UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

DIALIGHT PLC'S RESPONSES TO SANMINA CORPORATION'S STATEMENT OF MATERIAL FACTS AND STATEMENT OF ADDITIONAL MATERIAL FACTS PRECLUDING SANMINA'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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FACTS COMMON TO ALL ISSUES[1/]

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.]

Dialight's Response to Paragraph 1: Admitted that Sanmina portrays itself as one of the world's largest contract manufacturers with 75 facilities located in 25 countries. Dialight has not independently reviewed evidence to confirm or verify this claim.

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.)).]

Dialight's Response to Paragraph 2: Admitted in part, Dialight and Sanmina were parties to a contract called the Manufacturing Services Agreement ("MSA") prior to its January 31, 2019 termination. [Rader Decl. Ex. 1].

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.]

Dialight's Response to Paragraph 3: Admitted.

[1/] Subheadings in Paragraphs 1-70 are Sanmina's headers. Dialight disputes these alleged facts and arguments and views them as purported facts contrary to the evidence.

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.]

Dialight's Response to Paragraph 4: Admitted.

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.]

Dialight's Response to Paragraph 5: Dialight admits that Sanmina's Plant 2 and Plant 4, located in Guadalajara, handled the Dialight account. Dialight lacks information to admit or deny the remainder of Paragraph 5.

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.]

Dialight's Response to Paragraph 6: Disputed in part. Dialight states that it hired Michael Sutsko in June 2015 [Sutsko Tr. 21:15-17], and that Michael Sutsko first contacted Sanmina in June 2015. [Rader Decl. Ex. 2]. Dialight denies that Michael Sutsko did not have any outsourcing experience; he testified he did not have any experience "managing an outsourcer." [Sutsko, 76:18-21]. Dialight denies that Michael Sutsko could not identify anyone at Dialight with outsourcing experience. At his deposition which took place a little over six years after his first contact with Sanmina, Michael Sutsko could not remember if anyone at Dialight had outsourcing experience, testifying "I'm not sure" when asked "[d]id anybody at Dialight have that experience that you know of?" [Sutsko, 76:22-77:1]. Throughout the relationship, Dialight had personnel with outsourcing experience heavily involved with Sanmina, including Luis Ramirez, Perla Garcia, and John Kender. [Ramirez 21:8-11; Kender 18:10-13; Rader Decl. Ex. 3].

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

Dialight's Response to Paragraph 7: Disputed in part. Dialight admits that soon after starting at Dialight Michael Sutsko began reaching out to potential outsourcing partners. [Sutsko 25:14-20]. Dialight disputes Sanmina's narrative description in Paragraph 7 and the implication that Michael Sutsko looked into who at Dialight had outsourcing experience, learned that no one did, and proceeded anyway. Michael Sutsko's testimony when asked in July 2021 if anyone at Dialight had experience with outsourcing was "I'm not sure." [Sutsko Tr., 76:22-77:1].

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.]

Dialight's Response to Paragraph 8: Admits Michael Sutsko reached out to Sanmina about potentially forming a relationship. Michael Sutsko also reached out to Flextronics and Jabril. [Rader Decl. Exs. 4; 5].

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.]

Dialight's Response to Paragraph 9: Admitted in part. Dialight admits that Dialight announced a profit warning on June 10 2015. Dialight admits that Michael Sutsko testified in his deposition that: "I believe within a few days of my joining Dialight I had to lead a profit warning with investors, and one of the potential factors on evaluating the financials of the company and having discussions with the executive and the board was the capabilities of the – of the primary operations of the company including Ensenada" and that "[t]here were indications of cost overruns and inventory buildup and other financial items like that that were a cause of concern and were part of the underlying reason for the profit warning." [Sutsko 86:21-87:18]. There were a number of reasons for Dialight's profit warning, including "a slowdown in the oil and gas sector." [Rader Decl. Ex. 6]. Dialight admits that manufacturing was not "one of [Dialight's] core strengths," which was a reason why it decided to outsource its manufacturing. [Khanbabi 21:18-34].

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.]

Dialight's Response to Paragraph 10: Admitted.

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.]

Dialight's Response to Paragraph 11: Admitted.

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.]

Dialight's Response to Paragraph 12: Admitted in part. Dialight admits Preston Wells resigned from Dialight at the end of September 2015. [Rader Decl. Ex. 7]. Sanmina first provided its standard MSA to Dialight as part of its Request for Quotation ("RFQ") response on September 20, 2015 [Rader Decl. Exs. 8, 10]. Dialight provided Sanmina with a proposed draft on December 4, 2015 [Rader Decl. Ex. 11].

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

Dialight's Response to Paragraph 13: Disputed. Dialight denies that Dennis Geary was fired. Dennis Geary resigned from Dialight effective October 2, 2017. [Rader Decl. Ex. 14]. Michael Sutsko repeatedly stated he could not remember whether Dennis Geary resigned or was terminated. Michael Sutsko's full testimony on the subject is:

> Q. Did Dennis Geary leave Dialight?
> A. Yes.
> Q. Okay. Was he terminated or did he leave on his own volition?
> A. Yeah, ***I actually don't recall which one it was***. I believe he was terminated. [end Sanmina cite]
> Q. Do you recall why?

> A. No, not the specifics.
> Q. Who made the decision to terminate him?
> A. ***Well, you know, I'm not sure if he was.*** I don't really – I think, but ***I don't really remember. He may have quit on his own. I don't recall.***

[Sutsko 70:16-71:7] (emphasis added). Sanmina only asked one other witness, Dan Harris, about Dennis Geary's departure:

> Q. And when did Mr. Geary leave Dialight?
> A. Can't recall.
> Q. Okay. Do you know whether Mr. Geary left voluntarily or was terminated?
> A. I can't – I don't know.

[Harris 66:11-17].

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.]

Dialight's Response to Paragraph 14: Admitted in part. Dialight admits it worked with E&Y to do a "risk assessment," prepare "a readiness report," and look at the financials to determine whether outsourcing would be beneficial to Dialight. [Khanbabi 95:12-19; Harris 24:8-10]. E&Y's main assignment was to conduct a "financial benefit assessment." [Harris 25:15-16]. E&Y prepared its report for Dialight in September of 2015. [Rader Decl. Ex. 15]. Dialight admits Robert Freid was retained as an expert in contract manufacturing.

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

Dialight's Response to Paragraph 15: Admitted.

16. [redacted]

Dialight's Response to Paragraph 16 [redacted]

[redacted] The MSA was signed in March 2016, but Sanmina did not begin producing Dialight products and Dialight did not transfer its first product line to Sanmina until August 2016. [Rader Decl. Ex. 16]. The below table provides the transfer dates for each product line transferred to Sanmina:

Product Line	**Transfer to Sanmina**
Linear	August 2016
Bulkhead	October 2016
SS Linear	October 2016
Flood	November 2016
Highbay	September 2017
Area Light	July 2017

[Rader Decl. Ex. 16]. No product lines were transferred prior to H2 2016 and Dialight in the interim Dialight took steps to address the potential areas of improvement E&Y raised. [*See also* Response to Paragraph 18 below.]

17. [redacted]

Dialight's Response to Paragraph 17: Admitted in part. [redacted] Dialight formed such a task force. [Khanbabi 98:4-13].

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.]

Dialight's Response to Paragraph 18: Dialight admits that Paragraph 18 contains an accurate quote from Michael Sutsko's deposition in July 2021 but the snippet is out of context and incomplete. For example, Dialight's then-CFO testified that Dialight formed a tiger team "for a 12-month period [to] clean[] up a lot of [Dialight's] processes, [Dialight's] products, [Dialight's] documentation." [Khanbabi 98:4-13]. When Dialight closed its Newmarket plant, it sent the plant manager to Guadalajara to help the Sanmina team manufacture Dialight's products. [Khanbabi 99:5-11]. Additionally, Dialight hosted Sanmina personnel at its Newmarket plant prior to transferring the products manufactured there. Sanmina personnel took video recordings of how products were assembled, documentation, engineering drawings, manufacturing assembly steps, and information on assembly of parts and how to set up equipment. [Escamilla 52:12-23]. E&Y also recommended Dialight implement platform engineering. [Rader Decl. Ex. 15 at 6]. Dialight implemented platform engineering. [Sutsko 57:11-17]. This reduced the number of components that went into each product. [Sutsko 57:4-10; Ramirez 171:16-172:1; Rapp 18:3-22]. Dialight platform engineered the Area Light and High Bay product lines when they were transferred to Sanmina. [Khanbabi 265:3-5; Ramirez 172:11-18]. This process helped reduce the complexity of the Area Light and High Bay families. [Khanbabi 272:1-3].

19. [redacted]

Dialight's Response to Paragraph 19: [redacted] This range was "typical of every low volume-high mix [manufacturer], particularly with the amount of SKUs" Dialight had. [Ramirez 174:1-17]. Sanmina was aware Dialight forecasts were more accurate at a higher, product line level than at the lower SKU level and stated it could support that. [Lu 64:5-17].

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]

<u>Dialight's Response to Paragraph 20:</u> Dialight admits Robert Freid testified did not see the E&Y report before preparing his September 28, 2015 report. [Freid 31:7-12]. Freid also noted that when he did see the E&Y report "it, no doubt, added to my confidence in terms of going forward with the outsourcing strategy." [Freid 32:19:33:2].

B. <u>Negotiation of the MSA</u>

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

<u>Dialight's Response to Paragraph 21:</u> Disputed. Sanmina first provided its standard MSA to Dialight as part of its RFQ response on September 20, 2015 [Rader Decl. Exs. 8, 10]. On October 6, 2015, Bob Green sent Michael Sutsko, "a copy of [Sanmina's] standard MSA." [Rader Decl. Ex. 18].

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.]

<u>Dialight's Response to Paragraph 22:</u> Admitted. Dialight also notes Robert Jaegly was Dialight's VP of Global Operations & Supply Chain. [Rader Decl. Ex. 20].

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.]

<u>Dialight's Response to Paragraph 23:</u> Admitted.

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].

Dialight's Response to Paragraph 24: Disputed, because "entirely rewritten" is a vague and inaccurate description. That said, Dialight admits it proposed a revised draft MSA to Sanmina.

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

Dialight's Response to Paragraph 25: Admitted.

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

Dialight's Response to Paragraph 26: Admitted in part. Dialight admits it proposed that New York law govern the MSA but clarifies that the choice of law provision in the first draft MSA is § 25.10 [Rader Decl. Ex. 13] and the choice of law provision in the final MSA is also § 25.10 [Rader Decl. Ex. 21].

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.

Dialight's Response to Paragraph 27: Disputed. The internal draft MSA contained a recital that stated Dialight's products "currently require approximately 900 direct labor headcount and 80,000 ft2 of manufacturing floor space." [Rader Decl. Ex. 22]. The draft does not require Sanmina to provide the direct labor or floor space. [Rader Decl. Ex. 22]. Dialight admits that this recital does not appear 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.]

<u>Dialight's Response to Paragraph 28:</u> Disputed. Sanmina's initial MSA does not contain any provisions specific to Dialight or the floorspace that would be dedicated to Dialight. [Rader Decl. Ex. 19]. Dialight admits that the final MSA provides that Sanmina had to provide Dialight with a general plan within seven days, and a more specific plan within twenty-one days, following execution of the MSA, which [redacted] [Rader Decl. Ex. 21]. Dialight had assured Dialight there was space for the MSD business in Guadalajara, even though the exact floor plan would be provided later. [Rader Decl. Exs. 23; 24]. When it became apparent there was ***no*** space available, Sanmina was fully aware that the "IMS award from Dialight was contingent on Sanmina supporting the CNC and painting requirements on the Guad campus and specifically in [] Plant 6[.] It was discussed numerous times with [Dialight] on conference calls, site visits to Guad and even during [Sanmina's] visits to [Dialight's] sites in Mexico and New Jersey." [Rader Decl. Ex. 25]. Days before signing the MSA, Bob Green acknowledged internally that the lack of space for Dialight had to be kept "in house, or the whole relationship blows up." [Rader Decl. Ex. 26].

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

<u>Dialight's Response to Paragraph 29:</u> Disputed. Rader Decl. Ex. 19 is a copy of Sanmina's initial draft of the MSA; it does not say anything about Sanmina selling products to Dialight, or about Dialight at all.

30. Freid prepared an internal draft of the MSA stating that Sanmina would provide "Products" and "<u>Services</u>." [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.]

<u>Dialight's Response to Paragraph 30:</u> Disputed. Section 1.2 of the internal draft MSA provides for Dialight issuing purchase orders for services. [Rader Decl. Ex. 22]. The final MSA does not state that Sanmina would provide only those services necessary to deliver products.

Section 4.1 of the MSA states, in full, [redacted] [Rader Decl. Ex. 21 at § 4.1]. The MSA governs the provision of services, including materials purchasing (§ 4.2), materials planning (§ 4.5), supply chain management (§ 6), and creation of an exclusive customer team to support Dialight (§ 18.1).

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.]

Dialight's Response to Paragraph 31: Disputed. Dialight negotiated the deadline for Dialight's deemed acceptance of products by proposing 30 days. Sanmina's standard MSA contained a 15 day deadline. [Rader Decl. Ex. 19 at § 5.2]. Dialight proposed 30 days and, ultimately, the parties agreed to 15 days. [Rader Decl. Ex. 22, § 3.8; Ex. 21, § 3.7].

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.]

Dialight's Response to Paragraph 32: Disputed. The limitation of liability contained in Sanmina's standard MSA and the limitation of liability contained in the final MSA speak for themselves. Sanmina's standard MSA contained the following Limitation of Liability provision:

[redacted]

[redacted]

[Rader Decl. Ex. 19 at § 9.4].

The final MSA contains the following Limitation of Liability provision:

[redacted]

[redacted]

[Rader Decl. Ex. 21, § 22.4].

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.]

Dialight's Response to Paragraph 33: Disputed. Dialight's draft MSA speaks for itself. The initial draft Dialight sent to Sanmina contains the following limitation of liability clause:

[redacted]

[redacted]

[Rader Decl. Ex. 13, § 22.4].

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

Dialight's Response to Paragraph 34: Disputed. The final version of the MSA speaks for itself. *See* Dialight's Response to Paragraph 33. [Rader Decl. Ex. 21, § 22.4]. Sanmina added language to the limitation of liability section of the MSA in a draft sent to Dialight on January 13, 2016. [Rader Decl. Exs. 27, 28].

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.]

Dialight's Response to Paragraph 35: Admits to the extent the credit section of Dialight's proposed MSA does not appear in the final MSA. Dialight's proposed MSA contained an initial credit limit of $10 million. [Rader Decl. Ex. 13, § 11.6]. Brandon Soule testified that Sanmina "generally does not include any specific credit number in any contract or MSA." [Soule 64:20-21]. Although Sanmina does not include specific credit numbers in contracts, Sanmina's finance team did agree to extend $10 million in credit. [Rader Decl. Ex. 29].

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.]

Dialight's Response to Paragraph 36: Disputed**.** Dialight denies the assertions in Paragraph 36 that it was required to provide "complete and accurate . . . forecasts." In its RFQ, Dialight told Sanmina to "Expect continuous production of higher volume units, but wide variations from forecast in product mix in terms of finished products." [Rader Decl. Ex. 9]. Sanmina responded "No problem we can support this." [Rader Decl. Ex. 9]. Sanmina knew, prior to entering into the MSA, "that Dialight would have wide variations from forecast and product mix in terms of finished products." [Rios 97:21-25; Green 105:7-13]. Dialight "relied on the fact that [Sanmina] said they had expertise in dealing with a company like Dialight that had a low volume/high mix." [Khanbabi 110:3-17].

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.]

