

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

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

**SANMINA CORPORATION’S STATEMENT OF
MATERIAL UNDISPUTED FACTS IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT
(LOCAL RULE 56.1)**

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FACTS COMMON TO ALL ISSUES

1. Sanmina Corporation (“Sanmina”) is one of the world’s largest contract manufacturers (“CM”) with 75 facilities located in 25 countries. [Ex. 18 (Sutsko depo., 201:18-202:1 (Auth.)), p. 6.]

2. Dialight plc (“Dialight”) and Sanmina are parties to a contract called the Manufacturing Services Agreement (“MSA”). [Dialight Answer ¶ 8; Dialight Complaint ¶ 1; Ex. 24 ((Declaration of Jorge Camacho ¶ 3 (Auth.)).]

3. The MSA terms were the product of negotiations between the parties. [Exs. 2 (Green depo., 20:5-21:14 (Auth.)), 21 (Green 158:24-159:22 (Auth.)), 22 (Sutsko, 179:12-17 (Auth.)), 23 (Sutsko 179:12-180:12 (Auth.)), 131 (Sutsko 160:11-16 (Auth.)); 132 (Sutsko 161:19-162:3 (Auth.)), 133 (Sutsko 164:11-20 (Auth.)), 134 (Sutsko 165:1-166:3 (Auth.)), 135 (Sutsko 167:20-168:9 (Auth.)), 136 (Sutsko 167:20-168:9 (Auth.)), 137 (Sutsko 183:18-24 (Auth.)), 138 (Sutsko 235:14-236:5 (Auth.)), 139 (Sutsko 236:21-237:15 (Auth.)), 140 (Sutsko 239:23-240:6 (Auth.)), 141 (Sutsko 239:23-240:20 (Auth.)), 142 (Sutsko 242:23-243:8 (Auth.)), 143 (Sutsko 242:23-243:18 (Auth.)), 144 (Sutsko 246:6-15 (Auth.)); Sutsko 162:4-163:1; 179:6-183:24.]

4. Michael Sutsko, Dialight’s CEO, negotiated the agreement for Dialight, advised by its outside consultant Robert Freid and outside counsel, Wilson Sonsini Goodrich & Rosati. [Sutsko 36:3-6; 162:4-163:1; 166:4-14; Khanbabi depo., 94:17-23; 114:17-23.]

5. Sanmina’s Guadalajara factories, which handled the Dialight account, focus on four customer segments: computing; industrial and lighting; telecommunications; and medical and automotive. [Gonzalez depo., 31:6-23.]

A. Dialight’s Decision to Outsource

6. 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. [Sutsko, 16:1-20; 76:18-77:1; *see also* Rapp depo., 38:23-39:8.]

7. Sutsko nonetheless immediately embarked on the outsourcing project known as Project Fawkes. [Khanbabi depo., 23:12-24:3.]

8. Sutsko's first day on the job was June 1, 2015 [Sutsko 25:14-20]; on June 3, 2015, he and John Dullea of Sanmina exchanged emails pertaining to Sutsko's inquiry about Sanmina serving as Dialight's outsourcer. [Sutsko 23:4-26:11; Ex. 121.]

9. Within days of assuming the helm of Dialight, Sutsko had to announce a profit warning. He attributed much of the blame for that warning to Dialight's inefficient in-house manufacturing operations. [Sutsko 83:8-24; 84:1-4; 86:9-24; 87:1-24; 88:1.]

10. Those in-house operations were located in Ensenada, Mexico; Newmarket, UK; Roxboro, North Carolina; and Penang, Malaysia. [Sutsko 83:8-84:4; 86:9-88:1; Khanbabi 22:1-23:10; Dialight Complaint ¶ 12.]

11. Sutsko placed Dialight's head of operations, Preston Wells, in charge of Project Fawkes. [Ex. 121 (Sutsko 23:23-24:18 (Auth.)); Sutsko 28:15-29:12.]

12. Wells, however, quit sometime before the end of September 2015 (before the first draft of the MSA was even circulated). [Sutsko 60:13-61:6.]

