortious – and certainly no clear and convincing evidence that Sanmina fraudulently induced Dialight to enter into the MSA.

**D. Dialight Terminates the MSA Without Cause.**

The parties executed the MSA on or about March 8, 2016 [UF 46] and proceeded to ramp up the transfer of production from Dialight's in-house facilities to a Sanmina plant located in Guadalajara, Mexico. The relationship quickly frayed and on September 27, 2018, Dialight gave Sanmina notice of termination without cause under MSA § 21.1, with a termination effective date of January 31, 2019.[10] [UF 47.] Dialight's efforts to explain why it did not terminate for cause, given the allegations in this action, were unclear, but the decision was made in consultation with counsel.[11] [UF 48.]

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[9] It is also worth noting that Dialight's draft to Sanmina includes a note that states: "Discuss and define 'Delivery Rate' and the consequences for failure to meet the 95% rate, including monetary penalties and termination rights." [UF 43.] Ultimately this issue was resolved by stating that Sanmina would not have any liability for failing to meet Dialight's delivery dates. Mr. Freid told Dialight to agree because "financial penalties for late delivery" were "impossible to get." [UF 43.]

[10] Section 21.1 required Dialight to provide 90 days' notice of termination without cause, although Dialight provided about 120 days' notice. Section 21.2 allowed Dialight to terminate on 30 days' written notice for an uncured material breach.

[11] Sanmina reserves for trial the issue of whether Dialight's decision to terminate for convenience bars or limits its breach of contract claim. That is certainly the rule in construction contracts. *See e.g., Tishman*

On termination, Dialight had an obligation to buy all materials Sanmina purchased based on Dialight forecasts that remained unconsumed by Dialight orders – i.e., the E&O. [UF 49.] Dialight submitted POs for some, but not all, of the E&O, and refused to pay for more than $5 million of the E&O and other products it ordered. Dialight also refused to place orders for more than $8 million in E&O, claiming that it was Sanmina's fault that Dialight failed to consume it.

Sanmina sued for payment of the amounts Dialight owes for A/R (First Claim) and for E&O (Second Claim). Dialight responded with a complaint seeking hundreds of millions of dollars in claimed consequential damages due to Sanmina's alleged breaches. Dialight's damage claims are barred by the MSA's prohibition on "special, incidental, indirect [or] consequential damages of any kind," and to the extent not so barred, are capped by the MSA's liability cap. To attempt to evade the MSA's limitations of liability, Dialight also pleaded the tort claims that are addressed in this motion.

## III. SUMMARY JUDGMENT STANDARD

Summary judgment must be granted if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A fact is material when it might affect the outcome of the suit under governing law. *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 202 (2d Cir. 2007). A dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248. The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Federal Deposit Insurance Corp. v. Great American Insurance Co.*, 607 F.3d 288, 292 (2d Cir. 2010). Once the movant meets that burden, "the opposing party must come forward with specific evidence demonstrating the existence of a genuine dispute of material fact." *Id.* "To defeat a summary judgment motion, the

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*Constr. Corp. v. City of N.Y.*, 228 A.D.2d 293, 643 N.Y.S.2d 589 (1996) ("Where the City elects to terminate for convenience, as provided in section 15, whether with or without cause, it cannot counterclaim for the cost of curing any alleged default.").

non-moving party must do more than simply show that there is some metaphysical doubt as to the material facts and may not rely on conclusory allegations or unsubstantiated speculation." *Federal Deposit Insurance Corp.*, 607 F.3d at 292.

As shown below, Dialight's fraud and gross negligence claims consist of nothing more than complaints about Sanmina's contractual performance, adorned with vague assurances that Dialight tries to convert into a tort claim. None of Dialight's proof raises a triable issue of fact, and most of its allegations fail as a matter of law.

## IV. ARGUMENT

### A. Governing Law

This Motion briefly addresses two governing law issues: (i) whether New York law applies to the parties' dispute; and (ii) whether the MSA is a contract for the sale of goods such that New York's adoption of the Uniform Commercial Code ("UCC") applies. The answer to both is yes, but neither governing law determination is dispositive.

#### 1. NEW YORK LAW GOVERNS THE PARTIES' CLAIMS.

In the exchanges of pre-hearing letters, Dialight questioned whether the New York choice of law provision in the MSA applies to Dialight's tort claims. However, during the parties' Pre-Motion Conference on March 17, Dialight's counsel acknowledged that there is no substantive difference between New York and New Jersey law. [March 17, 2022 Transcript, 9:23-10:10.] Dialight also previously admitted that New York law applies. [Dialight Complaint ¶ 10; Dialight Answer to Sanmina First Amended Complaint ¶ 4.]

Sanmina thus keeps the choice of law discussion brief. First, New York choice-of-law rules apply. *Statek Corp. v. Dev. Specialists, Inc. (In re Coudert Bros. LLP)*, 673 F.3d 180, 186 (2d Cir. 2012) (forum state choice of law applies in diversity cases). Second, under New York law, the court first determines whether there is an actual conflict between the laws of the jurisdictions whose laws might potentially apply. *Beth Isr. Med. Ctr. v. Horizon Blue Cross & Blue Shield of N.J., Inc.*, 448 F.3d 573, 582 (2d Cir. 2006). If no actual conflict exists, and if New York is among the relevant jurisdictions, the court may simply apply New York law. *Licci*

*v. Lebanese Canadian Bank, SAL*, 672 F.3d 155, 157 (2d Cir. 2012). Dialight's admission that New Jersey law would not produce a different result means New York law governs.