<u>Dialight's Response to Paragraph 37:</u> Disputed. Dialight was required to provide Sanmina "a ***non-binding*** rolling forecast . . . of the Products expected to be ordered by DIALIGHT in each of the next twelve (12) months." [Rader Decl. Ex. 21, § 1.5] (emphasis added). The MSA specifically states [redacted] [Rader Decl. Ex. 21, § 1.5] (emphasis added). Sanmina was required to [redacted] [Rader Decl. Ex. 21, § 1.5]. Sanmina was authorized by Dialight [redacted] [Rader Decl. Ex. 21, § 4.2]. Sanmina did not make purchase commitments using economic order quantities, ABC buy and inventory management policy, and long lead-time Materials management principles. Sanmina's cite to John Kender's deposition is misleading, as John Kender clearly stated, and Sanmina clearly understood at the time, he did not know whether Sanmina complied with § 1.5 of the MSA:

> Q. But my question is going to be whether you're aware of any instance in which Sanmina did not comply with the last sentence of Section 1.5, which reads, quote: Sanmina shall make purchase commitments to its material suppliers, parentheses, vendors, close parentheses, based upon the forecast, using recognized economic order quantities, comma, ABC buy and inventory management policy and long lead-time materials management principles. That's the end of the quite. So again, the question is: Are you aware of any instance in which Sanmina did not comply with that provision?
> A.: I have no recollection, Mike.
> Q: Okay. Did you have any role in measuring the accuracy of Dialight's forecasts sent to Sanmina?
> A.: No.
> Q. Okay. Did you have any awareness of measures that Dialight had made of the accuracy of its forecasts?
> A. No.
> Q. This might be a shorter deposition than I was anticipating. As part of the forecasting process – and again, I – you know, if I'm asking you about something that you just weren't involved in and aren't familiar with, you're doing a good job of telling me, but I have to kind of check it off the boxes and all that kind of stuff.

Kender 48:14-50:1]. Earlier in the deposition, when asked what his involvement was in the Dialight forecasting process, John Kender testified "None at all. No input." [Kender 44:10-14]. He was also asked "Did you have any understanding of what happened after Dialight provided its forecast to Sanmina?" to which he replied "Vaguely. That wasn't my area of responsibility." [Kender 46:4-8].

Sanmina did not comply with § 1.5 of the MSA. Forecast was "just one portion of the whole planning process." [Ramirez 80:19-24]. "Sanmina should have used all the tools that are available, like ABC, inventory management, economic order quality, and the forecast to determine what materials [are needed] and when to buy it." [Ramirez 82:11-15]. Sanmina also should have analyzed the amount of materials actually consumed to help determine future purchasing needs. [Ramirez 85:1-6]. Additionally, once Dialight moved manufacturing back in-house it was able to achieve an on-time delivery rate between 70-80%. [Khanbabi 82:14-22].

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

Dialight's Response to Paragraph 38: Admitted to the extent that § 20.2 of the MSA states [redacted] [Rader Decl. Ex. 21, § 20.2]. On November 28, 2017, Luis Ramirez emailed Hossein Saadat, Rodrigo Ramirez, Fermin Lopez, Javier Carral, and Marco Gonzalez, asking "Plant 4 [to] put together a proposal for Safety Stock we can review, agree and implement." [Rader Decl. Ex. 30]. Plant 4 never provided Dialight with a proposal. [Saadat 88:11-89:23].

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.]

Dialight's Response to Paragraph 39: Contains a legal conclusion, not purported fact, and in any event is disputed. Sections 8.1 and 8.2 of the MSA, read in conjunction with the entirety of the MSA, set forth the parties' respective obligations and contradicts the purported legal conclusion set forth in Sanmina's Paragraph 39. [Rader Decl. Ex. 21, *see, e.g.*, §§ 8.1-8.8.]. Throughout the MSA Dialight was not solely responsible for unconsumed materials. [*See* Rader Decl. Ex. 31; 32; 33; 34; 35]. In June 2017, Sanmina did not reconcile E&O for the quarter "due to the errors in demand planning out of Plant 2." [Rader Decl. Ex. 33]. In March 2018, Sanmina claimed it was owed $1.7 million in E&O. [Rader Decl. Ex. 32]. Because Dialight had suffered greatly from Sanmina's "lower production volumes and failure to ramp up production," Sanmina agreed Dialight only owed 50% of the excess materials for the quarter. [Rader Decl. Exs. 32; 34]. After Dialight made the offer to pay 50% of the excess, Mike Giggey sent an internal email to Gerry Fay stating: "honestly this is 2X$+ of number] I thought she would agree [to] this quarter." [Rader Decl. Ex. 32]. In June 2018, Sanmina proposed "both companies split the excess created in the previous quarter 50/50" in order to "follow the same logic we used last quarter."

[Rader Decl. Ex. 31]. Sanmina ultimately agreed Dialight only owed 17% of the excess from that quarter. [Rader Decl. Ex. 35].

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.]

Dialight's Response to Paragraph 40: Admitted.

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

Dialight's Response to Paragraph 41: Admitted to the extent the MSA provides the following:

[redacted]

[Rader Decl. Ex. 21, § 14.1]. Sanmina also represented to Dialight that "they would be able to give [Dialight] input on [product] design from [the] manufacturer's side." [Khanbabi 55:5-19].

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.].

Dialight's Response to Paragraph 42: Disputed. Section 3.3 does not absolve Sanmina of liability for breaching Section 3.4 of the MSA, which provides [redacted] [Rader Decl. Ex. 21, § 3.4.]. In his deposition, Robert Freid testified that Section 3.3 "has to do with individual . . . order[s]" because it was impractical and uncommon to assess financial penalties for each individual late order. [Freid 277:1-281:2].

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.]

Dialight's Response to Paragraph 43: Disputed. Section 3.3 does not absolve Sanmina of liability for breaching Section 3.4 of the MSA, which provides [redacted] [Rader Decl. Ex. 21, § 3.4.]. In his deposition, Robert Freid testified that Section 3.3 "has to do with individual . . . order[s]" because it was impractical and uncommon to assess financial penalties for each individual late order. [Freid 277:1-281:2].

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

Dialight's Response to Paragraph 44: Admitted to the extent Section 3.6 provides:

[redacted]

[Rader Decl. Ex. 21, § 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.]

Dialight's Response to Paragraph 45: Paragraph 45 is a legal conclusion, not a purported fact. In any event, disputed.

D. <u>Dialight Terminates the MSA Without Cause.</u>

<u>Dialight's Response to Header D:</u> Dialight terminated the MSA under § 21.1, "Term Length," which provides, in part: [redacted] [Rader Decl. Ex. 21, § 21.1]. At no time did Dialight claim it was terminating the MSA without cause. Dialight's termination letter stated:

> Dialight entered into the MSA based on Sanmina's representations of its expertise and capacity to produce goods in sufficient quantity and quality to fulfil Dialight's needs, which were well understood . . . Since the inception of the MSA, however, Sanmina has failed to meet certain key contractual commitments. Dialight has continued to rely, in good faith but to its detriment, on Sanmina's representations as to its expertise and its ability to remedy these performance deficiencies. We have discussed this in many meetings between our two companies over the last two years and, as we have discussed, Dialight has suffered lost customers, lost sales, lost goodwill, lost profits, and many other losses as a result."

[Rader Decl. Ex. 1]. Sanmina's own personnel recognized Dialight was going to terminate the MSA because of Sanmina's performance. Three days before receiving the termination letter, Frank Shoemaker wrote in an internal Sanmina email: "It's very sad that everyone worked so hard to bring in and ramp up what we had as a $110M account only to see our manufacturing execution drive it into the ground . . . I don't see how Javier or anyone else from the Plant can defend themselves against the facts." [Rader Decl. Ex. 36].

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.]

<u>Dialight's Response to Paragraph 46</u>: Disputed. Dialight states the MSA was signed on March 4, 2016 [Rader Decl. Ex. 37] and dated March 7, 2016. [Rader Decl. Ex. 21]. After the MSA was signed, Dialight admits it began transferring products to Sanmina. The below table provides the transfer dates for each product line transferred to Sanmina:

Product Line	Transfer to Sanmina

Linear	August 2016
Bulkhead	October 2016
SS Linear	October 2016
Flood	November 2016
Highbay	September 2017
Area Light	July 2017

[Rader Decl. Ex. 16].

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.)).]

Dialight's Response to Paragraph 47: Disputed. Dialight admits it terminated the MSA on September 27, 2018, with an effective date of January 31, 2019. Dialight terminated the MSA pursuant to § 21.1, "Term Length," which provides, in part: [redacted] [Rader Decl. Ex. 21, § 21.1]. Dialight never claimed it was terminating the MSA without cause. The termination letter stated, in part, "Sanmina has failed to meet certain key contractual commitments. Dialight has continued to rely, in good faith but to its detriment, on Sanmina's representations as to its expertise and its ability to remedy these performance deficiencies. We have discussed this in many meetings between our two companies over the last two years and, as we have discussed, Dialight has suffered lost customers, lost sales, lost goodwill, lost profits, and many other losses as a result." [Rader Decl. Ex. 21, § 21.1].

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

Dialight's Response to Paragraph 48: Admitted.

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.]

Dialight's Response to Paragraph 49: Contains a legal conclusion, not purported fact, and in any event is disputed. Sections 8.1 and 8.2 of the MSA, read in conjunction with the entirety of the MSA, set forth the parties' respective obligations and contradicts the purported legal conclusion set forth in this Paragraph. [Rader Decl. Ex. 21, *see, e.g.*, §§ 8.1-8.8.]. Sanmina also recognized throughout the duration of the MSA that Dialight was not solely responsible for excess materials. [Rader Decl. Exs. 31; 32; 33; 34].

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.]

Dialight's Response to Paragraph 50: Admitted.

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

Dialight's Response to Paragraph 51: Admitted that this specific misrepresentation is memorialized in Recital D of the MSA.

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.]

Dialight's Response to Paragraph 52: Disputed. Dialight denies Sanmina had significant experience with high mix/low volume manufacturing at its Guadalajara facility. Discovery has shown this representation by Sanmina to be false at the time it was made. Among other things, Dialight's expert, Robert Freid, concluded in his expert report: "Sanmina did not have HMLV services in place at the time they executed the contract, or at any time afterwards during its two years of services to Dialight." [Rader Decl. Ex. 38 at ¶ 52; Sheehy 116:4-16]. Sanmina's expert did not rebut this conclusion. Further, Sanmina's own employee contemporaneously stated Plant 2 did not have the capabilities to handle Dialight's business, writing "Obviously we had not made the right decision on what needs to be manufactured in which location based on capabilities, expertise where we would have full optimized solution for us and customer." [Rader Decl. Ex. 39 (Saadat 30:1-3 (confirming "B2" is Plant 2))]. Luis Ramirez contemporaneously documented a conversation with Javier Carral, where he informed Carral his team in Plant 2 "did not know how to deal with the low volume high mix complexity of our products." [Rader Decl. Ex. 40]. Dialight engineer Angel Escamilla testified Sanmina's manufacturing system was "aimed at high volume, low mix." [Escamilla 75:1-3].

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.]

<u>Dialight's Response to Paragraph 53:</u> Disputed. Sanmina misled Dialight about the space available to accommodate Dialight's paint line and CNC machines. The misrepresentations were well documented contemporaneously by Sanmina internally. In February 2016, prior to signing the MSA, the space Sanmina planned to put Dialight was committed to another customer. Sanmina was "selling the same space to different customers." [Rader Decl. Ex. 41]. Bob Green acknowledged "It would be a deal killer for Dialight to lose the space." [Rader Decl. Ex. 42]. Chris Nelson succinctly explained on February 29, 2016 :

> The IMS award for Dialight was contingent on Sanmina supporting the CNC and painting requirements on the Guad

> campus and specifically in the Plant 6 space. It was discussed numerous times with the customer on conference calls, site visits to Guad, and even during our previous visits to customer sites in Mexico and New Jersey. We negotiated the agreement knowing this requirement.

[Rader Decl. Ex. 25]. When it became clear the space in Plant 6 committed to Dialight was not available and Plant 4 would have to accommodate Dialight, Patrick Macdonald wrote "WE [sic], MSD, were never involved in the space allocation discussion. All I know is that we originally declined this opportunity because we didn't have capability . . . All the communication I have seen is that there was 35k of space being allocated from IMS to this project, and it was shown to Dialight. Now they are at the point of signing up, and the space is no longer there?" [Rader Decl. Ex. 43]. At his deposition, when asked about the space allocation issue, Bob Green testified "it was just an internal discussion on where [Dialight] was going to be . . . we took care of it internally . . . there wasn't a need to inform Dialight that we didn't have the space or there was any type of issue internally." [Green 196:4-197:15]. But at the time, on March 3, 2016, Bob Green wrote to Chris Nelson "Bottom line is we need to keep this in house, or the whole relationship blows up." [Rader Decl. Ex. 26]. The MSA was signed the next day, on March 4, 2016, and Dialight was not informed Sanmina lacked the space for its CNC equipment and paint line. Dialight ultimately had to pay significant, inflated Non-Recurring Engineering Costs ("NRE") to expand Plant 4 and make space for the Dialight equipment, because Sanmina had none available despite its previous representations. [Rader Decl. Exs. 44; 45]. Dialight had to pay $978,144.49 to create the space it was promised. [Rader Decl. Ex. 45]. The costs included building an external oven enclosure for the paint line, installing a fire protection system for the new area of the plant, relocating another existing Sanmina client, installation of utilities needed to operate CNC machines, and other fixtures. [Rader Decl. Ex. 45].

Infrastructure improvements	**Cost**
	$000's

Build external over enclosure for paint line	428
Fire protection system for new area	201
Contribution to re-location of existing client	94
Installation of utilities for CNC machines	174
Other fixtures	80
Total	**978**

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.)).]

Dialight's Response to Paragraph 54: Dialight admits it attempted to evaluate Sanmina's capabilities. This included preparing an RFQ for Sanmina to complete [Rader Decl. Exs. 8; 9], and making Dialight's requirements clear to Sanmina throughout the process by providing it information on its products [Rader Decl. Ex. 46], emphasizing the high mix, low volume nature of Dialight's business. [Rader Decl. Exs. 11; 12], and including recitals in the MSA documenting Dialight's needs. [Rader Decl. Ex. 21]. Dialight was not permitted to observe Sanmina's product lines running high mix, low volume products when visiting Guadalajara. [Freid 53:20-54:19].

Dialight admits Robert Freid noted Sanmina "might be under-estimating the complexity of product mix from [Dialight]" in the context of Sanmina's reluctance "to set-up [a] dedicate[d] team prior to volume production." [Rader Decl. Ex. 47]. Robert Freid's concern was alleviated, as documented in a follow up email, when, at the Westin Guadalajara, he "just happened to bump into the Sanmina finance business manager assigned to [Dialight's] program. We had a good talk in the lounge about the things going well, but took the opportunity to express my concern about adequate up-front staffing. He well understood my point and said he'll meet with Plant 2 VP & GM to discuss. He seemed confident they will support with needed resources." [Rader Decl. Ex. 48].

55. [redacted]

<u>Dialight's Response to Paragraph 55:</u> [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.]

<u>Dialight's Response to Paragraph 56:</u> Disputed. Fariyal Khanbabi testified that she was not involved in any way in negotiating the limitation of liability provision or discussing it within Dialight and while she was aware of what the calculation potentially could be if it were found to be applicable, she offered no testimony as to whether it applied.

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)

<u>Dialight's Response to Unnumbered Header:</u> Dialight does not believe it is required to respond to allegations in unnumbered headers, but Dialight denies that the factual assertions below support Sanmina's motion for partial summary judgment.

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:

Dialight's Response to Paragraph 57 Part 1: Dialight admits it provided instances of fraudulent inducement in response to Sanmina's Contention Interrogatory No. 12. Dialight does not believe the remainder of Paragraph 57 Part 1 contains factual statements appropriate for a statement of undisputed facts, but nonetheless disputes that they are true.

- "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.]

Dialight's Response to Paragraph 57 Bullet 1: Dialight denies Paragraph 57 Bullet 1 because it contains solely legal arguments and no statements of fact. *See* Local Rule 56.1. Dialight also denies the legal arguments contained in Paragraph 57 Bullet 1 for the reasons set out in its Memorandum of Law in Opposition to Sanmina's Motion for Partial Summary Judgment (pgs 12 to 21), where these legal arguments belong. Dialight further denies that Paragraph 57 Bullet 1 correctly defines PERFORMANCE. The definition of "performance" is "[t]he successful completion of a contractual duty, usu. resulting in the performer's release from any past or future liability[.]" Black's Law Dictionary (11th ed. 2019).

- "INTEGRATION": this allegation is precluded by the MSA's integration clause and Dialight's opportunity to investigate. [*See* Motion at IV.B.2.e.]