13. Dialight later fired Wells' successor, Dennis Geary. [Sutsko 70:5-23.]

14. Dialight retained Ernst & Young ("E&Y") to evaluate the viability of Project Fawkes and Robert Freid, who operated Contract Manufacturing Consultants, Inc. ("CMC"), as Dialight's expert in contract manufacturing. [Sutsko 142:16-143:9.]

15. According to Sutsko, E&Y was to "advise on the risks and opportunities" of outsourcing. [Sutsko 61:21-22.]

16. [REDACTED]

17. [REDACTED]

[REDACTED]

18. 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.” [Sutsko 69:12-13.]

19. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

20. Dialight did not provide the E&Y report to 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. [Freid depo., 29:25-32:14.] [REDACTED]

[REDACTED]

[REDACTED]

B. Negotiation of the MSA

21. Bob Green, a Sanmina Business Development Manager, emailed an initial draft of the MSA to Sutsko on October 6, 2015. [Exs. 131, 132.]

22. 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. [Ex. 131.]

23. Exhibit 23, which was the Dialight draft proposed back to Sanmina bears the legend “WSGR” (for Wilson Sonsini Goodrich & Rosati, the law firm that advised Dialight in the negotiation of the MSA). [Sutsko 36:3-6; Khanbabi 114:20-22.]

24. Internally, Sutsko and Freid exchanged thoughts on revisions [Exs. 133, 134, 135, 136] that ultimately resulted in Dialight proposing an entirely rewritten MSA to Sanmina [Exs. 21, 22, 23].

25. Sanmina initially proposed that the MSA would be “construed in accordance with” California law. [Ex. 132, § 15.5.]

26. Dialight proposed the language that was ultimately used, stating that the “formation, construction, and performance” of the MSA would be governed by New York law [Ex. 23, § 25.11 (proposal); Ex. 24, § 25.10 (final) (Declaration of Jorge Camacho ¶ 3 (Auth.)).]

27. Freid added a recital in Dialight’s internal draft that would have required Sanmina to provide 80,000 square feet of manufacturing floor space and 900 direct laborers. [Ex. 134, p. 1.] Dialight never made such a proposal to Sanmina [Ex. 23] and it is not in the final MSA.

28. All MSA drafts agree, and the final MSA states, that such allocation of floorspace to be dedicated to Dialight would be made until 21 days *after execution of the MSA*. [Ex. 134, § 19.7(c); Ex. 23, § 19.8(c); Ex. 24, § 19.7(c).] Sanmina’s initial draft was silent on the issue. [Ex. 132.]

29. Sanmina’s initial draft of the MSA spoke only about Sanmina selling products to Dialight. [Ex. 132, § 2.1.]

30. Freid prepared an internal draft of the MSA stating that Sanmina would provide “Products” and “Services.” [Ex. 134, p. 1, § 1.2, and p. 24 (Services definition).] The “Services” language was not proposed to Sanmina [Ex. 23], and the final MSA states that Sanmina would provide only those services “necessary to deliver . . . Products.” [Ex. 24, § 4.1, p. 5.]

31. Dialight never tried to negotiate out of the MSA a deadline for Dialight’s deemed acceptance of products; it simply proposed 30 days, but ultimately agreed to 15 business days. [Compare Ex. 132, § 5.2; Ex. 134, § 3.8; Ex. 23, § 3.7; Ex. 24, § 3.6.]

32. 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. [Ex. 132, p. 11, § 9.4.]

33. Dialight’s draft MSA proposed eliminating the liability cap, but retaining the prohibition on “special, incidental, indirect [or] consequential damages” [Ex. 23, § 22.4.]

34. The final version of the document included both the limitation of liability and the liability cap. [Ex. 24, § 22.4.]

35. Dialight proposed credit terms that Sanmina rejected. [Ex. 23, § 11.6; Ex. 392 (Soule 63:9-64:14 (Auth.)); Soule depo., 63:11-65:4; Ex. 24, § 11.6.]

C. Structure of the Parties’ Relationship Under the MSA

36. In order for Sanmina to manufacture Dialight’s products, Dialight needed to provide, *inter alia*, complete and accurate specifications and forecasts of anticipated orders. 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. [Camacho Decl. ¶ 4.]