**2. ENFORCEABILITY OF THE MSA – AND ITS LIMITATION OF LIABILITY PROVISION – IS GOVERNED BY THE UNIFORM COMMERCIAL CODE.**

UCC Article 2 applies to "transactions in goods." N.Y. U.C.C. Law § 2-102. The MSA is undeniably a contract for the sale of goods. First, as noted above, the drafting history shows that, while Dialight debated internally adding "services" to the MSA, neither party made such a proposal, and the final agreement states clearly that the only services involved are those "necessary to deliver . . . the Products . . . ." [MSA § 4.1.]

Second, the MSA on its face states that Dialight is purchasing "Products" from Sanmina and that Sanmina is paid for manufacturing and selling these Products to Dialight. [MSA §§ 1.2, 10.2, 11.1.] There is no pricing of, or provisions for payment for, services. The MSA is thus a contract for the sale of goods. *See, e.g.*, *Mega Tech Int'l Corp. v. Miller Elec. Mfg. Co.*, 1998 U.S. Dist. LEXIS 7703, at *7 (S.D.N.Y. May 22, 1998) (UCC applied where plaintiffs' compensation was based on the sale price of the products that were sold, plus markup); *NewSpin Sports, Ltd. Liab. Co. v. Arrow Elecs., Inc.*, 910 F.3d 293 (7th Cir. 2018) ("Materials and Manufacturing Management Agreement Board Assembly" with no separate payment to defendant for its work and lack of price breakdown "strongly indicate[d] the predominant purpose of the Agreement [was] the sale of goods").

**B. Dialight's First and Third Claims for Fraudulent Inducement and Gross Negligence Cannot Void the MSA's Limitation of Liability Provision.**

The analysis of the enforceability of limitations of liability begins with the "bedrock principle" that courts must honor the contractual allocation of responsibility negotiated by the parties:

> "Freedom of contract is an important and deeply rooted public policy in this State. 'Absent some violation of law or transgression of a strong public policy, the parties to a contract are basically free to make whatever agreement they wish', and '[f]reedom of contract prevails in an arm's length transaction between sophisticated parties' such that courts generally

> may not 'relieve them of the consequences of their bargain.' Thus, 'when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms.' Further, '[c]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing."
>
> "In accordance with these bedrock principles, 'courts must honor contractual provisions that limit liability or damages because those provisions represent the parties' agreement on the allocation of the risk of economic loss in certain eventualities.'"

*U.S. Bank v. DLJ Mtge. Capital, Inc.*, No. 2022-01866, (N.Y. Mar. 17, 2022) (citations omitted).

The MSA was, as discussed above, heavily negotiated, with Dialight represented by a top-tier law firm and a contract manufacturing consultant. [UF 3-4, 21-35.] [redacted] Dialight did, indeed, hire good lawyers, who no doubt recognized that there is no exception for negligence or "malintent." They therefore pleaded a claim for fraudulent inducement that fundamentally lacks merit, along with a claim for gross negligence that would not affect the enforceability of the limitations of liability even if it survived summary judgment.

**1. THE LIMITATIONS OF LIABILITY ARE ENFORCEABLE UNDER THE UCC.**

Parties to a contract for the sale of goods may limit or alter the measure of damages recoverable. N.Y. U.C.C. Law § 2-719(1). A contractual liability cap is enforceable unless the cap causes the remedy to fail of its essential purpose. § 2-719(2). A bar on consequential damages is valid and enforceable unless it is unconscionable. § 2-719(3).

Sanmina's Contention Interrogatory no. 11 asked Dialight to explain why it believed the

limitations of liability are unenforceable. Dialight did not claim to have any argument under the UCC. Instead, it asserted: "Sanmina fraudulently induced Dialight into entering into the MSA and acted with gross negligence in manufacturing Dialight products." [Resp. to Int. no. 11.][12]

Dialight is in fact correct not to rely on the UCC to provide relief from the limitations of liability. Failure of essential purpose requires proof that the limitation of liability would "effectively deprive [plaintiff] of a remedy . . ." *Xerox Corp. v. Graphic Mgmt. Servs.*, 959 F. Supp. 2d 311, 320 (2013). The MSA's liability cap, however, allows Dialight to recover at least $1 million in direct damages if proven, and the MSA also provides Dialight with a number of other remedies including: rejection [§§ 3.7, 3.8]; cancellation [§ 7]; warranty claims [§ 23.3]; return rights [§ 23.4]; epidemic defect rights [§ 23.8]; and, of course, termination [§§ 21.1, 21.2].