Dialight's Response to Paragraph 57 Bullet 2: Dialight denies Paragraph 57 Bullet 2 because it contains solely legal arguments and no statements of fact. *See* Local Rule 56.1. Dialight also denies the legal arguments contained in Paragraph 57 Bullet 2 for the reasons set out in its Memorandum of Law in Opposition to Sanmina's Motion for Partial Summary Judgment (pgs 12 to 21), where these legal arguments belong. Dialight further denies that Paragraph 57 Bullet 2 correctly defines INTEGRATION. The definition of "integration" is "[t]he full expression of the parties' agreement, so that all earlier agreements are superseded, the effect being that neither party may later contradict or add to the contractual terms[.]" Black's Law Dictionary (11th ed. 2019).

- "PUFFERY": allegations with this annotation are puffery. [*See* Motion at IV.B.2.d.ii.]

<u>Dialight's Response to Paragraph 57 Bullet 3:</u> Dialight denies Paragraph 57 Bullet 3 because it contains solely legal arguments and no statements of fact. *See* Local Rule 56.1. Dialight also denies the legal arguments contained in Paragraph 57 Bullet 3 for the reasons set out in its Memorandum of Law in Opposition to Sanmina's Motion for Partial Summary Judgment (pgs 12 to 21), where these legal arguments belong. Dialight further denies that Paragraph 57 Bullet 3 correctly defines PUFFERY. The definition of "puffery" is "[t]he expression of an exaggerated opinion – as opposed to a factual misrepresentation – with the intent to sell a good or service." Black's Law Dictionary (11th ed. 2019).

- "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.]

<u>Dialight's Response to Paragraph 57 Bullet 4:</u> Dialight denies Paragraph 57 Bullet 4 because it contains solely legal arguments and no statements of fact. *See* Local Rule 56.1. Dialight also denies the legal arguments contained in Paragraph 57 Bullet 4 for the reasons set out in its Memorandum of Law in Opposition to Sanmina's Motion for Partial Summary Judgment (pgs 12 to 21), where these legal arguments belong. Dialight further denies there is an undisputed factual definition of the word "POST-K."

- "VAGUE": the claimed representation is too vague to support a fraud claim. [*See* Motion at IV.B.2.c.]

<u>Dialight's Response to Paragraph 57 Bullet 5:</u> Dialight denies Paragraph 57 Bullet 5 because it contains solely legal arguments and no statements of fact. *See* Local Rule 56.1. Dialight also denies the legal arguments contained in Paragraph 57 Bullet 5 for the reasons set out in its Memorandum of Law in Opposition to Sanmina's Motion for Partial Summary Judgment (pgs 12 to 21), where these legal arguments belong. Dialight further denies that Paragraph 57 Bullet 5 correctly defines VAGUE. The definition of "vague" is "[i]mprecise or unclear by reason of abstractness; not sharply outlined; indistinct; uncertain." Black's Law Dictionary (11th ed. 2019).

- "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.]

<u>Dialight's Response to Paragraph 57 Bullet 6:</u> Dialight denies Paragraph 57 Bullet 6 because it contains solely legal arguments and no statements of fact. *See* Local Rule 56.1. Dialight also denies the legal arguments contained in Paragraph 57 Bullet 6 for the reasons set out in its Memorandum of Law in Opposition to Sanmina's Motion for Partial Summary Judgment (pgs 12 to 21), where these legal arguments belong. Dialight further denies that Paragraph 57 Bullet 6 correctly defines NO DUTY. The definition of "no duty" is "[l]iberty not to do an act." Black's Law Dictionary (11th ed. 2019).

- "TRUE": the claimed representation is a true statement as a matter of undisputed fact. [*See* Motion at IV.B.3.b.]

<u>Dialight's Response to Paragraph 57 Bullet 7:</u> Dialight denies Paragraph 57 Bullet 7 because it contains solely legal arguments and no statements of fact. *See* Local Rule 56.1. Dialight also denies the legal arguments contained in Paragraph 57 Bullet 7 for the reasons set out in its Memorandum of Law in Opposition to Sanmina's Motion for Partial Summary Judgment (pgs 12 to 21), where these legal arguments belong. Dialight further denies that Paragraph 57 Bullet 7 correctly defines TRUE. The definition of "true" is "[i]n accordance with the actual state of affairs" Merriam-Webster Dictionary.

- "NOT PRESENT FACT": the claimed representation is not a statement of present fact. [*See* Motion at IV.B.3.b.]

Dialight's Response to Paragraph 57 Bullet 8: Dialight denies Paragraph 57 Bullet 8 because it contains solely legal arguments and no statements of fact. *See* Local Rule 56.1. Dialight also denies the legal arguments contained in Paragraph 57 Bullet 8 for the reasons set out in its Memorandum of Law in Opposition to Sanmina's Motion for Partial Summary Judgment (pgs 12 to 21), where these legal arguments belong. Dialight further denies there is an undisputed factual definition of the word "NOT PRESENT FACT."

a. Claimed Misrepresentation No. 1: MSA B: "SANMINA is an expert in the contract manufacturing field for LED products and components."

Dialight's Response to Paragraph 57 (a): Dialight admits that in response to Sanmina's Contention Interrogatories it claimed "SANMINA is an expert in the contract manufacturing field for LED products and components" was a misrepresentation.

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.]

Dialight's Response to Paragraph 57(a)(i): Disputed. Disputed. Discovery has shown this representation of Sanmina to be false at the time it was made. As Dialight's expert, Robert Freid, concluded in his expert report: "Sanmina did not have HMLV services in place at the time they executed the contract, or at any time afterwards during its two years of service to Dialight." [Rader Decl. Ex. 38 at ¶ 52]. Sanmina's expert did not rebut this conclusion. Further, Sanmina's own employee contemporaneously stated Plant 2 did not have the capabilities to handle Dialight's business, writing "Obviously we had not made the right decision on what needs to be manufactured in which location based on capabilities, expertise where we would have full optimized solution for us and customer." [Rader Decl. Ex. 39 (Saadat 30:1-3 (confirming "B2" is Plant 2))]. Luis Ramirez contemporaneously documented a conversation with Javier Carral, where he informed Carral that Carral's team in Plant 2 "did not know how to deal with the low volume high mix complexity of our products." [Rader Decl. Ex. 40].

ii. Legal issues: VAGUE; PUFFERY; PERFORMANCE; TRUE.

Dialight's Response to Paragraph 57(a)(ii): Dialight denies Paragraph 57(a)(ii) because it contains solely legal arguments and no statements of fact. *See* Local Rule 56.1.

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."

Dialight's Response to Paragraph 57 (b): Dialight admits that in response to Sanmina's Contention Interrogatories it claimed MSA Recital D was a misrepresentation.

i. Claimed Misrepresentation No. 2 is a true statement. [Rios 197:9-198:12; Green 162:24-164:11.]

Dialight's Response to Paragraph 57(b)(i): Disputed. Dialight denies that Sanmina actually had the capability to provide this manufacturing flexibility. The process referred to in Recital D is a special process typically found in high mix, low volume delivery systems, and it would be "reasonable for Dialight to understand this as clear indication of expert HMLV capability at [Guadalajara]." [Rader Decl. Ex. 38 at ¶ 42]. Sanmina did not have high mix, low volume capabilities at Guadalajra. [Rader Decl. Ex. 38 at ¶ 52]. Sanmina lacked the flexibility to properly manufacture Dialight products. [Ramirez 210:4-10; Khanbabi 53:21-22]. An example of Sanmina's lack of flexibility was its refusal to run MRP more than once a week because it "run[s] MRP over the weekend once a week for all customers" [Shoemaker 130:12-14; Smith 143:10-15] despite Dialight's requests to do so throughout the duration of the relationship [Rader Decl. Exs. 17; 50; 51]. Luis Ramirez contemporaneously documented that he had a conversation with Sanmina's own expert about the "rigidity of Sanmina systems." [Rader Decl. Ex. 40]. He also documented a conversation with Javier Carral, where Luis told him that Javier's "production team admits they have been treating Dialight as the rest of their customer[s] in P2 and they did not know how to deal with the low volume high mix complexity of [Dialight]'s products." [Rader Decl. Ex. 40].

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

<u>Dialight's Response to Paragraph 57(b)(ii):</u> Dialight denies Paragraph 57(b)(ii) because it contains solely legal arguments and no statements of fact. *See* Local Rule 56.1.

c. <u>Claimed Misrepresentation No. 3</u>: 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."

<u>Dialight's Response to Paragraph 57 (c):</u> Dialight admits that in response to Sanmina's Contention Interrogatories it claimed MSA Recital D was a misrepresentation.

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.").]

<u>Dialight's Response to Paragraph 57(c)(i):</u> <u>Disputed.</u> Dialight denies Paragraph 57(c)(i). Sanmina did not have the ability to provide the listed services from a single profit center. Bob Green and former Sanmina CEO Bob Eulau both testified that Plants 2 and 4 were separate profit centers. [Eulau Tran. 24:23-25-7; Green Tran. 232:18-22]. Michael Sutsko did not admit the single profit center was Sanmina. When asked "is the term profit center different, than, you know, just the term company?" he replied "Um, as I understand it, a profit center would be an entity that has accountability for profit and loss. You know, that could be a whole company." [Sutsko 181:21-182:4]. Michael Sutsko clearly testified that the fact that Sanmina's Plants 2 and 4 were separate profit centers did not align with Recital D:

> Q. At the time you entered into the contract with Sanmina, did you know that Plant 2 and Plant 4 each had their own P&L?
> A. I don't believe I was aware of that.
> Q. And would knowing that information have been relevant or irrelevant to you?
> A. Relevant.
> Q. Why?
> A. Because it goes against the requirement to have a single profit and loss center that we required and indicated in the recitals.

[Sutsko 198:15-199:5].

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 Plaint 4 to Plant 2 or directly to Dialight. [Ex. 24, exs. B, C.]

Dialight's Response to Paragraph 57(c)(ii): Disputed. Dialight denies Paragraph 57(c)(ii). Robert Freid testified his concerns over separate profit centers was not just financial, stating "this concern that I had is not only a financial one, but also an operational one. I find that having multiple profit centers like this within the same company is – can lead to problems." [Freid 171:22-172:5]. Sanmina's counsel later asked "But your purpose in looking for the single-profit-center language was primarily to make sure that there was not a separate markup charge to Plant 2 for work done for Plant – by Plant 4; is that correct?" [Freid 174:6-10]. Freid responded "Like I just explained, it was a combination of financial and also operational efficiency." [Freid 174:12-14]. Further, then-CEO Michael Sutsko testified that whether Sanmina could provide services from a single profit center was relevant to his decision to outsource with Sanmina:

> Q. And is it true that a factor in Dialight's selection of Sanmina was Sanmina's ability to provide from a single profit center the capabilities listed here?
> A. Yes.
> Q. And what did Dialight understand the single profit center to mean?
> A. I would interpret a single profit center as a single P&L where that drives behavior and accountability to results to there is no conflict of, of interest.
> Q. And why is that important?

> A. One of our advisors had said that there could be a problem in contract manufacturing when that's not the case and that having that creates all the functions within a contract manufacturer to work in a coordinated fashion to ensure, you know, product delivery, you know, and that if you have competing profit and loss interests that, you know, those will often create problems that, you know, are unwarranted, so we were very inclined to have that be a requirement in the, in the document.
> Q. Now, are you aware that during the outsourcing project Sanmina had two different plants involved in the, involved in the project, Plant[] 2 and Plant[] 4?
> A. We were there – we were aware there were two different buildings.
> . . .
> Q. Now, in this action [Bob] Green testified that P, that Plant and Plant 4 of Sanmina each have their plant – each have their own P&L that they have to report up through the organization. At the time you entered into the contract with Sanmina, did you know that Plant 2 and Plant 4 each had their own P&L?
> A. I don't believe I was aware of that.
> Q. And would knowing that information have been relevant or irrelevant to you?
> A. Relevant.
> Q. Why?
> A. Because it goes against the requirement to have a single profit and loss center that we required and indicated in the recitals.

[Sutsko 196:18-199:5].

iii. Legal Issues: PERFORMANCE; VAGUE; TRUE.

Dialight's Response to Paragraph 57(c)(iii): Dialight denies Paragraph 57(c)(iii) because it contains solely legal arguments and no statements of fact. *See* Local Rule 56.1.

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.

Dialight's Response to Paragraph 57(d): Dialight admits that in response to Sanmina's Contention Interrogatories it claimed Sanmina's response to Dialight's statement in its RFQ to "Expect continuous production of higher volume units, but wide variations from forecast in terms of finished products" was a misrepresentation.

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.]

Dialight's Response to Paragraph 57(d)(i): Admitted.

ii. This is a true statement. [Rios 172:24-173:17; Fact nos. 50-54.]

Dialight's Response to Paragraph 57(d)(ii): Disputed. Dialight denies Paragraph 57(d)(ii). Dialight admits that in its RFQ it told Sanmina to "Expect continuous production of higher volume units, but wide variations from forecast in terms of finished products" and Sanmina responded "No problem we can support this." Dialight denies Sanmina had the capability to support wide variations from forecast. Sanmina's standard process was ineffective in meeting Dialight's needs. [Rader Decl. Ex. 17].

iii. Legal Issues: VAGUE; PERFORMANCE; INTEGRATION; TRUE; NOT PRESENT FACT.

Dialight's Response to Paragraph 57(d)(iii): Dialight denies Paragraph 57(d)(iii) because it contains solely legal arguments and no statements of fact. *See* Local Rule 56.1.

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.

Dialight's Response to Paragraph 57(e): Dialight admits that in response to Sanmina's Contention Interrogatories it claimed Sanmina's statement that based on Dialight's product mix and challenges to vertically integrating Sanmina could add value to Dialight's efforts was a misrepresentation.

i. Legal Issues: VAGUE; PUFFERY; PERFORMANCE; INTEGRATION; TRUE; NOT PRESENT FACT.

Dialight's Response to Paragraph 57(e)(i): Dialight denies Paragraph 57(b)(i) because it contains solely legal arguments and no statements of fact. *See* Local Rule 56.1.

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.

Dialight's Response to Paragraph 57(f): Dialight admits that in response to Sanmina's Contention Interrogatories it claimed Sanmina withholding its credit team viewed Dialight as a "dime a dozen" opportunity and was opposed to extending credit was a misrepresentation.

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.)).]

Dialight's Response to Paragraph 57(f)(i): Admitted.

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.]

Dialight's Response to Paragraph 57(f)(ii): Disputed. Dialight denies Paragraph 57(f)(ii). Sanmina's sales team did not want Sanmina's credit team talking to Dialight. [Rader Decl. Ex. 52]. Sanmina's sales team altered the credit teams' slides to be presented to Dialight and told both Dialight and Sanmina's credit team the other was unavailable to meet. [Rader Decl. Ex. 53]. After Sanmina presented its credit proposal to Dialight, Sanmina's credit team withdrew its agreement to extent credit. [Rader Decl. Ex. 54]. Mark Strangie of Sanmina's sales team wrote afterwards that "someone in the company should be fired[.]" [Rader Decl. Ex. 55]. Mike Giggey made it clear that "Since [Sanmina had] not been awarded the business yet [Sanmina was] not communicating none of this to Dialight." [Rader Decl. Ex. 56]. Sanmina's sales team then arranged a meeting between the credit team and then-Dialight CFO Fariyal Khanbabi. Prior to the meeting, Mike Giggey wrote to the credit team "Dialight does NOT know SANM Credit has changed course, so please do not comment on it. We've positioned this call as final SANM finance checkpoint with Dialight while they review various RFP' for outsourcing award." [Rader Decl. Ex. 57]. Brandon Soule also expressed doubts about Dialight after the meeting with Fariyal Khanbabi. On January 28, 2016, Brandon Soule emailed Bob Green, Chris Nelson, and Mark Strangie, stating "I'm not sure that our $10M credit line will support $30M of business." [Rader Decl. Ex. 58]. Mark Strangie brushed off this comment, telling Bob Green "You do not want to have this conversation with him." [Rader Decl. Ex. 58]. When Bob Green asked Mark Strangie to clarify, he said "just anything to do with numbers." [Rader Decl. Ex. 58]. On April 20, 2016, Brandon Soule wrote in an internal Sanmina email that he had "serious concerns for the $10M credit limit[.]" [Rader Decl. Ex. 59].

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.]