37. The MSA required Dialight to provide Sanmina with rolling 12-month forecasts every month and Sanmina was required to “make purchase commitments to its Materials suppliers” based on those forecasts. [Ex. 24, § 1.5; *see also* § 4.2.] Sanmina did so. [Kender depo., 48:14-49:9.]

38. Under the MSA, Sanmina also could only order “safety stock” if “requested and authorized by Dialight.” [Ex. 24, § 20.2.]

39. Under the MSA, if Dialight failed to consume materials Sanmina ordered per forecast, Dialight had to pay for them. [Ex. 24, §§ 4.2, 8.1-8.8.]

40. Under the MSA, 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. [Ex. 24, §§ 1.2-1.4.]

41. Under the MSA, the products were to be manufactured in accordance with Dialight-provided written “Product Specifications.” [Ex. 24, § 14.1.]

42. Under the MSA, 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.” [Ex. 24, § 3.3.]

43. The no liability provision was specifically negotiated. [Sutsko 363:22-364:12.] 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.” [Ex. 23, p. 4.] Ultimately this issue was resolved by stating that Sanmina would not have any liability for failing to meet Dialight’s delivery dates. [Ex. 24, § 3.3.] Mr. Freid told Dialight to agree to this liability exclusion because “financial penalties for late delivery” were “impossible to get.” [Ex. 144.]

44. Under the MSA, shipments from Sanmina were deemed accepted if not rejected within 15 business days. [Ex. 24, § 3.6.]

45. Failure to reject shipments does not deprive Dialight of any remedies, but rather requires Dialight to assert warranty claims against Sanmina. [MSA § 3.8.]

D. Dialight Terminates the MSA Without Cause.

46. The parties executed the MSA on or about March 8, 2016 [Dialight Answer ¶ 6] and proceeded to ramp up the transfer of production from Dialight’s in-house facilities to Sanmina’s Guadalajara, Mexico facilities. [Harris 35:22-36:18.]

47. 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. [Dialight Answer ¶ 6; Ex. 59 (Ramirez 279:23-280:12 (Auth.)).]

48. Dialight’s decision to terminate the MSA was made in consultation with counsel. [Khanbabi 248:16-25-252:12.]

49. 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. [Ex. 24, § 8.]

**FACTS IN SUPPORT OF PARTIAL SUMMARY JUDGMENT ON DIALIGHT’S
FIRST CLAIM FOR RELIEF FOR FRAUDULENT INDUCEMENT AS
PLEADED**

50. Dialight’s Complaint alleges that “Sanmina fraudulently induced Dialight to sign the MSA . . . 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.”

[Dialight Complaint ¶ 68.]

51. According to Dialight, this supposed misrepresentation appears in Recitals B and D of the MSA. [Dialight Complaint ¶¶ 18-20.]

52. Sanmina did, in fact, have significant experience with high mix/low volume production, including at its Guadalajara facility. [Green 45:12-15; Carral depo., 26:7-29:11; 31:16-32:20; 38:16-22; Sugai depo., 18:5-17; Eulau depo., 17:24-20:7; Gonzalez depo., 26:5-30:18; Camacho depo., 25:10-27:1; Rios depo., 65:15-66:6; 88:11-93:18.]

53. Dialight was not misled about Sanmina’s machining capacity; rather it was directly involved in capacity planning, ultimately agreeing that the mechanical work, including “CNC” and a new paint line would be placed in Plant 4. [Exs. 258 (Freid depo., 176:20-177:2 (Auth.)), 259 (Freid 184:8-19 (Auth.)), 260 (Freid 184:8-19 (Auth.)); Freid 42:9-44:4; 98:11-99:2; 108:17-109:7; 164:3-168:2; Green 48:6-49:25; 165:25-167:15.]

54. Dialight also independently evaluated Sanmina’s capabilities. [Green 48:24-49:25; Freid 21:2-22:8; Exs. 127 (Sutsko 144:18-145:1 (Auth.)), 128 (Freid 91:12-17 (Auth.)), 129 (Freid 107:2-13 (Auth.)), 130 (Freid 113:4-19 (Auth.)), 248 (Freid 77:2-78:9 (Auth.)), 254 (Freid 156:7-11 (Auth.)), 255 (Freid 156:12-25 (Auth.)).] Its consultant, Robert Freid even noted that Sanmina “might be under-estimating the complexity of product mix from [Dialight].” [Ex. 257 (Freid 169:17-171:14 (Auth.)).]