Dialight would fare no better arguing unconscionability. There is a presumption that an exclusive remedy is not unconscionable "when the contract is between businessmen in a commercial setting." *Id*. An unconscionable contract is "one which is so grossly unreasonable as to be unenforceable because of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Russell Publ'g Grp., Ltd. v. Brown Printing Co.*, 2014 U.S. Dist. LEXIS 166803, at *16 (S.D.N.Y. Dec. 2, 2014); *see also Am. Elec. Power Co. v. Westinghouse Elec. Corp.*, 418 F. Supp. 435, 460 (S.D.N.Y. 1976) (enforcing limitation of liability despite allegation that defendant manufacturer allegedly knew that it could not meet contract requirements). In a business setting such as this, and with the MSA's drafting history, Dialight could never establish unconscionability.

**2. SANMINA IS ENTITLED TO JUDGMENT ON DIALIGHT'S AS-PLEADED FIRST CLAIM FOR RELIEF FOR FRAUDULENT INDUCEMENT.**

With the UCC admittedly offering Dialight no relief, it seeks to avoid the MSA's

[12] Dialight also claimed that the liability cap is too "difficult to calculate," but that is not a basis to set it aside and, in any event, Dialight's current CEO testified that Dialight was "obviously internally aware" of how to calculate the cap (which she quantified as between $1.6 and $1.8 million). [UF 56.]

limitations on liability by pleading a claim for fraudulent inducement. That claim fails as a matter of law, and as shown in the Rule 56.1 Statement, as a matter of undisputed fact as well.

***a. Dialight Cannot Survive Summary Judgment Unless it Can Offer Clear and Convincing Evidence of Fraudulent Inducement.***

Because Dialight must prove its fraudulent inducement claim by clear and convincing evidence, it must do the same in response to this Motion: "in order to survive a summary judgment motion, a plaintiff must proffer enough proof to allow a reasonable jury to find by clear and convincing evidence the existence of each of the elements necessary to make out a claim for fraud in the inducement." *Edrei v. Copenhagen Handelsbank A/S*, 1995 U.S. Dist. LEXIS 17015, at *7-8 (S.D.N.Y. Nov. 13, 1995); *accord Kriegel v. Donelli*, 2014 U.S. Dist. LEXIS 90086, at *34-35 (S.D.N.Y. June 30, 2014). As discussed below, Dialight cannot meet this high burden.

***b. Dialight's Complaint Alleges Fraudulent Inducement Based on Representations of Ability to Perform and Promises to Perform, which Fail as a Matter of Law.***

Dialight's Complaint alleges only that Sanmina's fraudulent inducement consisted of the representation that Sanmina could perform under the MSA: "Sanmina fraudulently induced Dialight to sign the MSA and entrust its manufacturing processes to Sanmina by falsely representing that it already possessed the necessary experience and capacity to satisfy the demands of Dialight's 'high mix/low volume' production model." [UF 50.] According to Dialight, this supposed misrepresentation appears in Recitals B and D of the MSA (and is thus not extraneous to the contract). [UF 51.]

Dialight actually admits that its fraudulent inducement claim is non-actionable, summarizing its own allegations as follows: "In other words, Sanmina promised that it had the then-existing capability to meet Dialight's unique needs." [Dialight Complaint ¶ 22.] That is a fair characterization of the Complaint's allegations; it is also an admission that the Complaint fails to state a claim for fraudulent inducement as a matter of law. Whether characterized as a

promise to perform or the representation of an ability to perform, the representation is not collateral to the contract.[13] *Dupont Flooring Sys. v. Discovery Zone, Inc.*, 2004 U.S. Dist. LEXIS 13149, at *34 (S.D.N.Y. July 13, 2004) ("Promises such as representations of expertise and resources are not considered collateral to the contract because they simply underscore the defendant's purported intention and ability to perform the contract and are thus simply part and parcel of the intention to perform.") (granting summary judgment as to fraudulent misrepresentation claim).

"Representations that merely underscore a party's purported intention and ability to perform a contract are simply part and parcel of the intention to perform." *Podlin v. Ghermezian*, 2014 U.S. Dist. LEXIS 75503, at *22-23 (S.D.N.Y. May 28, 2014); *id.* at *24 (the alleged misrepresentations "merely buttressed [Defendants'] intention to honor the alleged contract with Podlin and therefore cannot sustain a fraud claim"); *Cronos Group Ltd. v XComIP, LLC*, 156 A.D.3d 54, 62 (2017) ("Cronos's fraud cause of action falls short under the principle that a fraud claim is not stated by allegations that simply duplicate, in the facts alleged and damages sought, a claim for breach of contract, enhanced only by conclusory allegations that the pleader's adversary made a promise while harboring the concealed intent not to perform it."); *see also Landesbank v. Neb. Inv. Fin. Auth.*, 2017 U.S. Dist. LEXIS 27203, at *18 (S.D.N.Y. Feb. 27, 2017) (Failla, J.) (dismissing fraud claims where "there is no daylight" between fraud and contract claims).[14]

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[13] The Complaint also alleges that the MSA recital that Sanmina was providing services from a "single profit center" was false. [Complaint ¶ 21.] But Dialight did not allege that as a basis for its Fraudulent Inducement Claim. [Complaint ¶¶ 67-74.] More importantly, the allegation is patently false. Dialight sought the "single profit center" representation in order to prevent Sanmina from charging a profit on materials that Sanmina's Plant 4 supplied to Plant 2, where final assembly was done. [UF 57(c)).] Dialight had no interest in whether the two plants were on separate P&L's. [*Id.*]