<u>Dialight's Response to Paragraph 57(f)(iii):</u> Disputed. Dialight's then-CEO testified:

> Q. And are you aware that Mr. Soule had expressed the view internally at Sanmina that LED companies are a dime a dozen and they all feel they have their special niche and personally that he did not see much that was attractive in the Dialight opportunity?
> A. No.
> Q. If you had known in September of 2015 that this was the view of, that was being expressed internally by Sanmina's director of

> global treasury risk and credit, would knowing that information have mattered to you or –
> A. Yes
> Q. [or] not mattered to you?
> A. Mattered.
> Q. Why would that have mattered?
> A. We were relying on the credit facilities to scale and build the business. For example, I described the need to hold inventory, raw material inventory to manage on-time delivery, and we had experienced problems throughout the relationship with adequate credit to get even close to building to forecast, so there -- we had understood that the credit extension would have a direct relationship on the, their ability or desire to order and hold raw materials to meet the production and quality delivery requirements, and that knowing that the finance team didn't support the whole program would have caused concern that they would continuously undermine the ability to execute.

(Sutsko 349:10-350:22.) Sutsko's fears then repeatedly played out, with the Dialight account being put on multiple credit holds throughout the duration of the MSA. [Rader Decl. Exs. 60; 61; 62; 63; 64; 65].

iv. Legal Issues: PERFORMANCE; INTEGRATION; NO DUTY; VAGUE.

Dialight's Response to Paragraph 57(f)(iv): Dialight denies Paragraph 57(f)(iv) because it contains solely legal arguments and no statements of fact. *See* Local Rule 56.1.

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.

Dialight's Response to Paragraph 57(g): Dialight admits that in response to Sanmina's Contention Interrogatories it claimed Sanmina withholding from Dialight that Plant 4 was against taking on Dialight as a customer because it lacked capability was a misrepresentation..

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.)).]

Dialight's Response to Paragraph 57(g)(i): Dialight denies paragraph 57(g)(i). "Capability" refers to the ability to take on Dialight as a customer in Plant 4.

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).]

Dialight's Response to Paragraph 57(g)(ii): Admitted.

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.]

Dialight's Response to Paragraph 57(g)(iii): Disputed. Dialight denies Paragraph 57(g)(iii). Dialight incorporates by reference its Response to Paragraph 53. Sanmina promised the space it had previously committed to Dialight to another customer and did not inform Dialight prior to the execution of the MSA. [Rader Decl. Ex. 26]. Sanmina misled Dialight about the space available to accommodate Dialight's paint line and CNC machines. The misrepresentations were well-documented contemporaneously by Sanmina internally. In February 2016, prior to signing the MSA, the space Sanmina planned to put Dialight was committed to another customer. Sanmina was "selling the same space to different customers." [Rader Decl. Ex. 41]. Bob Green acknowledged "It would be a deal killer for Dialight to lose the space." [Rader Decl. Ex. 42]. Chris Nelson succinctly explained on February 29, 2016 "The IMS award for Dialight was contingent on Sanmina supporting the CNC and painting requirements on the Guad campus and specifically in the Plant 6 space. It was discussed numerous times with the customer on conference calls, site visits to Guad, and even during our previous visits to customer sites in Mexico and New Jersey. We negotiated the agreement knowing this requirement." [Rader Decl. Ex. 25]. When it became clear the space in Plant 6 committed to Dialight was not available and Plant 4 would have to accommodate Dialight, Patrick Macdonald wrote "WE, MSD, were never involved in the space allocation discussion. All I know is that we originally declined this opportunity because we didn't have capability . . . All the communication I have seen is that there was 35k of space being allocated from IMS to this project, and it was shown to Dialight. Now they are at the point of signing up, and the space is no longer there?" [Rader Decl. Ex. 43]. At his deposition, when asked about the space allocation issue, Bob Green testified "it was just an internal discussion on where [Dialight] was going to be . . . we took care of it internally . . . there wasn't a need to inform Dialight that we didn't have the space or there was any type of issue internally." [Green 196:4-197:15]. But at the time, on March 3, 2016, Bob Green wrote to Chris Nelson "Bottom line is we need to keep this in house, or the whole relationship blows up." [Rader Decl. Ex. 26]. The MSA was signed the next day, on March 4, 2016, and Dialight was not informed Sanmina lacked the space for its CNC equipment and paint line. As explained in the response to Paragraph 53, Dialight had to pay $978,144.49 to create the space it was promised. [Rader Decl. Ex. 45].

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.]

<u>Dialight's Response to Paragraph 57(g)(iv):</u> Disputed. Dialight denies Paragraph 57(g)(iv). Michael Sutsko did not refuse to say the ability of Plant 4 to accommodate the paint line would have mattered to him. He testified:

> Q. And before entering into the MSA, were you made aware of the position taken by executives at Plant 4 that Plant 4 would not have the capacity long term for paint only?
> A. Can you repeat that? It's a little bit confusing for me. Sorry.

> Q. Before entering into the MSA, were you aware that Plant 4's view was that Plant 4 would not have the capacity long term for paint only?
> A. No, I didn't have an indication of that.
> Q. And were you told before executing the MSA that Plant 4 was not completely on board with the overall opportunity?
> A. I don't recall that.
> Q. And were you aware that Plant 4 – were you ever made aware that Plant 4 had originally declined the Dialight opportunity because Plant 4 did not have capability?
> A. No, I don't recall.
> Q. Would knowing this information regarding Plant 4's – would knowing that information I just – withdrawn. Would knowing the information that I have just described have mattered to Dialight before Dialight entered into the MSA?
> A. Well, I can say that if we didn't have the ability to machine and paint and finish out metals in the factory, it would have impacted our choice to certainly go to Guadalajara if not overall.
> Q. And what about if you had known that Plant 4 was not supportive of the opportunity?
> Mr. Lieb: Objection; calls for speculation. Go ahead.
> A. It's hard to say. You know, it would have raised questions as to whether we could have come to an agreement to operate there."

Sutsko [350:23-352:22].

v. Legal Issues: PERFORMANCE; NO DUTY; VAGUE.

Dialight's Response to Paragraph 57(g)(v): Dialight denies Paragraph 57(g)(v) because it contains solely legal arguments and no statements of fact. *See* Local Rule 56.1.

h. Claimed Misrepresentation No. 8: Sanmina told Dialight Paint [sic] 4 could accommodate the paint line.

Dialight's Response to Paragraph 57(h): Dialight admits that in response to Sanmina's Contention Interrogatories it claimed Sanmina's representation to Dialight that it could accommodate the paint line was a misrepresentation.

i. As stated above, Sanmina moved a wall to fit the paint line in Plant 4. [Carral 57:8-13.]

Dialight's Response to Paragraph 57(h)(i): Dialight admits Sanmina created new space for Dialight because it did not have the space it promised. Sanmina also forced Dialight to pay to move the wall, in accordance with the instructions of then and current CEO Jure Sola. [Rader Decl. Ex. 66]. As explained in the response to Paragraph 53, Dialight had to pay $978,144.49 to create the space it was promised. [Rader Decl. Ex. 45].

ii. Legal Issues: PERFORMANCE; TRUE.

Dialight's Response to Paragraph 57(h)(ii): Dialight denies Paragraph 57(h)(ii) because it contains solely legal arguments and no statements of fact. *See* Local Rule 56.1.

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.

Dialight's Response to Paragraph 57(i): Dialight admits that in response to Sanmina's Contention Interrogatories it claimed Sanmina's representations about its ability to manage a supply chain was a misrepresentation.

i. Dialight fails to identify with any particularity any false statements in Exhibit 16.

Dialight's Response to Paragraph 57(i)(i): Disputed. Fariyal Khanbabi testified as to the falsehoods in Deposition Exhibit 16, noting Sanmina lacked superior supply chain tools, and one integrated procurement system, product life cycle support [Khanbabi 52:8-58:15].

ii. But for Slide 6, Exhibit 16 is a generic supply chain presentation. [Ex. 16 (Green 118:17-120:12 (Auth.)).]

Dialight's Response to Paragraph 57(i)(ii): Disputed in part. Dialight admits Sanmina representatives later testified this was a generic supply chain presentation. [Sugai 98:3-7]. But Sanmina knew contemporaneously that Dialight would be relying on the presentation to tell them what capabilities Sanmina had and could provide to Dialight. [Green 114:8-115:25]. And Dialight did rely on this presentation. [Sutsko 202:11-210:19].

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.]

<u>Dialight's Response to Paragraph 57(i)(iii):</u> Disputed. Slide 6 of Exhibit 16 states that the "Majority of the parts are single sources. Potential assurance of supply issue." Sanmina noted this was a risk of Dialight's current supply chain, and advertised that Sanmina could provide "[o]pportunity . . . to drive additional Agility via better Preferred Supplier List (PSL) alignment and qualifying alternate sources on any single sourced item." [Rader Decl. Ex. 68].

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.

<u>Dialight's Response to Paragraph 57(i)(iv):</u> Dialight denies Paragraph 57(i)(iv) because it is not a statement of fact. Nonetheless, Sanmina demonstrated throughout the relationship the supply chain presentation was false and did not adequately show tools the Sanmina Guadalajara campus was able to use. Sanmina personnel observed that the Sanmina materials group in Guadalajara "barely uses any of the tools given to them in Oracle." [Rader Decl. Ex. 69]. Sanmina's Guadalajara materials group needed assistance from Dialight throughout the relationship because Dialight's procurement team was able to secure materials Sanmina could not. [Khanbabi 53:13-18]. The presentation also represented Sanmina's supply chain was flexible when it was, in fact, "rigid" and "inflexible." [Khanbabi 53:19-22].

v. Legal Issues: PERFORMANCE; VAGUE; PUFFERY; INTEGRATION; TRUE; NOT PRESENT FACT.

<u>Dialight's Response to Paragraph 57(i)(v):</u> Dialight denies Paragraph 57(i)(v) because it contains solely legal arguments and no statements of fact. *See* Local Rule 56.1.

j. <u>Claimed Misrepresentation No. 10</u>: Sanmina represented to Dialight they were experts in high-mix low-volume manufacturing.

Dialight's Response to Paragraph 57(j): Dialight admits that in response to Sanmina's Contention Interrogatories it claimed Sanmina's representation that it was an expert in high mix, low volume manufacturing was a misrepresentation.

i. Claimed Misrepresentation No. 10 is already addressed in Fact nos. 50-54. Sanmina had this expertise.

Dialight's Response to Paragraph 57(j)(i): Dialight admits Sanmina addresses its purported high mix, low volume expertise in Fact nos. 50-54. Dialight incorporates by reference its Responses to Paragraphs 50-54. Dialight denies Sanmina had high mix, low volume expertise. [Rader Decl. Ex. 38 at ¶ 52).

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

Dialight's Response to Paragraph 57(j)(ii): Dialight denies Paragraph 57(j)(ii) because it contains solely legal arguments and no statements of fact. *See* Local Rule 56.1.

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.

Dialight's Response to Paragraph 57(k): Dialight admits that in response to Sanmina's Contention Interrogatories it claimed Sanmina's representations to Robert Freid regarding Dialight's future placement within Plant 2 was a misrepresentation.

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).]

Dialight's Response to Paragraph 57(k)(i): Dialight denies Paragraph 57(i) to the extent it makes legal conclusions inappropriate for the Statement of Undisputed Material Facts. Robert Freid was shown a "well lit, modern-looking area" but Sanmina later provided Dialight with space "at the very end of the plant." [Freid 50:18-51:17]. Any legal arguments about the effect of Sanmina's actions in light of the MSA is inappropriate for a Statement of Undisputed Material Facts.

ii. VAGUE ("likely location"); PERFORMANCE; INTEGRATION.

Dialight's Response to Paragraph 57(k)(ii): Dialight denies Paragraph 57(k)(ii) because it contains solely legal arguments and no statements of fact. *See* Local Rule 56.1.

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

Dialight's Response to Paragraph 57(l): Dialight admits that in response to Sanmina's Contention Interrogatories it claimed Sanmina's representation it had 30 years of experience in key markets was a misrepresentation.

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

Dialight's Response to Paragraph 57(l)(i): Dialight admits Sanmina has been in existence for over 40 years.

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

Dialight's Response to Paragraph 57(l)(ii): Dialight denies Paragraph 57(l)(ii) because it contains solely legal arguments and no statements of fact. *See* Local Rule 56.1.

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

Dialight's Response to Paragraph 57(m): Dialight admits that in response to Sanmina's contention interrogatories it claimed Sanmina's representations in the 9-22-15 presentation presented to Dialight by Sanmina were misrepresentations.

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

Dialight's Response to Paragraph 57(m)(i): Dialight admits the misrepresentations referenced in Paragraph 57(m) refer to Deposition Exhibit 18. During his deposition, Michael Sutsko explained the misrepresentations contained in Exhibit 18. [Sutsko 313:10-315:22].

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

Dialight's Response to Paragraph 57(m)(ii): Dialight denies Paragraph 57(b)(ii) because it contains solely legal arguments and no statements of fact. *See* Local Rule 56.1.

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.

Dialight's Response to Paragraph 57(n): Dialight admits that in response to Sanmina's Contention Interrogatories it claimed Sanmina's representation that no level IT systems/integration was required between the Dialight ERP system and Sanmina's ERP system was a misrepresentation.

i. It is not clear what Claimed Misrepresentation No. 14 means or what its source is.[2] 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.]

Dialight's Response to Paragraph 57(n)(i): Dialight denies Paragraph 57(n)(i). Paragraph 57(n)(i) provides commentary that is inappropriate for a statement of undisputed material facts.

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[2] 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.]

Dialight's Response to Footnote 1: Dialight denies footnote 1. Dialight objected to Interrogatory No. 10 because "it is overbroad and unduly burdensome" and seeks information already in Sanmina's possession. Dialight stated "[t]here were a number of conversations between Dialight and Sanmina personnel leading up to the MSA including in-person meetings and site visits." Nonetheless, Dialight provided examples of such misrepresentations.

In its RFQ, Dialight asked "What level of IT systems/integration is required between the Dialight ERP system and your ERP system?" Sanmina responded "No requirement for the initial engagement however Sanmina has the capability to integrate ERP systems to improve efficiency and accuracy both upstream and downstream." [Rader Decl. Ex. 9].

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.

Dialight's Response to Paragraph 57(n)(ii): Disputed. Despite Sanmina's representation it could integrate Dialight's ERP system, it did not. [Camacho 30:24-32:25; Rios 74:6-75:23; Carral 123:2-125:21].

iii. Legal Issues: VAGUE; PERFORMANCE; INTEGRATION.

Dialight's Response to Paragraph 57(n)(iii): Dialight denies Paragraph 57(b)(ii) because it contains solely legal arguments and no statements of fact. *See* Local Rule 56.1.

o. Claimed Misrepresentation No. 15: Sanmina made numerous representations throughout the course of the engagement that it would take remedial steps to improve performance.

Dialight's Response to Paragraph 57(o): Dialight admits that in response to Sanmina's Contention Interrogatories it claimed Sanmina's representations throughout the course of the engagement that it would take remedial steps to improve performance was a misrepresentation.

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.)).]

Dialight's Response to Paragraph 57(o)(i): Disputed. Dialight denies Paragraph 57(o)(i). Sanmina's performance did not improve. The "shared scorecard" in Depositions Exhibit 358 was prepared in April 2017, close to the start of Sanmina's production, before Dialight's highest volume products were transferred to Sanmina's facility. [Ex. 506 (showing Linear, Bulkhead, SS Linear, and Flood product families transferred prior to April 2017); Khanbabi 39:8-11 (noting Area Light and High Bay account for 70-75% of the overall lighting business)]. Dialight admits four categories in the document are labeled "Excellent." There are also four labeled "Satisfactory" and five labeled "Need Improvement." [Rader Decl. Ex. 70]. Sanmina's performance did not improve over the course of the relationship. Sanmina's abysmal performance is well-documented by Sanmina's own internal documentation. [Rader Decl. Exs. 36; 71; 73 74; 75].

ii. Legal Issues: POST-K; PERFORMANCE; TRUE.

Dialight's Response to Paragraph 57(o)(ii): Dialight denies Paragraph 57(o)(ii) because it contains solely legal arguments and no statements of fact. *See* Local Rule 56.1.

p. Claimed Misrepresentation No. 16: Sanmina regularly made build commitments to Dialight knowing at the time they could not be met.

Dialight's Response to Paragraph 57(p): Dialight admits that in response to Sanmina's Contention Interrogatories it claimed the build commitments Sanmina made when it knew the commitments could not be met were misrepresentations.

i. There is disputed testimony as to whether this occurred; however, as a post-execution allegation, it cannot support a fraudulent inducement claim.