55. [REDACTED]

56. Dialight's current CEO testified that Dialight was "obviously internally aware" of how to calculate the liability cap (which she quantified as between \$1.6 and \$1.8 million). [Khanbabi 242:15-243:16.]

**ADDITIONAL FACTS IN SUPPORT OF PARTIAL SUMMARY JUDGMENT
ON DIALIGHT'S FIRST CLAIM FOR RELIEF FOR FRAUDULENT
INDUCEMENT AS SUPPLEMENTED BY INTERROGATORY RESPONSES
(Sanmina disputes Dialight's right to rely on unpleaded fraud allegations)**

57. Dialight asserts in its response to Sanmina Special Interrogatory no. 12 that its fraud in the inducement claim relies on the following additional alleged misrepresentations by Sanmina. [See Dialight's Responses to Contention Interrogatories.] To the extent the Court considers these additional alleged misrepresentations, they do not raise a triable issue of fact. Legally, these claims are non-actionable. The legal reasons these allegations, even if true, could not support Dialight's claims, are addressed in the Motion. [See Motion at IV.B.2.] Below, Sanmina addresses the true facts underlying Dialight's allegations, while also annotating the corresponding legal arguments as follows:

- "PERFORMANCE": allegations with this annotation tout Sanmina's ability and intention to perform, coupled with an allegation that Sanmina had no such intent. Such representations are not actionable. [See Motion at IV.B.2.b.]
- "INTEGRATION": this allegation is precluded by the MSA's integration clause and Dialight's opportunity to investigate. [See Motion at IV.B.2.e.]
- "PUFFERY": allegations with this annotation are puffery. [See Motion at IV.B.2.d.ii.]
- "POST-K": allegations with this annotation pertain to post-contracting conduct that cannot have induced Dialight to sign the MSA. [See Motion at IV.B.2.f.]

- “VAGUE”: the claimed representation is too vague to support a fraud claim. [*See* Motion at IV.B.2.c.]
- “NO DUTY”: the claimed representation represents a purported opinion held internally by Sanmina that it would be under no duty to disclose to Dialight. [*See* Motion at IV.B.2.d.ii.]
- “TRUE”: the claimed representation is a true statement as a matter of undisputed fact. [*See* Motion at IV.B.3.b.]
- “NOT PRESENT FACT”: the claimed representation is not a statement of present fact. [*See* Motion at IV.B.3.b.]
 - a. Claimed Misrepresentation No. 1: MSA B: “SANMINA is an expert in the contract manufacturing field for LED products and components.”
 - i. Claimed Misrepresentation No. 1 is a true statement. At the time Sanmina entered into the MSA it was manufacturing LED products for two other customers in Guadalajara Plant 2 and previously had a third customer in Plant 2. [Carral 27:2-24; 32:10-16; Gonzalez 27:18-29:25; 30:10--31:1.]
 - ii. Legal issues: VAGUE; PUFFERY; PERFORMANCE; TRUE.
 - b. Claimed Misrepresentation No. 2: MSA Recital D: “DIALIGHT’s Finished Products share common sub-assemblies that may be manufactured and held in work-in-process locations until required for final configuration into a Finished Product. SANMINA’s expressed capability to provide this manufacturing flexibility is one determining factor in the selection of SANMINA by DIALIGHT as the manufacturer of the products.”
 - i. Claimed Misrepresentation No. 2 is a true statement. [Rios 197:9-198:12; Green 162:24-164:11.]
 - ii. Legal Issues: PERFORMANCE; VAGUE; TRUE; NOT PRESENT FACT.