[14] Numerous other cases are in accord:

- *Crabtree v. Tristar Auto. Grp., Inc.*, 776 F. Supp. 155, 163 (S.D.N.Y. 1991) ("representations [alleged] are simply part and parcel of the intention to perform which we earlier stated could not be separated from the breach of contract claim").
- *C3 Media & Mktg. Grp., LLC v. FirstGate Internet, Inc.*, 419 F. Supp. 2d 419, 432 (S.D.N.Y. 2005) ("A contracting party's representations about its resources underscore that party's purported intention and ability to perform the contract . . . and are simply part and parcel of the intention to perform.") (internal

This is not a case where Sanmina falsely stated a concrete, verifiable fact to trick Dialight into signing a contract. This is not *Channel Master Corp. v. Aluminum Ltd. Sales, Inc.*, 4 N.Y.2d 403 (1958), in which the plaintiff lied about the amount of aluminum ingot it had secured to fill the contract. Nor is this akin to *Wild Bunch SA v. Vendian Ent., LLC*, 256 F. Supp. 3d 497 (SDNY 2017), where the plaintiff lied about its authority to pledge $3 million in funding when the person whose authority was required for the funding never agreed to it. Putting the most aggressive spin on Dialight's allegations, Sanmina stated that it believed it could meet Dialight's business requirements by performing according to the terms of the MSA. If that were enough to constitute fraudulent inducement, then such a claim could be alleged in every business dispute arising from a negotiated contract because every such contract arises from negotiations in which the bidding party claims it will do a great job. As the litany of cases cited above confirms, those sorts of pre-contract discussions cannot support a fraud claim.

***c. The Alleged Representation is Too Vague to Support a Fraud Claim.***

The allegation that Sanmina falsely represented that it had "necessary experience and capacity" to perform is also so vague that it could not possibly constitute a false statement of an existing fact. *See, e.g., Arista Techs., Inc. v. Arthur D. Little Enters.*, 125 F. Supp. 2d 641, 647 (E.D.N.Y. 2000) ("vague allegations of unstated misrepresentations, assurances, and efforts" could not support fraudulent misrepresentation claim); *Pharmatec, Inc. v. Clinical Techs. Assocs., Inc.*, 1991 U.S. Dist. LEXIS 2530, at *4 (S.D.N.Y. Mar. 5, 1991) (General references to

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citations omitted) (citing *Crabtree*).

- *Bridgestone/Firestone v. Recovery Credit Servs.*, 98 F.3d 13, 19 (2d Cir. 1996) ("[T]hese facts amount to little more than intentionally-false statements by Beladino indicating his intent to perform under the contract. That is not sufficient to support a claim of fraud under New York law.").
- *Grappo v. Alitalia Linee Aeree Italiane*, 56 F.3d 427, 434 (2d Cir. 1995) ("A cause of action for fraud does not generally lie where the plaintiff alleges only that the defendant entered into a contract with no intention of performing.").
- *Spinelli v. NFL*, 903 F.3d 185, 209 (2d Cir. 2018) ("Where a plaintiff alleges . . . that the defendant simply misrepresented its intent to perform under a contract, no separate claim for fraud will lie, and the plaintiff must instead bring an action for breach of contract.").

assurances by Pharmatec that it would be able to achieve the desired results constituting "vague allusions to possible fraudulent inducement are insufficient to meet the particularity requirements of F.R.Civ.P. 9(b), or to withstand a motion for summary judgment.").

**3. DIALIGHT'S EXPANDED FRAUD ALLEGATIONS IN ITS INTERROGATORY RESPONSES FAIL TO ESTABLISH A TRIABLE ISSUE OF FACT.**

Dialight's Interrogatory responses effectively seek to amend its Complaint by identifying 18 purported misrepresentations, one of which (item no. 10) duplicates the contention from Dialight's Complaint that Sanmina misled Dialight about Sanmina's ability to handle high mix/low volume production. These claims, which the court should not consider, also fail.

***a. Dialight's Interrogatory Responses Cannot Add Allegations to the Complaint.***

As an initial matter, the Court should refuse to consider Dialight's efforts to supplement its complaint with interrogatory responses. Courts generally will not consider allegations made for the first time in opposition to a motion for summary judgment. *Tomlins v. Vill. of Wappinger Falls Zoning Bd. of Appeals*, 812 F. Supp. 2d 357, 363 n. 9 (S.D.N.Y. 2011) (declining to consider facts raised for first time in opposition to motion for summary judgment); *Scott v. City of New York Dep't of Correction*, 641 F. Supp. 2d 211, 229 (S.D.N.Y. 2009) (same); *Jackson v. Onondaga Cty.*, 549 F. Supp. 2d 204, 219-20 (N.D.N.Y. 2008) (disregarding factual allegations raised in opposition to motion for summary judgment which "flesh[] out" the allegations in the complaint). "A complaint cannot be amended merely by raising new facts and theories in plaintiffs' opposition papers, and hence such new allegations and claims should not be considered." *Southwick Clothing LLC v. GFT* (USA) Corp., 2004 U.S. Dist. LEXIS 25336, at *20-21 (S.D.N.Y. Dec. 15, 2004); *see also Rojo v. Deutsche Bank*, 487 F. App'x 586, 588 (2d Cir. 2012) (A court is "justified" in brushing aside further argument not alleged in complaint but raised for first time in opposition to summary judgment).