Dialight's Response to Paragraph 57(p)(i): Dialight denies Paragraph 57(p)(i) because it contains legal arguments inappropriate for a statement of undisputed facts. *See* Local Rule 56.1. Sanmina constantly moved shipment dates after making commitments. [Smith 120:4-12].

Internal Sanmina communications documented instances of Sanmina making commitments it knew it could not meet. [Rader Decl. Ex. 73; 76; 77; 78; 79]. For example, on July 28, 2017, Sanmina missed 992 units of the overall committed deliveries to Dialight for the week, but was not going to inform Dialight until 5:00 p.m. on Friday. [Rader Decl. Ex. 77]. Frank Shoemaker wrote to Jorge Rios and Javier Carral that "[t]his is a complete disaster and clearly shows that your operation is out of control, in fact, based on all the problems we have been seeing, we really see it as never being under control for the past several months[.]" [Rader Decl. Ex. 77]. In a follow up email the next day, Bob Green informed Mark Strangie that the shortage was not 992 units, but almost 2,000: "I got a call from Eduardo [Renteria] Friday afternoon letting me know of the shortages, we are actual [sic] almost 2,000 units behind although they will ship over 1000 [sic] units this weekend. We will see." [Rader Decl. Ex. 77]. In December 2017, Bob Green asked Jorge Camacho if a delay had been communicated to Dialight. [Rader Decl. Ex. 79]. It was not. [Rader Decl. Ex. 79]. Bob Green wrote to Frank Shoemaker: "How does this even happen. We don't ship on time, when it is an urgent order and Dialight is not even informed." [Rader Decl. Ex. 79]. In June 2018, in an internal Sanmina assessment of the Dialight business, that, "[o]n a weekly basis, Sanmina Plant 2 misses their delivery commitments by greater than 50%." [Rader Decl. Ex. 73]. Sanmina recognized the importance of the commitment dates, because "the delivery dates that [Dialight] tell[s] their Sales and Customers keep changing which gives them more reason to pull assemblies back to Ensenada." [Rader Decl. Ex. 74]. The importance of commitment dates was also recognized in a March 2018 report prepared by Tom Sugai:

> Our commits become (are) Dialight's promises to their customer. If we break our promise, so does Dialight. Dialight's reputation is being harmed by SANM and customers are moving away from Dialight. Where Dialight was sole sourced for many years, customers are now soliciting their competitors to meet their demands. This is serious.

[Rader Decl. Ex. 80]. Gerry Fay, Sanmina's former Chief Business Officer who reported directly to then-CEO Bob Eulau, testified that Sanmina could have communicated better, including failing to inform Dialight that deliveries would be late until after the supposed delivery date already passed, "where clearly factory management would have known they weren't going to meet the commitment." [Fay 40:18-41:10].

ii. Legal Issues: POST-K; VAGUE.

Dialight's Response to Paragraph 57(p)(ii): Dialight denies Paragraph 57(p)(ii) because it contains solely legal arguments and no statements of fact. *See* Local Rule 56.1.

q. Claimed Misrepresentation No. 17: Sanmina represented it had world class quality, reliability, and responsiveness.

Dialight's Response to Paragraph 57(q): Dialight admits that in response to Sanmina's Contention Interrogatories it claimed Sanmina's representation that it had world class quality, reliability, and responsiveness was a misrepresentation.

i. Sanmina did make this representation and Dialight has not identified any evidence that it was untrue.

Dialight's Response to Paragraph 57(q)(i): Disputed. Sanmina's then-manager of Plant 4, For example, Brian Smillie, wrote of Plant 2: "worst service level, support and responsiveness I have experienced and witnessed[.]" [Rader Decl. Ex. 81].

ii. Similar representations were made to Dialight by its own consultant, based on his independent investigation. [Freid. Ex. 128, pp. 8, 12, 22.]

Dialight's Response to Paragraph 57(q)(ii): Dialight denies Paragraph 57(q)(ii). Page 8 of the cited exhibit is a slide on Flextronics. Page 12 does not mention quality, reliability, or responsiveness and is based off representations made by Sanmina. Page 22 contains clips from secondary sources on Sanmina.

iii. Legal Issues: PUFFERY; VAGUE; PERFORMANCE; INTEGRATION; TRUE; NOT PRESENT FACT.

Dialight's Response to Paragraph 57(q)(iii): Dialight denies Paragraph 57(q)(iii) because it contains solely legal arguments and no statements of fact. *See* Local Rule 56.1.

r. Claimed Misrepresentation No. 18: Sanmina represented itself as having expertise in the Lighting Market.

Dialight's Response to Paragraph 57(r): Dialight admits that in response to Sanmina's Contention Interrogatories it claimed Sanmina's representation that it had expertise in the Lighting Market was a misrepresentation.

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.]

Dialight's Response to Paragraph 57(r)(i): Disputed. Sanmina did not have expertise in the lighting market in its Guadalajara plant as it pertained to the products that Sanmina needed to make for Dialight. [*See* Escamilla 89:20-91:14].

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

Dialight's Response to Paragraph 57(r)(ii): Dialight denies Paragraph 57(r)(ii) because it contains solely legal arguments and no statements of fact. *See* Local Rule 56.1.

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

Dialight's Response to Unnumbered Header: Dialight denies the proceeding paragraphs contain 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].

Dialight's Response to Paragraph 58: Disputed. Dialight denies Paragraph 58. Dialight alleges in part that Sanmina "owed Dialight a duty to refrain from negligently or intentionally harming Dialight's business operations" and "failed to discharge this duty." [Complaint ¶ 101]. Dialight claims "Sanmina plainly lacked all concern for Dialight's rights under the MSA or for the disastrous financial consequences certain to befall Dialight as a result of Sanmina's incompetence. Thus, Sanmina is liable not only for breaching its contractual obligations, but for negligently or willfully exacerbating the consequences of those breaches." [Complaint ¶ 106] The evidence in support of this claim is voluminous. *See supra* at ¶¶ 158-265

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.)).]

Dialight's Response to Paragraph 59: Dialight denies Paragraph 59 to the extent it purports to limit Dialight's evidence for its gross negligence claim to a limited number of cited emails. The evidence in support of this claim is voluminous. [Rader Decl. Exs. 26; 39; 73; 77; 81; 82; 83; 84; 85; 86; 87; 88; 89; 90; 91; 92; 93; 94; 95; Escamilla 93:20-25 ("I was just terrified at that moment. Okay, so you are just, like, violating your ISO 9001 certificate in a big way. If they were audited at that particular point, that would be a major finding and they could really lose their certificate as a ISO 9001 certified company.")]. Pursuant to Section 12.3 of the MSA Sanmina was required to be certified under ISO 9001 or ISO 9002. [Rader Decl. Ex. 21, § 12.3].

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.]

Dialight's Response to Paragraph 60: Disputed. Dialight denies Paragraph 60. Sanmina deponents admitted Sanmina refused to address they bared any responsibility for its performance. [Sugai 146:2-17 ("I guess in Marco [Gonzalez]'s point of view . . . he thought that there wasn't [sic] issues and it was more of a customer centric issue. My response is that it was, you know a little of both."); Fay 42:14-22 ("I think Marco [Gonzalez] was too biased at looking at what potentially the customer has done wrong versus maybe what his team could improve on .

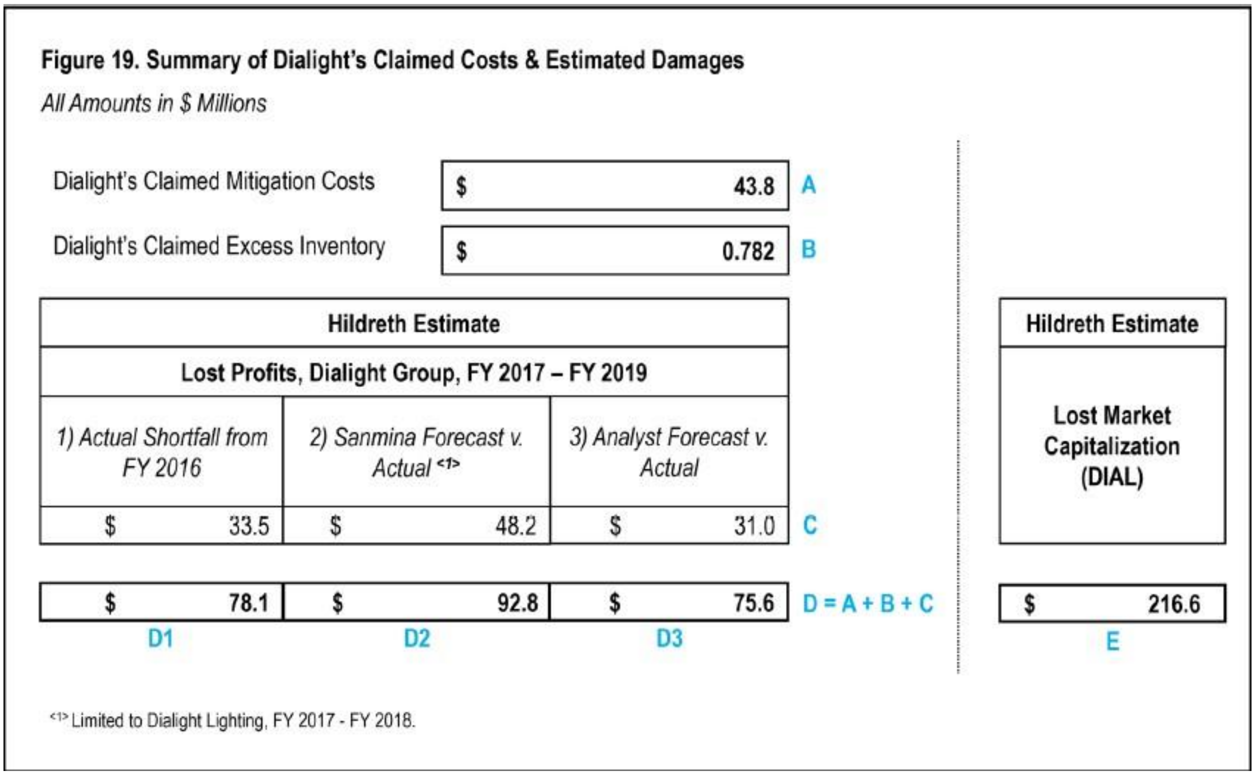
. . I think it was difficult for him to be objective in how we could improve things between the two companies.”); Shoemaker 88:24-89:6 (“[O]ver the course of a few years we ha[d] made a number of PowerPoint presentations with recovery plans that may have not met expectations[.]”)]. Jorge Camacho, a Sanmina 30(b)(6) witness and program manager for the Dialight account, could not recall any issues that were Sanmina’s fault besides two discrete quality issues. [Camacho 99:11-101:2]. The evidence in support of Sanmina’s inability and failure to improve its performance is voluminous. [Rader Decl. Exs. 73; 93; 96; 97; 98; 99; 100; 101; Rapp 125:10-15 (“We sent all of our people in there with recommendations of how to do surveillance on materials; and basically they were, like, I think, treated pretty disrespectfully. Their – their suggestions for improvement weren’t heeded, and finally we, and I agree, we pulled them out. They weren’t listening to us.”); Rapp 126:21-127:2 (“[T]heir recommendations weren’t taken onboard in terms of making a sustainable improvement in the actual operations, which over time, these datapoints kind of eroded my confidence that Sanmina was serious about fixing our business and my confidence that they actually knew how to fix it were eroded, including my meeting with [then-Sanmina CEO] Bob Eulau.”); Rapp 132:19-133:9 (“My overall suggestion to Bob [Eulau] and to Gerry Fay and to Marco [Gonzalez], everybody on the line was, you guys basically are the experts. You said you’re the experts. Fix it. Here’s what we think needs to be done to fix it . . . It’s just a little while longer; it’s almost fixed. But we saw no substantial change the whole time I was there. So it’s not that they – we said, do A, and they said we’re not doing A. It’s they say we’re going to fix it, just hang in there for another couple weeks or a month or whatever, and there’s no change. In fact, from June [2018] through September [2018], the on-time delivery for some of the product lines were very significantly worse.”)]. An example of this refusal to improve is Sanmina’s refusal to run its MRP system more than once a week despite being told it was critical for the Dialight business. [Rader Decl. Exs. 17; 40; 51; Smith 142:18-143:15]. Sanmina refused to accommodate Dialight and run MRP more than once a week because once a week was standard for all Sanmina customers. [Smith 143:12-15; Shoemaker 130:12-17; Camacho 87:8-12; Gonzalez 226:3-6].

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.

Dialight’s Response to Paragraph 61: Disputed in part. Dialight first Dialight admits that there have not yet been any personal injuries caused by the alleged lanyard defects, but the carelessness with which the lanyards were handled establishes the willful misconduct with which Sanmina handled the Dialight account. The lack of personal injuries is because Dialight issued a product recall of the lanyards. *See also infra*, at ¶ 255.

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

<u>Dialight's Response to Paragraph 62:</u> Disputed. Dialight's claimed damages are set forth in its expert report and interrogatory responses and reproduced below:



Direct Mitigation / Other Out-of-Pocket Expense	Description	Cost
Additional freight costs	Additional freight charges incurred to expedite late orders.	$3.6 million
Ensenada	Maintaining Ensenada staff at below optimal production.	$2.2 million
Production transfer costs	Set-up costs, project management, and dedicated engineering time to the transfer to Sanmina.	$9.1 million
Severance	Employee severance from the Newmarket and Ensenada plants.	$6.5 million
Infrastructure improvements paid by Dialight	Cost of expanding Plant 4.	$824,000
Labor cost to inspect metals		$269,000

Metals uneconomic to re-work		$446,000
Third party inspection of finished goods in UK and Australia		$446,000
Raw materials shipped to Sanmina		$77,000
Finished goods warranty returns from Europe never replaced		$54,000
Warranty claim of finished goods failures		$107,000
Finished goods invoiced but never received in Australia		$45,000
Equipment sourced by Sanmina not returned		$1.069 million
Equipment transferred from Dialight not returned		$55,000
Escrow Fund	Dialight provided Sanmina with a $5.6 million escrow fund to cover potential E&O expenses.	$5.6 million

Insourcing Cost	**Description**	**Cost**
Cost of moving equipment	The cost of moving Dialight equipment (Paint Line and CNC machines) from Sanmina's premises in Guadalajara and re-installing and calibrating them in Dialight's facility in Tijuana, Mexico.	$1.2 million
Cost of moving inventory	The cost of getting the inventory purchased from Sanmina (due to the contract termination) to Dialight premises in Mexico and Malaysia in a timely manner to minimize disruption to production.	$4.2 million
Dual running costs	These consisted of two elements: a) Ramp-up costs for Dialight's facility in Tijuana which Dialight acquired to house the Paint Line and CNC machines. This covers the ramp-up over a period of 9 months with certification of the site, testing of all parts for quality and acquiring and training staff. ($2.9 million).	$7.9 million

	b) During the ramp-up period, Dialight used 3rd party vendors to provide these machining and painting services. This resulted in higher prices as they were smaller vendors and Dialight also had to pay overhead and profit margins. ($5.0 million).	

[*See* Rader Decl. Ex. 102; 103].

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

<u>Dialight's Response to Unnumbered Header:</u> Dialight denies the proceeding paragraphs contain facts in support of 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.]

<u>Dialight's Response to Paragraph 63:</u> Admitted only to the extent Section 3.6 of the MSA is as quoted in Dialight's Response to Paragraph 44. Dialight denies it has liability for any products that arrived damage or did not arrive at all. Additionally, Dialight disputes that the 15 day acceptance window was in effect after the MSA was terminated. A significant number of Sanmina's claimed invoices were issued after the effective termination date of the MSA. [*See* Camacho Dec. Ex. A].

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.]

<u>Dialight's Response to Paragraph 64:</u> Disputed. Dialight does not view Sanmina' accounts receivable claim as based on unpaid invoices issued by Sanmina. Sanmina was difficult to get answers from when there were disputes involving invoices from Dialight and Sanmina ignored invoices from Dialight. [Sheehy 66:7-20]. Dialight did not pay disputed invoices. [Sheehy 199 2:12].

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).]