- c. Claimed Misrepresentation No. 3: MSA Recital D: “Another factor is SANMINA’s ability to provide from a single profit center complete vertical integration capabilities, including sheet metal fabrication, machining, printed circuit board assembly, paint line, and final Product assembly operations.”
- i. Claimed Misrepresentation No. 3 is a true statement. The “single profit center” is Sanmina. [Green 165:25-167:3.] Dialight’s CEO acknowledged this (while also acknowledging that the representation is vague). [Sutsko 181:21-182:9 (“a profit center would be an entity that has accountability for profit and loss. You know, that could be a whole company. You know, I’m just opining, but it could be a whole company, it could be a guy, it could be, you know, a group of facilities all working together, you know, lots of different things.”).]
- ii. Dialight’s contention that the “single profit center” language concealed from Dialight the fact that Plants 2 and 4 operated on separate P&L’s is false. Robert Freid, Dialight’s consultant who inserted this recital [Sutsko 181:10-20 (single profit center language inserted on advice from CMC), Ex. 137], admitted that the purpose of inserting Claimed Misrepresentation No. 3 was to ensure that Sanmina would make space available in its Plant 4 to install a paint line and to prevent Plant 4 from charging a profit when it transferred painted fixtures to Plant 2. [Freid 166:20-169:16.] Included in his testimony is the following:
- “Q. Okay. But did you care one way or the other as to whether Plant 2 and Plant 4 were on a separate P&L?
- “A. I wasn’t asking questions along those lines. My concern was whether there . . . was going to involve any additional markups other than cost – on a cost basis.”

[See also Ex. 272 (Freid 259:12-266:21 (Auth.)); Freid 260:4-268:1.] In other words, Dialight could not have relied on that representation in the manner it claims because it did not insert that recital to obtain a representation about the Plant 2 and Plant 4 P&Ls. Dialight also knew that Sanmina's Plant 4 would handle metal processing work. [Sutsko 296:23-297:20.]

The MSA itself also discloses that Plant 4 is simply treated as any other supplier to Plant 2, with detailed pricing information and markups on metal-work supplied by Plant 4 to Plant 2 or directly to Dialight. [Ex. 24, exs. B, C.]

- iii. Legal Issues: PERFORMANCE; VAGUE; TRUE.
- d. Claimed Misrepresentation No. 4: RFP: Dialight request: "Expect continuous production of higher volume units, but wide variations from forecast in product mix in terms of finished products." Sanmina Response: "No problem we can support this." For further information see depositions Exhibits 10 and 11.
 - i. Claimed Misrepresentation No. 4 refers to item no. 10 in Exhibit 11, located under the tab labeled "Exhibit 4 Other Specifications." [Ex. 11 (Green 99:16-101:23 (Auth.)).] "RFP" in Claimed Misrepresentation No. 4 refers to Dialight's request for proposal and Sanmina's response. [Exs. 10 (Green 99:16-100:15 (Auth.)), 11.]
 - ii. This is a true statement. [Rios 172:24-173:17; Fact nos. 50-54.]
 - iii. Legal Issues: VAGUE; PERFORMANCE; INTEGRATION; TRUE; NOT PRESENT FACT.
- e. Claimed Misrepresentation No. 5: Sanmina represented that based on Dialight's product mix and challenges of vertically integrating; it could add value to Dialight's efforts.

- i. Legal Issues: VAGUE; PUFFERY; PERFORMANCE; INTEGRATION; TRUE; NOT PRESENT FACT.
- f. Claimed Misrepresentation No. 6: Sanmina withheld from Dialight that its credit team viewed Dialight as a “dime a dozen” opportunity and was opposed to extending credit. The finance team was instructed not to let Dialight know that Sanmina credit had changed course.
 - i. To provide context, Claimed Misrepresentation No. 6 is a reference to deposition Exhibit 4 (also part of Ex. 386 (Soule depo., 49:14-50:25 (Auth.))) in which Sanmina’s credit team internally expressed reservations about Dialight’s credit-worthiness. The author was Brandon Soule. [Ex. 4 (Soule 52:13-53:18 (Auth.)).]
 - ii. Far from keeping these concerns confidential, Mr. Soule testified that he brought them to the attention of Dialight’s then-CFO (now CEO) Fariyal Khanbabi. Based on that conversation with Ms. Khanbabi, memorialized in a handwritten note marked as Exhibit 385 (Soule 36:5-37:16 (Auth.)), Mr. Soule testified that he was convinced that Dialight was credit-worthy and that its products were unique and not “a dime a dozen.” [Soule 36:5-49:13; 78:19-86:12.]
 - iii. The MSA contains a clear provision on Sanmina’s obligations to extend credit to Dialight (§ 11.6). That provision was heavily negotiated. [See, e.g., Soule 63:24-65:4 (discussing the rejection of Dialight’s proposed wording of Section 11.6).] And Dialight admits that Sanmina adhered to its obligation in the final version of that provision. [Sutsko 364:15-365:5.]
 - iv. Legal Issues: PERFORMANCE; INTEGRATION; NO DUTY; VAGUE.
- g. Claimed Misrepresentation No. 7: Sanmina withheld from Dialight that Plant 4 was against taking on Dialight as a customer because it lacked the capability.