Per Local Civil Rule 33.3, Sanmina could not serve contention interrogatories until nearly the end of discovery, and Dialight therefore was not required to answer them until after

deposition discovery was complete. Sanmina was thus deprived of the opportunity to investigate these allegations[15] and is thus placed in the same position as a defendant confronting claims raised for the first time in an opposition brief.

***b. The Allegations in Dialight's Interrogatories Fail to Support its Fraudulent Inducement Claim.***

Even if the Court were to consider Dialight's interrogatory responses, the result would not change. As set forth in the Rule 56.1 Statement, none of the alleged representations are actionable – and certainly none raise a triable issue of fact by clear and convincing evidence. Indeed:

- Most of the supposed misrepresentations were, in fact, true statements (UF 57(a)-(e), (h)-(j), (l), (o), (q)-(r)[16]). *See Kamhi v. Tay*, 244 A.D.2d 266, 267 (1997) (claim for fraud cannot be based on a true statement).
- Many also were representations of a professed ability to perform, which is not actionable (UF 57(a)-(k), (m)-(o), (q)-(r)). *See* Section IV.B.2.b., above.
- Many were not representations of any present facts (UF 57(d)-(e), (i)-(j), (l)-(m), (q)-(r)). *See Wolfson v. Wolfson*, 2004 U.S. Dist. LEXIS 1485, at *24 (S.D.N.Y. Feb. 4, 2004) (cannot maintain a claim for fraudulent inducement without misrepresentation of a present fact).
- Many are also non-actionable puffery (UF 57(a), (i)-(j), (l)-(m), (q)-(r)). *See, e.g., Meister Seelig & Fein, LLP v. Hornick*, 2013 N.Y. Misc. LEXIS 2623, *9 ("misrepresentations of one's expertise are opinions or puffery not actionable as a matter of law").
- And some are mere failures to disclose Sanmina's subjective opinion regarding an aspect of the proposed relationship that Sanmina had no duty to disclose, and that were fully addressed in the MSA in consultation with Dialight (UF 57(f)-(g)). *See, e.g., Frigitemp Corp. v.*

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[15] At best, Sanmina could glean a few of the alleged misrepresentations from questions asked of Sanmina witnesses, but that is not the type of notice required of a claim that must be alleged with particularly. F.R.Civ.P. 9(b).

[16] Sanmina addresses the entirety of Dialight's response to Interrogatory no. 12 as one Material Undisputed Fact with sub-parts for each allegation. This seemed to be the clearest way to present the issue.

*Fin. Dynamics Fund, Inc.*, 524 F.2d 275, 283 (2d Cir. 1975) (no claim for fraud based on failure to disclose between two arms-length participants in a transaction – not a fiduciary relationship).

Quite simply, Dialight has never identified a false representation of an existing fact on which it could reasonably have relied to induce it to enter into the MSA. This is confirmed by Sutsko's testimony: "Q. Sitting here today is it your belief that Sanmina defrauded Dialight into signing the MSA? A. I can't speculate on that." [Sutsko 367:2-9.][17]

***c. Many of the Alleged Representations Are Either Barred by the MSA Itself or Are Not Even Attempts to Allege Fraudulent Inducement.***

**i. The MSA's Integration Clause Precludes Reliance on Most of the Representations Dialight Alleges.**

All but the first three representations identified in Dialight's interrogatory responses constitute parol statements on which, as a matter of law, Dialight cannot assert reliance (UF 57(d)-(i), (k), (n), (q)-(r)). *See, e.g.*, *Primedia Enthusiast Publ'n, Inc. v. Op. & Ashton Int'l Media, Inc.*, 2003 U.S. Dist. LEXIS 16728, at *15-16 (S.D.N.Y. Sep. 25, 2003) ("Notwithstanding the lack of an explicit disclaimer of representations that form the basis of a fraud-in-the inducement claim, courts may disregard a fraudulent inducement claim and give effect to a contract when the parties have negotiated at arms lengths and they are sufficiently sophisticated that they could have easily protected themselves either through obtaining readily available information or alternatively including a protective clause in the agreement.").

The bar on relying upon extracontractual representations is confirmed by the MSA's broad integration clause that precludes reliance on representations not incorporated into the contract. [*See* MSA § 25.14 ("This Agreement is the entire agreement between the Parties, and

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[17] Robert Freid, whom Dialight has designated as an expert witness, offered similar testimony, admitting that the fraud claim is an after-the-fact supposition based on his understanding that Sanmina performed poorly:

> Q. Do you know whether Sanmina was misrepresenting anything, or are you just suspecting that based upon Dialight's claims about Sanmina's performance?
>
> A. I'm basing it upon the – primarily upon the claims of performance.