Dialight's Response to Paragraph 65: Disputed. Dialight disputes it owes Sanmina this amount due to non-delivery of invoiced goods. [Sheehy 349:19-23]. Dialight also inspected and rejected goods Sanmina delivered. [Sheehy 351:3-12].

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

Dialight's Response to Paragraph 66: Disputed. There were instances throughout the duration of the MSA where Sanmina invoiced Dialight for goods it did not ship. [Sheehy 349:19-23; Rader Decl. Ex. 104]. One of Sanmina's 30(b)(6) witnesses, Jorge Rios, testified that it is "an issue of big concern to invoice without shipping[.]" [Rios 185:5-8]. Invoicing Dialight but not shipping products was a "major ongoing problem" for Sanmina. [Rader Decl. Ex. 104]. Sanmina 30(b)(6) witness Bob Green did not recall how the issue was addressed. [Green 228:5-10].

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.]

Dialight's Response to Paragraph 67: Disputed. After termination, Dialight received a large number of goods from Sanmina. [Escamilla 221:12-14]. Dialight had to sort the goods into tents to determine which were defective. [Escamilla 201:24-202:22].

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

Dialight's Response to Paragraph 68: Disputed. This is a legal contention inappropriate for a statement of facts. *See* Local Rule 56.1. Dialight denies the interest rate applies to Sanmina's A/R claim because Dialight disputes it owes the invoices. [Sheehy 349:19-23].

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.]

Dialight's Response to Paragraph 69: Dialight denies Paragraph 69. Paragraph 69, which contains a legal conclusion as to the ultimate merit of Sanmina's claims, is inappropriate for a statement of undisputed facts. Additionally, Sanmina owes Dialight $1,948,000 in an unpaid invoice for fixed assets recharged to Sanmina and $1,444, 992 for other unpaid invoices. [*See* Rader Decl. Exs. 105; 106; 107; 108; 109] Sanmina also holds $5.3 million of Dialight's money in escrow. [Sheehy 359:18-23].

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.]

Dialight's Response to Paragraph 70: Disputed. Invoicing Dialight without shipping the product was a major problem for Sanmina throughout the relationship. [Rader Decl. Ex. 104]. Further, Dialight denies Paragraph 70 because it contains legal claims inappropriate for an undisputed statement of material facts. *See* Local Rule 56.1.

Additional Paragraphs Containing Material Facts Precluding Summary Judgment in Sanmina's Favor

Dialight's Search for an Outsourcing Partner

71. Dialight designs and manufactures industrial light-emitting diode ("LED") lighting fixtures, among other products, that are used in a variety of high risk and safety critical environments such as factory floors, oil refineries, and telecommunications towers. [Rader Decl. Ex. 17; *see also* About Us: Company Overview, Dialight.com, https://www.dialight.com/about/#company-overview].

72. Dialight products utilize high mix, low volume manufacturing. [Khanbabi 30:14-15; Rapp 17:17-19; Escamilla 76:12-17.]

73. High mix, low volume manufacturing requires a high number of SKUs per dollar of revenue, meaning customers can customize products that are made to order, rather than mass production of standard products. [Rapp 16:3-18; Escamilla 76:12-18 ("you are going to run . . .

little quantities of product A and then little quantities of product B. And the difference between product A and product B, it might be some accessory.")].

74. As of June 2015, Dialight products had over 4,500 unique finished good SKUs and used over 8,000 different raw materials in production. [Rader Decl. Ex. 46].

75. In June 2015, Dialight's then-CEO, Michael Sutsko, began exploring outsourcing the company's manufacturing to a contract manufacturing partner. [Sutsko 30:10-19].

76. As part of that process, Michael Sutsko reached out to three potential contract manufacturers: Sanmina, Flextronics, and Jabil. [Rader Decl. Exs. 2; 4; 5].

77. Dialight began investigating the possibility of outsourcing the manufacturing of its products so it could focus on its core competencies of technology and sales. [Khanbabi 21:15-24].

78. Bob Green of Sanmina was the leader of Sanmina's effort to obtain the Dialight business. [Rader Decl. Ex. 110].

79. Bob Green was selected to lead Sanmina's effort to obtain the Dialight business because he was based in Pennsylvania which was "relatively close" to Dialight's office in Farmingdale, New Jersey. [Green 32:16-24; Shoemaker 22:17-20].

80. Bob Green was new to Sanmina, having started in January 2015. [Green 23:18-19].

81. Bob Green had not yet secured any customers in Sanmina; Dialight was his first. [Green 157:3-6].

82. Bob Green's compensation was tied to securing new business for Sanmina. [Green 25:18-26-10].

83. Dialight took steps to ensure Sanmina understood what Dialight required from a manufacturing partner, including providing a breakdown of its Stock Keeping Unit ("SKU") count [Rader Decl. Ex. 46] and a detailed RFQ [Rader Decl. Ex. 9; 12].

84. Dialight's 4,500 unique finished good SKUs was a significant number of SKUs. [Green 178:25-179:10].

85. When selecting an outsourcing partner and later negotiating the MSA, Dialight relied on Sanmina's representations that it had the ability and expertise to manufacture Dialight's products. [Khanbabi 21:18-20].

86. High mix, low volume manufacturing forecasts have a high degree of variability [Ramirez 37:6-12] and forecast inaccuracies, which is a challenge faced by companies manufacturing high mix, low volume products. [Ramirez 50:12-20].

87. Because of this, a key requirement of manufacturing Dialight products is manufacturing flexibility. [Ex 24, § D].

88. Dialight retained a contract manufacturing consultant, Robert Freid, to help Dialight select a contract manufacturing partner. [Sutsko 30:20-31:8].

89. Robert Freid traveled to Guadalajara on September 8, 2015, to evaluate whether Sanmina would be an appropriate outsourcing partner. [Rader Decl. Ex. 111].

90. On his visit, Robert Freid was not allowed to look at Sanmina product lines running LED lighting with high-mix industrial products up close. [Freid 53:20-54:2].

91. Sanmina claimed Robert Freid could not observe the product lines more closely because they had NDAs with those customers. [Freid 54:8-55:8; Green 54:21-55:7].

92. After Robert Freid's visit, Sanmina's Executive Vice President of the Mechanical Systems Division, Patrick Macdonald, wrote in an internal Sanmina email "Im [sic] not sure where exactly we are going with this Dialight opportunity, however I made it perfectly clear at the very start that we would not be using P4 paintline to paint these diecast items. We will not have capacity long term for paint only!" [Rader Decl. Ex. 112].

93. Sanmina's Plant 4 manager, Brian Smillie, followed up Macdonald's concerns in an email stating "There is no machining capacity either for this type of work. I am a little confused on why these were not made clear for the customer during the tours." [Rader Decl. Ex. 113].

94. Additionally, Sanmina showed Robert Freid where the Dialight business would be; in a "well lit, modern looking area." [Freid 50:18-51:12].

95. To help it evaluate potential contract manufacturing partners, Robert Freid prepared a detailed RFQ for potential partners to complete. [Rader Decl. Ex. 38 at ¶¶ 30-35; 114; 115; 116; 117; 118; 119; 120;121].

96. The instructions to the RFQ state that proposed sites must have, among other things, a "Strong focus on high mix, medium to ultra-low volume production." [Rader Decl. Ex. 117].

97. In the RFQ, Dialight told potential contract manufacturing partners to "Expect continuous production of higher volume units, but wide variations from forecast in product mix in terms of finished products." [Rader Decl. Ex. 9]. Sanmina responded "No problem we can support this." [Rader Decl. Ex. 9].

98. The RFQ also asked "What level of IT systems/integration is required between the Dialight ERP system and your ERP system?" Sanmina responded "No requirement for the initial engagement however Sanmina has the capability to integrate the ERP systems to improve efficiency and accuracy both upstream and down stream [sic]." [Rader Decl. Ex. 9].

99. Dialight also emphasized the need for manufacturing flexibility in a cover letter it sent to Sanmina along with the first draft of the MSA, writing "We trust that you appreciate the nature of our business. Our end-customer average order size is small. Also, because of corporate selling, customer sites ordering only a few units a month suddenly and unexpectedly can ramp to hundreds." [Rader Decl. Exs. 11; 12].

100. Bob Green drafted and transmitted Sanmina's RFQ responses on September 20, 2015. [Rader Decl. Ex. 8].

101. Unbeknownst to Dialight, Bob Green had no personal knowledge of the manufacturing capabilities of Sanmina's Guadalajara campus, but relied on conversations he had with Jorge Rios and Javier Carral, who worked in Guadalajara. [Green 46:3-47:22].

102. Bob Green testified that Jorge Rios and Javier Carral understood the nature of the Dialight business because "they were involved in some of the discussions of Dialight and had seen the RFP quote." [Green 47:8-17].

103. Although Bob Green believed Jorge Rios understood Dialight's product mix because he had seen the RFQ, Jorge Rios did not see the RFQ until after the MSA was signed. [Rios 96:17-22].

104. Jorge Rios provided answers to the RFQ over the phone, without looking at the document. [Rios 96:17-22].

105. On September 22, 2015, Sanmina gave Dialight a presentation on Sanmina's supply chain capabilities. [Rader Decl. Exs. 67; 68].

106. The presentation purported to explain Sanmina's supply chain tools that would be available to Dialight. [Rader Decl. Exs. 67; 68].

107. Bob Green testified that Sanmina presented the supply chain tools as ones Sanmina had, and that "I'm sure we presented them that if they were needed we would use them . . . I would – if I understand it correctly, that Dialight would assume or they would expect – if we are presenting it, then – as our capabilities, then they would expect we would – we could use them, I would assume so." [Green 115:11-25].

108. Dialight relied on this presentation, because supply chain management was "extremely important to [Dialight]." [Khanbabi 31:6-9].

109. Despite Sanmina's representations about the supply chain tools it possessed, Sanmina internally observed that the materials group in Guadalajara "barely uses any of the tools given to them in Oracle." [Rader Decl. Ex. 69].

110. Kinaxis is an example of Sanmina not using the supply chain tools it represented it would use. As explained by Sanmina's own Supply Chain manager Tom Sugai, Kinaxis's Rapid Response tool allows Sanmina to run what-if scenarios. [Sugai 73:16-75:19].

111. At Sanmina, Rapid Response is run at the plant level. [Sugai 75:12].

112. In its September 22, 2015 presentation to Dialight, Sanmina stated it had Rapid Response available. [Rader Decl. Ex. 68 at 3].

113. Sanmina did not run Kinaxis for Dialight because Sanmina wanted Dialight to pay more to use it (which was not disclosed to Dialight prior to signing the MSA); but Dialight

thought it "was a fundamental tool that [Sanmina] should use in order to deal with a business as complex as Dialight." [Ramirez 80:7-18].

114. When Dialight and Sanmina were negotiating the MSA, there were multiple instances where Sanmina internally discussed lying to Dialight to avoid losing the potential business and give Dialight the message that Sanmina was unified in its support of the Dialight opportunity. [Rader Decl. Exs. 26; 56; 57; 113; 228].

115. On September 9, 2015, Sanmina's Director of Global Treasury, Risk, & Credit wrote to the Sanmina sales team "If I may throw my 2 cents in, LED companies are a dime a dozen, and they all feel they have their special niche . . . Personally, I don't see much that's attractive here." [Rader Decl. Ex. 54].

116. On September 19, 2015, after Dialight attempted to set up a meeting with the Sanmina finance team, Mark Strangie instructed Bob Green to "[t]ell the customer that we can't get to aligning finance until at least Wednesday. Tell our people the same thing. We see how the meeting goes Tuesday and then if we need them to talk, we do it after Tuesday's discussion. I am planning on altering Brandon [Soule's] slides. At the end of the day, this is our job to sell and win this deal, not finances or Erik's group. If we win the deal and it's a piece of shit then I will own that." [Rader Decl. Ex. 53].

117. On September 22, 2015, Brandon Soule informed the Sanmina sales team he was withdrawing his agreement to extend any credit to Dialight. [Rader Decl. Ex. 54].

118. In response, Erik Swennumson wrote "We made commitments today to a company based on your credit assessment." [Rader Decl. Ex. 54].

119. On September 23, 2015, Mike Giggey wrote to Erik Swennumson, "Hey Mr [sic] Deal . . . I just talked with Chuck K on this he's pretty fired-up at Brandon [Soule] and Brian [Casey] . . . Since we've not been awarded the business yet not communicating none of this to Dialight." [Rader Decl. Ex. 56].

120. After setting up a call between Sanmina's finance team and Dialight's then-CFO Fariyal Khanbabi, Bob Green and Mike Giggey discussed listening in on the call and make sure

the finance team did not reveal their true opinions on the Dialight account. [Rader Decl. Ex. 122].

121. Bob Green observed that they would "probably need to at least let our guys know if we were going to listen in." [Rader Decl. Ex. 122].

122. Prior to the call, on September 25, 2015, Mike Giggey told Brian Casey and Brandon Soule "Dialight does NOT know SANM Credit has changed course, so please do not comment on it. We've positioned this call as final SANM finance checkpoint with Dialight while they review various RFP's for outsourcing award." [Rader Decl. Ex. 57].

123. Brandon Soule and Brian Casey followed Mike Giggey's instructions and did not inform Dialight that Sanmina credit had changed course. [Soule 99:18-100:4].

124. Then-Dialight CEO Michael Sutsko testified that knowing the true opinions of the Sanmina finance team would have affected his decision to outsource with Sanmina because Dialight was "relying on the credit facilities to scale and build the business . . . we had understood that the credit extension would have a direct relationship on the, their ability or desire to order and hold raw materials to meet the production and quality delivery requirements, and that knowing that the finance team didn't support the whole program would have caused concern that they would continuously undermine the ability to execute." [Sutsko 349:18-350:22].

125. In his 30(b)(6) deposition, Bob Green testified that the call with Fariyal Khanbabi was not an example of Sanmina being transparent with Dialight. [Green 22-24].

126. Credit would remain an issue throughout the duration of the relationship and the Dialight account was put on a credit hold multiple times. [Rader Decl. Exs. 60; 61; 62; 63; 64; 65].

127. On at least one of these occasions, Sanmina chose not to inform Dialight it was even on credit hold. [Rader Decl. Ex. 65].

128. In October 2015, Robert Freid asked Bob Green for Sanmina's wage information to use in financial modeling. [Rader Decl. Ex. 123].

129. Mark Strangie emailed Jorge Rios and Ramiro Garcia and asked "[c]an we come up with some type of 'bullsh*t' matrix with a few general ideas to try and make him go away on this?" [Rader Decl. Ex. 123].

130. Green shared the "bullsh*t" matrix with Robert Freid. [Rader Decl. Ex. 123].

131. Sanmina also continuously misled Dialight about Plant 4's capability to handle the Dialight business. [Sutsko 351:6-11; Rader Decl. Ex. 43].

132. Sanmina reported to Robert Freid that there was "excellent space available – 25k ft2 [sic]" for the MSD business. [Rader Decl. Ex. 124]

133. These representations were important to Dialight, because if Dialight "didn't have the ability to machine and paint and finish [it's] metals in the factory, it would have impacted [Dialight's] choice to certainly go to Guadalajara if not overall." [Sutsko 352:7-12].

134. In January 2016, Bob Green sent an internal email to Chris Nelson expressing his view that personnel from Sanmina Plant 4 should not join an internal call about Dialight because "My fear is that that [sic] MSD will dismiss this quickly as they have not been completely on board with the overall opportunity . . . If we completely refuse to bring into [sic] the CNC and paint line, it will likely jeopardize the entire engagement." [Rader Decl. Ex. 126].

135. Bob Green's concern over Plant 4 were not unfounded; on January 18, 2015, Patrick Macdonald wrote in an internal Sanmina email "We need to get agreement on this before you do anything. I'm not sure where we would put another paintline in P4, and I'm not sure I would want to. Every square foot of space in that factory needs to be utilized in the best way to make money. I can't see how that's going to work here." [Rader Decl. Ex. 126].

136. In late February 2016, Sanmina realized the space it had committed to Dialight in Plant 6 was no longer available; Brian Smillie emailed Ramiro Garcia "Can you help me understand who controls Plant 6 warehouse space? I am being requested to move out and shrink to 6k sq ft in total by March 7 for other customers that are planned to go in this area from Plant 6 projects . . . not sure who may not be on the same page but did we not just commit this area to Dialight for 35k-40k sq ft?" [Rader Decl. Ex. 127].