- i. First, “capability,” as used in the memo to which Dialight refers in Claimed Misrepresentation No. 7, means machining equipment. [Ex. 29 (Carral 50:19-52:9 (Auth.)).]
 - ii. In fact, Plant 4 did not have the equipment necessary to handle the Dialight business, which is why Dialight transferred its own “CNC” equipment to Sanmina and purchased a new paint line. Both were installed in Plant 4 with Dialight’s knowledge and at Dialight’s expense. [See also Ex. 24, § 19.7(a) (requiring Sanmina to provide a floor space plan so that Dialight could install the CNC machines and paint line).]
 - iii. Second, Plant 4 needed additional floorspace to accommodate the CNC machines and paint line and, again, Dialight was informed of this. [Ex. 194 (Giggey depo., 38:15-39:16 (Auth.)); Gonzalez 44:23-47:23.] Sanmina initially considered placing the Dialight paint line in Plant 6, but Plant 6 could not be used for painting. [Ex. 32 (Carral 60:21-63:1 (Auth.)).] Sanmina therefore expanded Plant 4 by moving a wall between Plants 4 and 6 to accommodate the Dialight business. [Carral 50:19-57:13; 62:6-64:22.]
 - iv. Finally, Sutsko refused to say that this information even mattered to him, stating that Dialight obviously needed to be able to paint its products but refusing to say that Plant 4’s alleged initial reluctance to accommodate the paint line would have mattered to him. [Sutsko 350:23-352:22.]
 - v. Legal Issues: PERFORMANCE; NO DUTY; VAGUE.
- h. Claimed Misrepresentation No. 8: Sanmina told Dialight Paint [sic] 4 could accommodate the paint line.
- i. As stated above, Sanmina moved a wall to fit the paint line in Plant 4. [Carral 57:8-13.]
 - ii. Legal Issues: PERFORMANCE; TRUE.

- i. Claimed Misrepresentation No. 9: Sanmina’s representations about the strength of their ability to manage a supply chain. Exhibit 16 contains examples of Sanmina’s fraudulent representations to Dialight about its supply chain capabilities.
 - i. Dialight fails to identify with any particularity any false statements in Exhibit 16.
 - ii. But for Slide 6, Exhibit 16 is a generic supply chain presentation. [Ex. 16 (Green 118:17-120:12 (Auth.))]
 - iii. Slide 6, which is tailored to Dialight, actually warns Dialight of risks inherent in its supply chain because of over-reliance on single source vendors for much of its material needs. [Ex. 16.]
 - iv. Sanmina is unaware of any basis for the claim that this presentation is false but will address that evidence if presented in an opposition.
 - v. Legal Issues: PERFORMANCE; VAGUE; PUFFERY; INTEGRATION; TRUE; NOT PRESENT FACT.
- j. Claimed Misrepresentation No. 10: Sanmina represented to Dialight they were experts in high-mix low-volume manufacturing.
 - i. Claimed Misrepresentation No. 10 is already addressed in Fact nos. 50-54. Sanmina had this expertise.
 - ii. Legal Issues: PUFFERY; PERFORMANCE; VAGUE; TRUE; NOT PRESENT FACT.
- k. Claimed Misrepresentation No. 11: On Robert Freid’s plant tour from 9/7/2015-9/9 2015 Sanmina, Freid was shown space in Plant 2 that would be the likely location of Dialight. The space was up-front, modern looking, and well lit.
 - i. Section 19.7 of the MSA refutes this claim of misrepresentation. It states: “Sanmina shall provide Dialight a general plan within seven (7) days, and more specific plans within twenty-one (21) days, *following execution of*

this Agreement to include these critical items: [¶] (a) CNC/Paint. Provide general floor space plan for Equipment ; [¶] (c) Manufacturing Floor Space: Provide general floor space plan for PCBA and finished product assembly with test and burn-in.” [Ex. 24 (emphasis added).]