[Freid 58:8-15.]

supersedes all prior and contemporaneous agreements and representations.").] Where the parties' contract includes an integration clause, "a fraud claim will not stand where the clause was included in a multi-million dollar transaction that was executed following negotiations between sophisticated business parties and a fraud defense is inconsistent with other specific recitals in the contract." *Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 165 F. Supp. 2d 615, 622 (S.D.N.Y. 2001). Here, the MSA – under which Dialight paid Sanmina tens of millions of dollars for products and materials – was the result of months of negotiation and due diligence by two world-class manufacturers represented by sophisticated legal counsel and multiple outside consultants. [UF 3-4, 21-35.] Dialight's reliance on alleged misrepresentations made outside the four corners of the MSA, despite the presence of the bargained-for integration clause, thus cannot be reasonable as a matter of law. *See, e.g., 28th Highline Assocs., L.L.C. v. Roache*, 2019 U.S. Dist. LEXIS 30057, at *30-31 (S.D.N.Y. Feb. 22, 2019) ("If these alleged misrepresentations were truly material to Defendant, he certainly had the sophistication, guidance, and means to ensure that the Agreement required Plaintiff to affirm them.").

**ii. Several of Dialight's Fraud Allegations Cannot Support a Claim for Fraudulent Inducement Because they Occurred Post-Execution.**

Dialight claims in response to Interrogatory no. 12, and also in response to Interrogatories 15 and 16 (UF 57(o)-(p)), and in its Pre-Motion Letter, that Sanmina committed fraud throughout the parties' relationship. [*See* Resp. to Int. No. 15 (representations "throughout the course of the engagement" that Sanmina would take remedial steps); No. 16 (alleging that Sanmina made build commitments it could not meet); January 16, 2020 Response to Sanmina's Pre-Motion Letter [Dkt-72, Case No. 1:19-cv-11710-KPF] (Sanmina overcharged for labor).] However, any triable issue of material fact regarding any such actions cannot affect the enforceability of the MSA's limitations of liability because these actions allegedly occurred *after* the parties entered into the MSA, and the limitation of liability could only be avoided by proving that the MSA was *induced* by fraud. *Am. Elec. Power*, 418 F. Supp. at 460; *see also O'Dell v. Ginsberg*, 677 N.Y.S.2d 583, 584 (1998) ("Clearly, there can be no fraud in the inducement as to these

representations since one cannot be induced to sign a contract by representations made after the contract has already been executed.").

**4. DIALIGHT'S FRAUDULENT INDUCEMENT CLAIM IS AN IMPROPER ATTEMPT TO "TORTIFY" A BREACH OF CONTRACT CLAIM.**

Finally, while fraudulent inducement is a recognized cause of action, the case law confirms that the inducement cannot be about something in the contract itself. To give rise to a fraud claim, the misrepresentation must be both factual and extraneous to the contract. *Torchlight Loan Servs., LLC v. Column Fin., Inc.*, 2012 U.S. Dist. LEXIS 105895, at *25 (S.D.N.Y. July 22, 2012) ("[I]t is not sufficient that the alleged misrepresentations are about then-present facts; rather, they also must be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract.") (quotations omitted).

Many of the misrepresentations Dialight identifies in its Complaint as fraudulent misrepresentations are actually addressed *in the MSA itself*. Such statements cannot be collateral to the contract; therefore, they cannot be a basis for holding Sanmina liable in tort. *See, e.g.*, *Noufrios v. Murat*, 193 A.D.2d 791, 792 (1993) (dismissing fraud claim based on alleged false representation in rider to contract and holding that to state a fraud claim arising out of a contractual relationship the allegedly false representation must be "collateral or extraneous to the terms of the agreement"); *Kriegel*, 2014 U.S. Dist. LEXIS 90086, at *47 ("From Plaintiff's view, the *exact* representations made by Defendant in the warranty in Section 10(c) also fraudulently induced Plaintiff's entry into the contract; therefore, his claim is wholly duplicative.").

**5. SANMINA IS ENTITLED TO JUDGMENT ON DIALIGHT'S THIRD CLAIM FOR GROSS NEGLIGENCE/WILLFUL MISCONDUCT.**

***a. Dialight's Controverted Evidence of Errors by Sanmina Fails to Meet the Standard for Gross Negligence or Willful Misconduct.***

"Gross negligence . . . is defined as 'conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing.'" *Gold Connection Discount Jewelers v. American Dist. Tel. Co.*, 212 A.D.2d 577, 578 (1995); *Furs v. Jewelers Protection Services, Ltd.*

79 N.Y.2d 1027, 1029 (1992).

Dialight complains about untimely deliveries and non-conforming products that triggered claims for breach of warranty. Those are not issues that support a claim of gross negligence. To the contrary, the MSA states clearly that Sanmina is not liable for late deliveries (§ 3.3) and it provides a clear set of remedies for warranty claims that include a duty on Sanmina's part to repair, replace, or issue a refund for defective products. [UF 42, 45.]