137. Bob Green and Jaime Glez had an IM conversation:

> Jaime Glez: Just saw the e-mail from Brian regarding space that does not look good for Dialight.
> Bob Green: What does it mean. Thought Javier committed the space?
> Jaime Glez: I don't know man but it does not sound good.

[Rader Decl. Ex. 128].

138. Brian Smillie later commented "I just want you all to be aware that someone has committed 40,000 sq ft of manufacturing space to a customer called Dialight who will install a Paint Line, Wash System, and 30x CNC Machining centers with secondary machining operations, this does not appear to be considered on your layout below and I just want the right people to be aware as it looks like we are selling the same space to different customers that might not be available to them all, just sharing a concern. If this space is already spoken for with a Plant 6 customer then I have no idea where 40,000 sq ft for Dialight would go as it does not fit in Plant 4." [Rader Decl. Ex. 41].

139. Bob Green recognized the importance of this development; noting that "It would be a deal killer to lose the space." [Rader Decl. Ex. 42].

140. On February 29, 2016, Chris Nelson wrote internally "The IMS award from Dialight was contingent on Sanmina supporting the CNC and painting requirements on the Guad campus and specifically in the Plant 6 space. It was discussed numerous times with the customer, on conference calls, site visits to Guad, and even during our previous visits to our customer sites in Mexico and New Jersey. We negotiated the agreement knowing this requirement." [Rader Decl. Ex. 25].

141. Bob Green also acknowledged on March 1, 2016 in an email to Mike Giggey and Mark Strangie that "the agreement with Dialight is based on Sanmina's commitment to support a paint line and CNC machines in Plant 6." [Rader Decl. Ex. 129].

142. On March 1, 2016, Patrick Macdonald wrote "WE, MSD, were never involved in the space allocation discussion. All I know is that we originally declined this opportunity

because we didn't have capacity . . . All the communication I have seen is that there was 35k of space being allocated from IMS to this project, and it was shown to Dialight. Now they are at the point of signing up, and the space is no longer there?" [Rader Decl. Ex. 43].

143. On March 3, 2016, Bob Green wrote to Chris Nelson "Bottom line is we need to keep this in house, or the whole relationship blows up." [Rader Decl. Ex. 26].

144. Because Sanmina did not disclose the space set aside for Dialight was no longer available, Dialight had no other choice but to pay increased NRE costs to expand Plant 4 to make space for the Dialight business. Dialight was forced to pay $978, 144.49 [Rader Decl. Exs. 44; 45].

145. The $978,144.49 included the cost of building an external oven enclosure for the paint line, adding a fire protection system to the new area, relocating an existing Sanmina client, installing CNC machines, and other fixtures. [Rader Decl. Ex. 45].

146. Dialight and Sanmina signed the MSA on March 4, 2016 [Rader Decl. Ex. 37] dated March 7, 2016. [Rader Decl. Ex. 21].

147. The MSA contained explicit representations in the recitals regarding Sanmina's existing capabilities that were the basis of Dialight's selection of Sanmina as its manufacturing partner. [Rader Decl. Ex. 21; Giggey 216:24-25].

148. Recital B of the MSA provides: "Sanmina is an expert in the contract manufacturing field for LED products and components." [Rader Decl. Ex. 21, § B].

149. Recital D of the MSA provides:

> 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. 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.

[Rader Decl. Ex. 21, § D].

150. The language in Recital D referring to "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" refers to a special process typically found in high mix, low volume delivery systems, "Supermarket" Work-in-Process, and is a clear indication of high mix, low volume capabilities [Rader Decl. Ex. 38 at ¶ 42] and was the most important recital. [Freid 268:3-270:20].

151. Bob Green testified in his 30(b)(6) deposition that Sanmina understood Recital D was a determining factor in Dialight's selection of Sanmina. [Green 163:13-22].

152. Sanmina did not, in fact, have high mix, low volume capabilities at its Guadalajara Plant 2; Dialight's expert concluded, after reviewing the materials in the record, "Sanmina did not have HMLV services in place at the time they executed the contract, or at any time afterwards during its two years of services to Dialight." [Rader Decl. Ex. 38 at ¶ 52].

153. Multiple Dialight and Sanmina personnel who spent a significant amount of time at Sanmina's Guadalajara campus testified that Sanmina did not have high mix, low volume capabilities. [Sutsko 101:19-24 (Sanmina did not have the capability "to manage a high mix low volume type of operation"); Escamilla 75:1-3 (Sanmina's "manufacturing system . . . was aimed at high volume, low mixed parts"); Rader Decl. Exs. 39 (internal Sanmina email stating "obviously we had not made the right decision on what needs to be manufactured in which location based on capabilities, expertise"); 40 (Luis Ramirez contemporaneously states that Plant 2 "did not know how to deal with the low volume high mix complexity of our products"); 130 (internal Sanmina message stating Plant 2 has no idea what Dialight's requirements are); 131 (Luis Ramirez recaps conversation with Jorge Rios where Rios stated "the current mix is more challenging due to the ATOs and low volume configuration" and Ramirez "reminded them their statement that low volume high mix is their sweet spot")].

154. Sanmina also represented in Recital D that it could provide services to Dialight from a single profit center. [Rader Decl. Ex. 21, § D].

155. The single profit center portion of Recital D was false when made because Sanmina's former CEO Bob Eualu and a Sanmina 30(b)(6) witness Bob Green both testified that Plant 2 and Plant 4 were separate profit centers; "they have their own P&L that they have to report up through the organization" and "each plant has to be responsible for their own operations." [Green 232:18-22; Eulau 24:23-25:7].

156. Dialight's then-CEO Michael Sutsko testified he would not have entered the MSA if he knew Recital D was false. [Sutsko 195:8-23, 198:15-199:5].

157. When the MSA was executed, Sanmina no longer had the space shown to Robert Freid available and placed Dialight at the very end of the plant. [Freid 51: 13-17].

Sanmina's Performance During the MSA

158. Sanmina provided services to Dialight from Plant 2 and Plant 4 in Guadalajara, Mexico. [Khanbabi 33:1-5].

159. Plant 2 is part of Sanmina's Integrated Manufacturing Services Division ("IMS"). [Giggey 269:16-20; Gonzalez 111:6-9].

160. Plant 2 handled, among other things, top level assembly and testing. [Rader Decl. Ex. 132 at 6].

161. Plant 4 is part of Sanmina's Manufacturing Services Division ("MSD"). [Green 188:4-9].

162. Plant 4 housed Dialight's CNC machines and paint line. [Rader Decl. Ex. 124].

163. Sanmina shipped products directly to Dialight customers in North America, and to Dialight owned distribution centers in Australia and Europe (which made up approximately 25% of shipments). [Sheehy 67:15-68-5].

164. From the start of the relationship, Sanmina's Plant 2 failed to devote sufficient resources to load the Bill of Materials ("BOM") that Dialight provided. [Rader Decl. Ex. 76].

165. The BOM must be loaded into Oracle in order to purchase materials. [Shoemaker 33:20-34:8, 41:11-21].

166. Sanmina also refused to provide information to Dialight it requested about Sanmina's efforts to fix the issue. [Rader Decl. Ex. 133].

167. In April, 2017, Sanmina had still not allocated sufficient resources to load Dialight's Bill of Materials ("BOM"). Bob Green wrote in an internal email in April 2017 "Yes, the immediate concern/request is Area Light BOMs being loaded. Mainly because we are going into mass production in April, we have had the BOMs for almost 4 weeks and they are still not loaded. Big concern, since currently we are not driving any demand until they are loading into the system. The big picture is we have just received and will continue to receive a huge amount of documentation for Obstruction and Hi Bay. They have zero confidence that we can load them in time." [Rader Decl. Ex. 76].

168. Earlier, in January 18, 2017, when Dialight asked for information on resources dedicated to loading BOMS, Frank Shoemaker wrote in an internal email "Let's discuss internally, I do not understand why the plant does not want to present this level of information, are we trying to hide something??" [Rader Decl. Ex. 133].

169. Frank Shoemaker testified he was brought in to assist Bob Green with the Dialight account due to its complexity. [Shoemaker 13:3-12].

170. Frank Shoemaker was actually brought in to assist with the Dialight account because there were "so many issues going on with the ramp" up of production and Bob Green was "swamped." [Rader Decl. Ex. 130].

171. He was also brought in to help Bob Green "on the Mexico BS" because he was "up to [his] knees in it!!" [Rader Decl. Ex. 134].

172. When Bob Green informed Francisco Montero that Frank Shoemaker would be assisting with the account, Francisco Montero noted he had been in meetings with Plant 2 and they had "no idea" what Dialight's requirements were which "really scare[s] us." [Rader Decl. Ex. 130].

173. This was the first time in 15-20 years Frank Shoemaker was asked to help manage an account that he did not bring in to Sanmina. [Shoemaker 17:18-18:13].

174. Section 3.4 of the MSA provides that "SANMINA will achieve an on-time Delivery Rate of 95% or better." [Rader Decl. Ex. 21, § 3.4].

175. By Sanmina's own measurements, it never came close to achieving a 95% on-time delivery rate, consistently achieving an on-time deliver rate of about 50%. [Rader Decl. Ex. 36; 71; 73; 74; 75].

176. At his deposition, Marco Gonzalez claimed that Section 3.4 of the MSA did not require on-time delivery of anything that fell outside Dialight's forecast. [Gonzalez 193:20-24].

177. This explanation contradicts the on-time delivery rates Sanmina reported to Dialight on a weekly basis. [*See* Rader Decl. Exs. 135; 136; 137; 138; 139; 140; 141; 142; 143; 144; 145; 146; 147; 148; 149; 150; 151; 152; 153; 154; 155; 156; 157; 158; 159; 160; 161; 162; 163; 164; 165; 166; 167; 168; 169; 170; 171; 172; 173; 174; 175; 176; 177; 178; 179; 180; 181; 182; 183; 184; 185; 186; 187; 188; 189; 190; 191; 192; 193; 194].

178. Frank Shoemaker testified that no one ever expressed the view, to his knowledge, that the on-time delivery metric Sanmina used in its weekly reports was the wrong metric. [Shoemaker 91:25-92:6].

179. Sanmina personnel recognized in internal emails how poorly the operations team in Guadalajara was performing. [Rader Decl. Ex. 68; 82; 84].

180. On February 22, 2017, Francisco Montero expressed concern to Plant 2 about "the lack of space in your warehouse to manage all of the incoming Dialight shipments from P4. In that same tone, NO space has been allocated in Plant 2 to create the Supermarket that Dialight is constantly requesting Sanmina, if that would be the case, we need you to immediate [sic] remove the supermarket from the demand and inform Dialight that we will not be following their instructions." [Rader Decl. Ex. 196].

181. In February 23, 2017, after continued infighting between Plant 2 and Plant 4 over pulling materials, Frank Shoemaker commented to Bob Green that it was "World War III between plants." [Rader Decl. Ex. 82].

182. Infighting between Plant 2 and Plant 4 was relentless. [Escamilla 74:15-25].

183. Jorge Rios, a Sanmina 30(b)(6) witness testified that his "first job is to protect Sanmina. [His] second job is to protect [his] plant." [Rios 137:15-16].

184. Brian Smillie of Plant 4 also recognized each plant had to look after itself, telling executives at Plant 2 that each plant had to take care of itself financially as he sought payment he believed Plant 2 contractually wrote Plant 4: "We understand that you are looking after the wellbeing of your operation and I respect that. I do have to look after the wellbeing of mine." [Ex. 37].

185. This animosity between Plants 2 and 4 has an effect on Sanmina's performance, and on November 28, 2017, Hossein Saadat informed Luis Ramirez that the plants were "not communicating and sharing critical information[.]" [Rader Decl. Ex. 30].

186. On February 28, 2017, Bob Green lamented that "My opinion is still that we either don't have the right people owning the action and/or not enough people." [Rader Decl. Ex. 197].

187. On May 20, 2017, Brian Smillie of Plant 4 wrote to Bob Green about Plant 2's inability to improve performance, stating that the "errors and confusing signals simply continue, no progress and no engagement from Plant 2 senior management, we will keep trying. Only F.Y.I., its truly painful, worst service level, support and responsiveness I have experienced and witnessed." [Rader Decl. Ex. 81].

188. On May 25, 2017, Hossein Saadat of Plant 4 emailed Bob Green and other personnel from the Sanmina's sales team that

> [I] had [the] opportunity to be part of the team and take a tour from our B2 [*sic*] in Guadalajara factory. As of now, ***if this is what customer*** [sic] ***is going to see, I will not be surprised if they ask us to stop production*** till [sic] re [sic] engineer process, flow, cycle time, capacity planning,…..etc. Obviously we had not made the right decision on what needs to be manufactured in which location based on capabilities, expertise, where would [sic] have full [sic] optimized solution for us and customer.

[Rader Decl. Ex. 39].

189. Following Saadat's email, Mark Strangie commented to Mike Giggey "When this guy says B2, he is meaning P2 or Plant 2. Do you realize how bad he is slamming the P2 folks? Brian has the same commentary towars [sic] those folks." [Rader Decl. Ex. 198].

190. Hossein Saadat confirmed in his deposition that he was referring to Plant 2 in his May 25th email. [Saadat 30:1-2].

191. On May 31, 2017, Frank Shoemaker internally reported on a meeting with Dialight that, the "Situation has reached a critical stage within Dialight Board of Directors because they are losing customer orders and has created a major impact on Dialight revenues this quarter." [Rader Decl. Ex. 51].

192. On September 2, 2017, Frank Shoemaker wrote to Mike Giggey "Bob [Green] and I are beside ourselves, something needs to change in Guad, no support, no commitment, no involvement, lack of engagement, it's unacceptable." [Rader Decl. Ex. 83].

193. On November 18, 2017, Director of Sales-Northeast Region Mark Strangie wrote "if Michael [Sutsko] goes, heads should fall within our organization and responsibility should get as high as Marco [Gonzalez] as this is squarely on the Mexico Ops team. [Rader Decl. Ex. 71].

194. On November 29, 2017, Frank Shoemaker wrote to Plant 2 with respect to Sanmina's failure to provide services for products intended for one of Dialight's major customers: "Dialight now has a very high risk of losing this account which will be a major problem for both Dialight and Sanmina." [Rader Decl. Ex. 199].

195. On December 1, 2017, Francisco Montero informed Bob Green that the situation was "getting worst" and "Dialight mess . . . Is not even near the mess in the rest of the plant." Francisco Montero later asked "Does P2 really care about the business?" [Rader Decl. Ex. 85].

196. After Dialight's then-CEO Michael Sutsko was removed by the Dialight board, Mark Strangie wrote "I don't think you will see anyone on our side hold operations in Guad accountable, which is a major part of the problem." [Rader Decl. Ex. 84]. Bob Green replied "The plants inability to execute basically cost Michael his job." [Rader Decl. Ex. 84].

197. On December 13, 2017, Frank Shoemaker reported "Now we have major quality issues." [Rader Decl. Exs. 200; 201].

198. Bob Green responded to this development with "WTH. Who is even overseeing this operation." [Rader Decl. Ex. 91].

199. On December 23, 2017, Bob Green wrote to Frank Shoemaker about Sanmina's failure to perform: "How does this even happen. We don't ship on time, when it is an urgent order and Dialight is not even informed." [Rader Decl. Ex. 79].

200. Sanmina's highest ranking executives took the view that Dialight was trapped at Sanmina having transferred its entire manufacturing there, so Sanmina's egregious performance was not something Dialight could address: "I told Bob yesterday that I was sure Dialight was going to fire us if we didn't help fill their loss in some way. Marco [Gonzalez, Sanmina's COO] told Bob [Eulau, Sanmina's CEO] it was too hard for [Dialight] to leave because of the paint booth they bought." [Rader Decl. Ex. 202].

201. Dialight had made a significant investment of $2,965,700 for a new paint line for Sanmina. [Rader Decl. Exs. 203; 204].

202. On January 8, 2018, Frank Shoemaker wrote to Bob Green about Plant 2's inability to meet its representations to Dialight: "The Plant committed to $21M, then $18M then $15M and actually built $12M, so who in operations is going to be held accountable from our side for not making any of the numbers." [Rader Decl. Ex. 205].

203. In his deposition, Frank Shoemaker testified about the January 8, 2018, email: "If I wrote that, then I believe it's true. It must have been based on prior communications and production plans for revenue commitments." [Shoemaker 72:5-8].