ii. VAGUE (“likely location”); PERFORMANCE; INTEGRATION.

l. Claimed Misrepresentation No. 12: Sanmina represented it had 30 years of experience in key markets.

i. Claimed Misrepresentation No. 12 is vague, but Sanmina has been in existence for over 40 years. [Declaration of Jorge Camacho, ¶ 2.]

ii. Legal Issues: VAGUE; PUFFERY; TRUE; NOT PRESENT FACT.

m. Claimed Misrepresentation No. 13: The 9-22-15 presentation from Dialight to Sanmina contained numerous false statements.

i. Sanmina believes Claimed Misrepresentation No. 13 is a reference to Exhibit 18. [Ex. 18.] No false statements, however, are identified.

ii. Legal Issues: VAGUE; PUFFERY; PERFORMANCE; NOT PRESENT FACT.

n. Claimed Misrepresentation No. 14: Sanmina represented that no level IT systems/integration was required between the Dialight ERP system and Sanmina’s ERP system.

i. It is not clear what Claimed Misrepresentation No. 14 means or what its source is.¹ It seems self-evident that Dialight’s systems and Sanmina’s systems would need to talk to each other. [See also Giggey 112:24-113:15.]

¹ In Interrogatory no. 10, Sanmina asked Dialight to identify each representation by a Sanmina representative that Sanmina “had the then-existing capability to meet Dialight’s unique needs.” No representation about systems integration capabilities is identified. [See Dialight Response to Special Interrogatory no. 10.]

- ii. Sanmina witnesses have testified that they experienced difficulties with *Dialight's* "TMS" shipment management system, *which Dialight required Sanmina to use*, while Sanmina preferred to use its Oracle system. [Camacho 29:16-37:6.] To the extent Dialight is complaining about issues with its TMS system, that did not constitute a pre-contract misrepresentation by Sanmina.
- iii. Legal Issues: VAGUE; PERFORMANCE; INTEGRATION.
- o. Claimed Misrepresentation No. 15: Sanmina made numerous representations throughout the course of the engagement that it would take remedial steps to improve performance.
 - i. Sanmina's performance did improve by Dialight's admission. About one year into the relationship, Dialight prepared a "shared scorecard" identifying areas that were "Excellent," "Satisfactory," and "Need Improvement." Four of the categories, including "Overall" were labeled "Excellent." [Ex. 358, p. DIA825086 (Harris depo., 117:18-22 (Auth.)).] In fact, in an August 24, 2018 internal email, Dialight's COO, Luis Ramirez, reported extensively on improvements made by Sanmina. [Ex. 519 (Rapp depo., 148:18-151:2 (Auth.)).]
 - ii. Legal Issues: POST-K; PERFORMANCE; TRUE.
- p. Claimed Misrepresentation No. 16: Sanmina regularly made build commitments to Dialight knowing at the time they could not be met.
 - i. There is disputed testimony as to whether this occurred; however, as a post-execution allegation, it cannot support a fraudulent inducement claim.
 - ii. Legal Issues: POST-K; VAGUE.
- q. Claimed Misrepresentation No. 17: Sanmina represented it had world class quality, reliability, and responsiveness.

- i. Sanmina did make this representation and Dialight has not identified any evidence that it was untrue.
 - ii. Similar representations were made to Dialight by its own consultant, based on his independent investigation. [Freid. Ex. 128, pp. 8, 12, 22.]
 - iii. Legal Issues: PUFFERY; VAGUE; PERFORMANCE; INTEGRATION; TRUE; NOT PRESENT FACT.
- r. Claimed Misrepresentation No. 18: Sanmina represented itself as having expertise in the Lighting Market.
- i. This is the same as Claimed Misrepresentation no. 1. Sanmina did have expertise in the lighting market. [Carral 27:2-24; 32:10-16; Gonzalez 27:18-29:25; 30:10-31:1.]
 - ii. Legal Issues: VAGUE; PUFFERY; INTEGRATION; PERFORMANCE; TRUE; NOT PRESENT FACT.