Dialight also points to internal Sanmina communications in which employees (usually on the sales team and not based in Plant 2) are complaining about errors supposedly made by other Sanmina employees who are actually operating Plant 2. [UF 59.] Far from demonstrating an intentional disregard for Dialight, or a lack of effort by Sanmina, these emails reflect Sanmina's sincere concern about improving its performance and frustration over the difficulties it faced in doing so. These are not emails that say: "who cares about Dialight?;" they are emails that say: "we need to fix this!" That is the opposite of reckless disregard.

The only other specific example of gross negligence cited by Dialight concerns a claim that 1/3 of safety lanyards, comprising about 1,000 items shipped in several orders, failed inspection. [UF 58, 61.] Dialight's damages from that claimed "epidemic defect" were less than $100,000. [*Id.*] Dialight also failed to report it until more than one year after terminating the MSA. [*Id.*] No matter how elusive it may be to define gross negligence, a 1/3 failure rate in a single product part so unimportant that Dialight did not even report it until more than a year after it terminated the MSA, cannot possibly support a claim that Sanmina's conduct under the MSA was grossly negligent.

***b. The Third Cause of Action Is an Improper Attempt to "Tortify" a Breach of Contract Claim.***

As with its claim for fraud, Dialight's claim for gross negligence also fails as a matter of law because it is an improper attempt to hold Sanmina liable in tort for an alleged breach of contract. Under New York law, "the duty giving rise to a gross negligence claim must be independent of the duty arising from a contract. That is, a party cannot sustain a tort claim if it

does no more than assert violations of a duty which is identical to and indivisible from the contract obligations which have allegedly been breached." *Fillmore E. BS Fin. Subsidiary LLC v. Capmark Bank*, 2013 U.S. Dist. LEXIS 47608, at *49 (S.D.N.Y. Mar. 30, 2013); *see also Teachers Ins. & Annuity Ass'n of Am. v. CRIIMI MAE Servs. Ltd. P'ship*, 2007 U.S. Dist. LEXIS 101862, at *4 (S.D.N.Y. Sep. 7, 2007) ("If intentional wrongdoing were all it took, almost every breach of contract claim potentially would turn into a parallel claim for gross negligence.").

Dialight alleges that "[i]ndependent of its contractual duties to Dialight, Sanmina also owed Dialight a duty to refrain from negligently or intentionally harming Dialight's business operations." [Complaint ¶ 101.] But Dialight has not shown, or even alleged, any actions other than purported non-performance under the MSA that damaged Dialight in any way. Its gross negligence claim is, as noted above, based on the contentions that: (a) Sanmina failed to take effective actions to improve its performance under the MSA; and (b) that Sanmina failed to manufacture about 1,000 safety lanyards properly. [Dialight Complaint, ¶¶102, 105.] These are plainly allegations of poor performance under the MSA and Dialight's gross negligence claim thus fails as a matter of law because it impermissibly seeks to transform a contract claim into a tort claim. *See, e.g., B & M Linen, Corp. v. Kannegiesser USA, Corp*., 2013 U.S. Dist. LEXIS 37982, at *18 (S.D.N.Y. Mar. 19, 2013) (granting summary judgment on duplicative gross negligence claim).

Confirming that Dialight is improperly attempting to transform its breach of contract claim into a gross negligence tort claim, Dialight seeks the same damages for all three of its claims. [UF 62.] That alone defeats Dialight's attempt to turn a claim for breach of contract into a tort. *Torchlight*, 2012 U.S. Dist. LEXIS 105895, at *24 ("To be actionable, extra-contractual claims must seek damages distinct from those sought under a claim for breach of contract.") "Where a plaintiff pleads a tort claim in addition to a contract claim and the tort claim seeks the same benefit sought under the contract claim, the tort claim becomes duplicative of the contract claim and may not stand." *LiveIntent, Inc. v. Naples*, 293 F. Supp. 3d 433, 445 (S.D.N.Y. 2018) (Failla, J.) (dismissing fraud claim as duplicative of breach of contract claim). Dialight's claim

for gross negligence fails as a matter of law because it is an improper attempt to hold Sanmina liable in tort for something that, if true, would be a breach of contract. *See also Pac. Life Ins. Co. v. Bank of N.Y. Mellon*, 2018 U.S. Dist. LEXIS 43602, at *41 (S.D.N.Y. Mar. 16, 2018) (Fallia, J.) (dismissing tort claims alleging "damages that flow from the violation of the governing agreements").

***c. Dialight's Gross Negligence Claim Cannot Be Used to Avoid the Contractual Limitation on Liability.***

Even if the Court were to find the existence of a triable issue of fact on Dialight's Third Claim for Relief, Sanmina would still be entitled to a determination that the MSA's limitations of liability are valid and enforceable. As explained above, because the MSA is a contract for the sale of goods, the UCC displaces New York common law. Under the UCC, gross negligence cannot be used to set aside contractual limits of liability. *McNally Wellman Co. v. N.Y. State Elec. & Gas Corp.*, 63 F.3d 1188, 1196 (2d Cir. 1995) (UCC 2-719 governs enforceability of limitations of liability in contracts for the sale of goods); *Those Certain Interested Underwriters v. Farley Grp.*, 2015 U.S. Dist. LEXIS 134148, at *109 (N.D.N.Y. Sep. 23, 2015) (rejecting the argument that a limitation of liability provision was unenforceable due to gross negligence because the UCC displaces the common law on the issue of unenforceability).