204. On March 20 to March 22, 2018, Sanmina Supply Chain Manager Tom Sugai visited Plant 2 and, with respect to Sanmina's production floor, observed: "Bins with no labels; No labels on the cards; Label on cart doesn't match the two different part#s [sic] stack on the cart; Two different part#s [sic] in the same bin; I took pictures and can provide as requested." [Rader Decl. Ex. 95].

205. On May 15, 2018, Frank Shoemaker wrote about Plant 2 in an internal email to Bob Green and Mark Strangie: "I got nothing, I have never seen anything like this, they are pulling business and they won't reply, engage, communicate, respond or do anything about it, no accountability." [Rader Decl. Ex. 86].

206. On May 16, 2018, Gerry Fay criticized Sanmina: "What is unacceptable is the lack of response and the continued surprises from the factory that causes us continued ill will with the customer." [Rader Decl. Ex. 206].

207. Frank Shoemaker later responded to Marco Gonzalez's complaint that he was getting to many emails: "The reason for so many emails is because no one responds with an improvement plan and we have the customer on our backs with no information to communicate." [Rader Decl. Ex. 89].

208. In June 2018, after meeting with then-Dialight CEO Marty Rapp, then-Sanmina CEO wrote to him "I am disappointed in our results and I know Sanmina can do better for you. We are making progress but not fast enough for either company." [Rader Decl. Ex. 98].

209. The Sanmina sales team prepared a business assessment of the Dialight account on June 5 2018. [Rader Decl. Exs. 72; 73].

210. The report notes "Keep in mind we are 2 years into this account and are still experiencing major problems . . . Too many PowerPoint presentations have been given to Dialight management in the past that have not fixed the problems or improved the overall performance to meet Dialight's expectations." It went on to say "Dialight On-time Delivery requirement is 95% to their mandate as [sic] the Guad Plant 2 average OTD rate is 48% for 2018 year to date. There has to be a fundamental issue with how the operations are being managed when we cannot achieve 70 or 80% in two years . . . On a weekly basis, Sanmina plant 2 misses their delivery commitments by greater than 50%. This is a major concern with Dialight management as they have used our delivery commits to commit to their sales management and customers . . . This is all due to the fact that in two plus years, Sanmina has been unable to meet

[Dialight] business objectives, manufacturing requirements and customer service levels." [Rader Decl. Ex. 73].

211. In September 2018, when it became clear to the Sanmina sales team that Dialight would be leaving Sanmina, Frank Shoemaker wrote "It's very sad that everyone worked so hard to bring in and ramp up what we had as a $110M account only to see our manufacturing execution drive it into the ground . . . I don't see how Javier [Carral] or anyone from the Plant can defend themselves against the facts." [Rader Decl. Ex. 36].

212. At this time, when Sanmina suspected Dialight would terminate the MSA, it refused to release control plans which contained the steps to manufacture Dialight products. [Rader Decl. Ex. 207].

213. Per Section 9 of the MSA, Dialight was entitled to the control plans. [Rader Decl. Ex. 21, § 9; 207].

214. Frank Shoemaker recognized in an internal email Sanmina had an obligation to turn over the instructions, writing "My only comment is that it really doesn't matter why they want it, how much they want it or when they want it, there is a contractual obligation on our part to provide the documentation they are requesting which I have reviewed with our legal team and they agree." [Rader Decl. Ex. 207].

215. Despite this obligation, Sanmina delayed providing Dialight with a response "for well over a month." [Rader Decl. Ex. 207].

216. Mike Giggey informed Gerry Fay, Sanmina's Chief Business Officer, that he was "stalling releasing any documentation to Dialight[.]" [Rader Decl. Ex. 208].

217. Sanmina was also overcharging Dialight for labor and pallets. [Rader Decl. Exs. 88 ("MSD does not want the new COO at Dialight digging into the fixed cost charges over the past year. After taking a closer look, it is pretty obvious that they have been overcharging for labor on a monthly basis. Some months invoicing close to $200k for DL, when in reality they hardly shipped any items"); 95 ("Plant 4 is charging Dialight for 800 new pallets every month,

the shipments from Plant 4 to Plant 2 don't come close to that number and Plant 2 is using new pallets for other warehouse requirements after the [sic] use the Plant 4 Mechanical's"].

218. Additionally, on May 23, 2017, Bob Green told his Sanmina colleagues "there is a major ongoing problem where we are invoicing the customer and we are not shipping product. Additionally, they are not being notified until they actually call Sanmina." [Rader Decl. Ex. 104].

219. This pattern was consistent from the directive of then-Sanmina CEO (and current CEO after a time away from the company) to "charge for everything you can, as much as you can." [Rader Decl. Ex. 92].

Sanmina Quality

220. Sanmina's quality was poor throughout the duration of the MSA. [Escamilla 100:14-16].

221. Sanmina made simple errors like sending lights to Australia with a missing top-hat, which was described as Dialight Australia as "sort of like selling a car with no wheels[.]" [Rader Decl. Ex. 209].

222. Due to the high number of Sanmina quality issues, Dialight had to hire a third party to inspect all goods received by Dialight distribution centers in Australia and the UK. [Sheehy 68:19-69:15; Rader Decl. Ex. 210].

223. In March 15, 2018, Luis Ramirez reported to Sanmina there was "a 10-15% failure rate on incoming inspection of product from Sanmina[.]" [Rader Decl. Ex. 211].

224. When he received the March 15, 2018, email, Marco Gonzalez responded "this is unacceptable." [Rader Decl. Ex. 211].

225. Quality issues were so prevalent in Australia Sanmina had to send two technicians to Australia to try and address the issues coming in. [Rader Decl. Exs. 212; 213].

The Epidemic Defect

226. Sanmina's poor quality led to an epidemic defect in Dialight safety lanyards produced by Sanmina. [Rader Decl. Ex. 214].

227. Dialight formally notified Sanmina of the epidemic defect on October 4, 2019. [Rader Decl. Ex. 214].

228. The safety lanyards are a critical safety feature of Dialight products; they serve as a "secondary, fail-safe, retention for heavy industrial light fittings . . . [l]ight fittings which, if they fall from height, could, very obviously, cause serious actual and/or economic harm to persons and/or property." [Rader Decl. Ex. 214].

229. Dialight explained in the epidemic defect notice: "[w]ithin this context, the failure rate of these critical safety items speaks volumes about the level of care, professionalism and manufacturing competency exercised by Sanmina in performing its obligations under the MSA." [Rader Decl. Ex. 214].

230. Dialight estimates that between Q4-2017, 2018, and Q1-2019, approximately 1,006 of the 3,083 lanyard units shipped by Sanmina were defective; a 32.6% failure rate. [Rader Decl. Ex. 214].

231. Dialight described the manufacturing of the lanyards as follows:

> "The lanyard sub-assembly incorporates two crimped loops. Adherence to the specified method of crimping is critical to product functionality and safety. If the crimp is not made, or is inconsistently made, then the crimp will fall at a breaking strain below that of the constituent stainless steel wire, rendering the product inoperative and hazardous."

[Rader Decl. Ex. 214].

232. Dialight discovered that Sanmina was using an incorrect tool to crimp safety lanyards used for Dialight products. [Rader Decl. Ex. 215; Escamilla 148:7-17].

233. A "significant number of lanyards . . . failed a simple hand-pull test performed by customer installers and by Dialight staff." [Rader Decl. Ex. 214].

234. A pull test done by having a person pull on the lanyard to see if it comes apart. [Escamilla 153:13-15].

235. In October 2019, Dialight performed a Tyler Crimp Tool Test to determine what tool Sanmina used to crimp the lanyards. [Rader Decl. Ex. 215].

236. Dialight's build engineering drawings made clear that a Nicopress tool should be used. [Rader Decl. Ex. 215].

237. Sanmina told Dialight it had used a Tyler Tool. [Rader Decl. Ex. 215].

238. Dialight was unable to reproduce the crimped Sanmina lanyards using a Tyler Tool. [Rader Decl. Ex. 215].

239. Sanmina did not use a Tyler Tool to crimp the lanyards, but instead used a generic pair of pliers. [Escamilla 149:2-10].

240. When Angel Escamilla traveled to Guadalajara and asked to see the tool Sanmina was using, they informed him they could not find it. [Escamilla 149:18:32; Camacho 151:8-13].

241. The issue first came to Dialight's attention in the fall of 2018 when a customer reported the lanyards they received were crimped improperly. [Rader Decl. Ex. 216].

242. On November 2, 2018, Angel Escamilla reported internally at Dialight that the customer "was able to pull the cable out from the crimp[.]" [Rader Decl. Ex. 216].

243. During the fall of 2018, Dialight believed the improperly manufactured lanyards were an isolated issue because of Sanmina's representation in its corrective action report. [Ramirez 266:21-267:2].

244. On May 15, 2019, Dialight informed Sanmina another customer received an improperly crimped lanyard:

> "Two end users reported safety lanyards coming apart from crimping sleeve using minimal hand force. First report was sent to Sanmina on November 2nd 2018. We have a new report from a different customer. Upon further review and inspection of the failed units, improperly crimped in [sic] lanyards were discovered. Inspection of about 30 pieces in one end user stock revealed that the person was able to pull the cable out of the crimp on at least 8 of the first 20 pieces he inspected. From customer provided pictures, we can see the markings are not consistent with correct crimping tool as the assembly drawing calls for."

[Rader Decl. Exs. 217; 218].

245. Since being informed of the lanyard issue, Sanmina has consistently denied any responsibility. [Rader Decl. Ex. 219].

246. In May 2019, Jorge Camacho, Senior Program Manager for the Dialight account, stated "We need to look at how we can lead him to some lack of documentation from Dialight is possible." [Rader Decl. Ex. 220 (translated using DeepL)].

247. An internal Sanmina email confirmed that Sanmina did not have any written approval to deviate from the Dialight build instructions. [Rader Decl. Ex. 221].

248. In a letter responding to Dialight's epidemic defect notice, Sanmina insisted Sanmina used a Tyler Tool to crimp the lanyards, despite the results of the Dialight tests. [Rader Decl. Ex. 219].

249. Sanmina's response letter also stated that Dialight misconstrued; "the MSA and the limited services Dialight engaged Sanmina to provide: contract manufacturing and assembly services (not design services) performed according to Specifications Dialight provided." [Rader Decl. Ex. 219].

250. In an internal email, dated May 6, 2019, Horacio Velasco wrote: "Attached is evidence of the tooling we used for crimping the harness." [Rader Decl. Ex. 222(translated using DeepL)].

251. Horacio Velasco included a picture of a set of pliers in his May 6, 2019 email. [Rader Decl. Ex. 222].

252. The set of pliers in Horacio Velasco's email is not the Tyler Tool Sanmina claimed it used. [*Compare* [Rader Decl. Ex. 222 *with* Rader Decl. Ex. 214].

253. Jorge Camacho was designated as Sanmina's 30(b)(6) witness on Topic 21 of the 30(b)(6) deposition notice, which stated: "Sanmina's manufacture or assembly of safety lanyards as referenced in the epidemic defect notice provided by Dialight in October 2019." [Camacho 145:23-146:6].

254. Jorge Camacho testified the lanyards were "getting loose" and he did not know how the lanyards were used. [Camacho 147:7-16].

255. Dialight ultimately recalled the safety lanyards to prevent potential bodily injury. [Rader Decl. Ex. 223].

Sanmina's Lack of Improvement

256. Dialight tried to help Sanmina improve, but ideas presented by Dialight personnel were not accepted by Sanmina. [Rapp 125:10-16; Rader Decl. Exs. 100; 101].

257. One way Dialight thought Sanmina could improve was by running MRP more than once a week. [Rader Decl. Exs. 17; 40; 51].

258. Despite this, Sanmina never ran MRP more than once a week for Dialight because Sanmina has "always had a standard practice of once a week." [Shoemaker 143:17-22].

259. Dialight believed MRP required human involvement; "you get a dispatch list out of MRP that tells you recommendations. There is a human being that then has to make a decision if that recommendation is going to be accepted or not accepted . . . there has got to be a human intervention that understand[s] the information and make[s] decisions so that, you know, you're not creating expedites or being short in terms of materials." [Ramirez 88:15-90:14].

260. Tom Sugai, Sanmina Supply Chain Manager, testified planners should only plan based off demands generated by MRP. [Sugai 178:19-180:3].

261. In order to help Sanmina, multiple Dialight employees spent a significant amount of time at Sanmina's Guadalajara campus. [Ramirez 108:9-18 (60-70% of his time spent in Guadalajara), Kender 33:8-16 (50% of his time spent in Guadalajara), Lu 178:13-20 (traveled to Guadalajara every few weeks), Smith 90:7-21 (traveled to Guadalajara seven times for approximately one week at a time).

262. On January 4, 2018, Dialight hired a full time employee, Perla Garcia, to be stationed at the Sanmina Guadalajara plant. [Rader Decl. Ex. 3].

263. Gerry Fay, Sanmina's Chief Business Officer, testified that he thought Marco Gonzalez "was too biased at looking at what potentially the customer has done wrong versus

maybe what [Sanmina] could improve on" and that he could not be relied upon to give an accurate read on the Dialight situation. [Fay 42:8-22].

264. The June 2018 internal Sanmina business assessment of the Dialight account states: "in the past two plus years, Sanmina has been unable to meet their business objectives, manufacturing requirements and customer service levels." [Rader Decl. Ex. 73].

265. While Dialight was working to help Sanmina improve, Sanmina personnel were making derogatory comments about then-Dialight CFO Fariyal Khanbabi. [Rader Decl. Exs. 224; 225].

Termination of the MSA

266. Sanmina knew on September 24 that Dialight was going to terminate the MSA because of Sanmina's abysmal performance, as Frank Shoemaker described "I would be surprised if they do not pull out of Sanmina 100% It's very sad that everyone worked so hard to bring in and ramp up what we had as a $110M account only to see our manufacturing execution drive it into the ground. And I thought the email from Fariyal to me was bad….I don't see how Javier or anyone from the Plant can defeat themselves against the facts." [Rader Decl. Ex. 36].

267. Dialight terminated the MSA on September 27, 2018, stating:

> Dialight entered into the MSA based on Sanmina's representations of its expertise and capacity to produce goods in sufficient quality to fulfill Dialight's needs, which were well understood. Based upon those representations, Dialight shuttered its own facilities that were able to manufacture the products. Since the inception of the MSA, however, Sanmina has failed to meet certain key contractual commitments. Dialight has continued to rely, in good faith but to its detriment, on Sanmina's representations as to its expertise and its ability to remedy these performance deficiencies. We have dismissed this in many meetings between our two companies over the last two years and, as we have discussed, Dialight has suffered lost customers, lost sales, lost goodwill, lost profits, and many other losses as a result.

[Rader Decl. Ex. 1].

268. After termination, Sanmina attempted to hold Dialight's equipment hostage to force payments Dialight disputed. [Rader Decl. Ex. 226].

269. Bob Green wrote that he was not sure "Sanmina could legally prohibit [Dialight] from removing the equipment." [Rader Decl. Ex. 227].

270. Frank Shoemaker instructed that "Any communication about holding [Dialight's] equipment should be done verbally." [Rader Decl. Ex. 227].

271. After the termination of the MSA, Dialight invoiced Sanmina for fixed assets it paid for at Sanmina and other items including the cost of inspecting metals, metals uneconomic to re-work, third party inspection of finished goods in Australia and the UK, raw materials shipped to Sanmina, finished goods warranty returns from Europe never replaced, warranty claim on finished good failures, and finished goods invoiced but never received in Australia. [*See* Rader Decl. Exs. 105; 106; 107; 108; 109].

272. Sanmina has not paid the invoices. [Sheehy 359:18-23].

273. Sanmina also holds $5.3 million of Dialight's money in escrow. [Sheehy 359:18-23].

Dated: New York, New York
June 16, 2022

Respectfully submitted,

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/s/ *Scott Rader*

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CERTIFICATE OF SERVICE

I, Scott A. Rader, hereby certify that on June 16, 2022, I caused to be served a true and correct copy of the foregoing **DIALIGHT'S MEMORANDUM OF LAW IN OPPOSITION TO SANMINA'S PARTIAL MOTION FOR SUMMARY JUDGMENT** with the Clerk of the Court using the CM/ECF filing system, which will send notification of such filing to all attorneys on record.

Dated: June 16, 2022
New York, New York

/s/ Scott Rader
Scott A. Rader