**FACTS IN SUPPORT OF PARTIAL SUMMARY JUDGMENT ON DIALIGHT'S
THIRD CLAIM FOR GROSS NEGLIGENCE**

58. Dialight bases its gross negligence claim on two allegations: a vague allegation that Sanmina “took no effective steps to improve its performance” [Complaint ¶102] and the allegation of an “epidemic defect” alleged with respect to certain safety lanyards [Complaint ¶105].

59. As to the first issue, to support its contention that Sanmina failed to try to improve performance, Dialight points to internal Sanmina communications in which Sanmina employees are attempting to fix problems, often expressing concern that the efforts are inadequate. [See, e.g., Exs. 6 (Green 72:18-73:18 (Auth.)), 8 (Green 81:8-83:11 (Auth.)), 9 (Green 86:21-87:14 (Auth.)), 34 (Green 209:13-210:22 (Auth.)), 40 (Green 247:25-248:17 (Auth.)).]

60. In direct conflict with the allegation in paragraph 102 of the Complaint, Dialight also admits that Sanmina took affirmative steps to improve performance and that it successfully did so. [Ex. 519.]

61. The epidemic defect claim alleges that 1006 of 3083 safety lanyards failed a test created by Dialight. [Complaint ¶ 59.]. Dialight admits that it did not raise this claim until October 14, 2019 – *more than one year after Dialight provided notice of termination of the MSA*. [Dialight Complaint ¶ 61.] Dialight also contends that its damages from this issue were less than \$100,000, and that includes testing (\$38,000), “personnel time” (\$42,000) and legal fees (\$15,000). [Dialight Response to Contention Interrogatory no. 6.] Dialight does not allege any personal injury claims resulting from the alleged lanyard defects.

62. Dialight seeks the same damages for all three of its claims. [Dialight Complaint ¶ 64.]

**FACTS IN SUPPORT OF PARTIAL SUMMARY JUDGMENT ON COUNT ONE OF
SANMINA’S COMPLAINT FOR BREACH OF CONTRACT (A/R CLAIM)**

63. Pursuant to Section 3.6 of the MSA, any product deliveries not rejected by Dialight within 15 business days are deemed accepted. [Ex. 24, § 3.6.]

64. In Count One of its Complaint, Sanmina seeks to recover money owed for unpaid invoices issued by Sanmina. [Sanmina First Amended Complaint ¶¶ 27-34.]

65. The current balance of Sanmina’s A/R claims is \$5,277,11.02 for goods and materials that Dialight ordered from Sanmina, Sanmina shipped to Dialight, Dialight did not timely reject, and for which Dialight failed to pay. [FAC ¶¶ 27-34; Camacho Decl. ¶ 7, Exs. A, B (current A/R balance as of May 2, 2022).]

66. Sanmina contemporaneously invoiced Dialight upon shipping goods and materials. [Camacho Decl. ¶¶ 6-8.]

67. Dialight did not provide Sanmina with notice of rejection of any of the Products shipped, or other charges reflected in, any of the invoices comprising Sanmina’s A/R claim for the delivery of products other than a single invoice that was removed from the computation of damages. [Camacho Decl. ¶¶ 11-12.]

68. All unpaid invoices bear interest at the rate of 1% per month. [Ex. 24, § 11.4.]

69. With interest through the date of filing, Dialight owes Sanmina the sum of \$7,784,126.91 for unpaid invoices as alleged in Count One. [Camacho Decl. ¶ 10, Exs. A, B.]

70. To the extent relevant to the resolution of this claim based on Dialight's contention that the MSA's rejection requirements should be unenforceable: all of the invoices comprising the A/R claim represent shipments direct to Dialight or to a hub or transit point specified by Dialight. [Camacho Decl. ¶ 14.]

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 STATEMENT OF MATERIAL UNDISPUTED FACTS IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT (LOCAL RULE 56.1)** 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