The result would be the same even if the UCC did not apply, because common law will set aside a contractual limitation of liability only if the limitation consigns the plaintiff to nominal damages. *Deutsche Bank Nat'l Trust Co. v. Morgan Stanley Mortg. Capital Holdings LLC (In re Part 60 Put-Back Litig.)*, 36 NY3d 342, 348-49 (N.Y. 2020) ("[I]n a breach of contract action, the public policy rule prohibiting parties from insulating themselves from damages caused by grossly negligent conduct applies only to exculpatory clauses or provisions that limit liability to a nominal sum."). Thus, neither the UCC nor common law allows Dialight to void the MSA's limitations of liability.

**C. Summary Judgment Should Be Entered in Favor of Sanmina on its First Cause of Action for Breach of Contract (A/R).**

Through its first cause of action for breach of contract (the A/R claim), Sanmina seeks payment for $5,277,11.02 in goods and materials that Dialight ordered from Sanmina, Sanmina shipped to Dialight, Dialight did not timely reject, and for which Dialight failed to pay. Interest, which accrues at the rate of 1% per month [MSA § 11.4], brings the outstanding total through the date of filing this motion to $7784,126.91. [UF 69.]

Under UCC 2-602, 2-606, and 2-607, a buyer must pay for all goods it fails to timely reject. Under the MSA, Dialight had 15 business days to reject all deliveries or they were deemed accepted. [UF 63.] Dialight did not timely reject any deliveries at issue in the A/R claim. [UF 67.] Failure to reject limits Dialight to asserting warranty claims against Sanmina. [UF 45.]

This is not a "gotcha" issue. Timely notice of rejection is essential "to provide the seller with an opportunity to cure or to allow the seller to attempt to minimize its losses." *Vitol S.A., Inc. v. Koch Petroleum Grp., LP*, 2005 U.S. Dist. LEXIS 18688, at *33 (S.D.N.Y. Aug. 30, 2005); *see also Phillips P.R. Core, Inc. v. Tradax Petroleum, Ltd.*, 782 F.2d 314, 321 (2d Cir. 1985) (plaintiff waived right to rely on belatedly alleged defect to justify nonpayment because that failure deprived defendant of opportunity to cure); N.Y. U.C.C. Law § 2-605(1)(a) ("The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach … where the seller could have cured it if stated seasonably.").

Sanmina shipped approximately $5.3 million in goods and materials to Dialight, transmitting corresponding invoices to Dialight upon shipment. [UF 65.] The contemporaneous issuance of invoices is important because Dialight contends that certain shipments were never received and thus it could not have timely rejected them. That is wrong. Dialight received invoices and effectively had three weeks to verify receipt of the goods identified in the invoice. It would have been relatively simple for Dialight to notify Sanmina that a shipment invoiced to

Dialight never showed up.

Dialight also tacitly admits that it rejected only one invoice for which Sanmina seeks payment in its A/R Claim. In response to Sanmina's Contention Interrogatory no. 14, which asked Dialight to identify any instance in which it timely rejected a delivery that underlies Sanmina's A/R Claim, Dialight first argued that Section 3.6 of the MSA should be unenforceable because it is unreasonable. Somewhat inconsistently, Dialight identified documents showing that it had, in fact, timely rejected certain Sanmina deliveries. [*See* Dialight's Response to Contention Interrogatory No. 14.] However, only one of the documents identified by Dialight pertains to an invoice underlying the A/R claim, and to avoid a triable issue of fact, Sanmina has removed that invoice from its calculation. [UF 67.][18]

## V. CONCLUSION

For all the above reasons, summary judgment should be entered in Sanmina's favor on Dialight's First and Third Claims for Relief, and on Count One of Sanmina's Complaint. Furthermore, even if the Court were to deny Sanmina summary judgment on Dialight's Claim for Gross Negligence, Sanmina would still be entitled to a ruling that the MSA's limitations of liability apply to all of the remaining claims in Dialight's Complaint.

[18] Dialight's claimed right to a $1.3 million offset is irrelevant to this Motion and does not preclude summary judgment in favor of Sanmina. "Offset claims do not bar summary judgment on promissory notes or other payment obligations, unless such obligations and the offset claims involve contractually 'dependent' promises." *Computech Int'l, Inc. v. Compaq Comput. Corp.*, 2004 U.S. Dist. LEXIS 9120, at *35 (S.D.N.Y. May 21, 2004).

Dated: May 2, 2022

ERVIN COHEN & JESSUP LLP
and
RICH, INTELISANO & KATZ, LLP

By: /s/ Michael C. Lieb

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**PROOF OF SERVICE**

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 9401 Wilshire Boulevard, Ninth Floor, Beverly Hills, CA 90212-2974.

On May 2, 2022, I served true copies of the following document(s) described as **SANMINA CORPORATION'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT** on the interested parties in this action as follows:

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☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be electronically transmitted to the persons at the e-mail addresses listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 2, 2022, at Beverly Hills, California.

/s/ Andrew J. Peterson
Andrew J. Peterson