UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

SANMINA CORPORATION'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. SUMMARY OF REPLY

Dialight's pleaded fraudulent inducement claim is that Sanmina misled Dialight into signing the MSA by misrepresenting its experience with "high mix/low volume" production and by concealing that Plants 2 and 4 operated under separate financial books of account. Dialight's opposition identifies seven alleged misrepresentations, only 1½ of which (no. 7 and, perhaps, half of no. 2) are alleged in its complaint. The five+ new alleged misrepresentations, if made, and if false, would have been known to have been falsely made before Dialight sued. And, of course, Dialight certainly did not need discovery to find out what it relied on. These newly-raised misrepresentations are not genuine; they are just "stuff" thrown at the wall hoping something will stick. They should not be considered by the Court but, even if considered on their merits, they do not raise a triable issue of fact.

As to the gross negligence/willful misconduct claim, Dialight's litany of internal Sanmina emails, that can fairly be described as demonstrating mounting frustration about performance issues, are not relevant to the fraudulent inducement claim. They also undermine the willful misconduct claim because they show that Sanmina tried very hard to perform, a conclusion with which John Kender, the Dialight employee with the most direct knowledge of Sanmina's efforts, agreed. Asked whether he was "aware of anything that Sanmina did that you would view as intentionally refusing to comply with their obligations under the MSA," Kender replied: "No."

Finally, with respect to Sanmina's First Cause of Action, Dialight's alleged offset rights do not raise a triable issue of fact on the amount of Sanmina's A/R claim. That issue is fully addressed in the moving papers and, due to space constraints, not further addressed in this Reply.

II. ARGUMENT

A. The Pleaded Fraudulent Inducement Claim Fails as a Matter of Fact and Law.

1. Dialight's Own Admissions Refute the Pleaded Claim.

Dialight's fraudulent inducement claim is based on the allegation that Sanmina lied about its ability to handle Dialight's high mix/low volume production needs from a "single profit center." Dialight's own testimony dooms both aspects of this allegation (which is why

Dialight's opposition tries to move the goalpost).

Dialight's former CEO, Michael Sutsko, who negotiated the MSA for Dialight and was fired when it didn't work out, was asked whether Sanmina's representation "that it had experience with high mix low volume production" was false. He testified "no, I believe that they did have experience with it." [Sutsko 108:7-15.] In fact, he said it twice. [Sutsko 149:22-151:2.] And, Sanmina did have this experience, as every witness with personal knowledge testified. [Fact no. 52.]

Robert Freid, the author of the "single profit center" language in the MSA (Sutsko 181:10-182:9; 197:8-21; Ex. 137), admitted that he never discussed with Sanmina whether the two plants were on the same P&L, and that issue was not important to him. [Freid 100:1-101:1.] And the term "single profit center" is, at best, ambiguous. Dialight's current CEO concedes that it is not synonymous with a single P&L (*e.g.*, Khanbabi 253:16-24[1]), and her predecessor testified that the issue didn't matter to him.[2] Sutsko's after-the-fact attorney-prompted statement that the "separate P&L" issue was "relevant" to him doesn't change the fact that Sutsko's understanding of the recital came from Freid (Sutsko 181:10-182:9; 197:8-21), and Freid admits that he never discussed with Sanmina whether the plants operated under separate P&Ls.

2. THE REPRESENTATION THAT SANMINA COULD HANDLE HIGH MIX/LOW VOLUME MANUFACTURING IS NOT ACTIONABLE AS A MATTER OF LAW.

The only "evidence" that Sanmina lacked experience handling high mix/low volume manufacturing is post-hoc conjecture from Dialight witnesses based on performance results. [Fact nos. 152-53.] The "fact" of whether Sanmina had this experience is not disputed based on any admissible evidence – and is admitted by Dialight's CEO.

Dialight attempts to turn this representation into a guaranty that Sanmina would be able to handle *Dialight's* high mix/low volume production no matter what. At worst, however, *that*

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[1] As Ms. Khanbabi put it: "you know, we were dealing with Sanmina. It was a single company, a single profit center . . . ."

[2] Rapp 77:15-78:11 ("I think there were different profit centers, which, you know, that shouldn't matter, but I didn't – I really didn't think that much of it at the time.").

would be "an insincere promise of future performance." As a matter of law, as so construed, the representation is not actionable because, "if the promise ***concerned*** the ***performance*** of the contract itself, the ***fraud*** claim is subject to dismissal as duplicative of the claim for breach of contract."[3] *HSH Nordbank AG v. UBS AG*, 95 A.D.3d 185, 206, 941 N.Y.S.2d 59, 74 (2012) (*emphases in original*; *citations omitted*); *see also Sotheby's, Inc. v. Stone*, 388 F. Supp. 3d 265, 275 (S.D.N.Y. 2019) (fraudulent inducement claim must allege the "breach of a duty separate from, or in addition to, a breach of the contract") (*citing First Bank of the Ams. v. Motor Car Funding, Inc.,* 257 A.D.2d 287, 690 N.Y.S.2d 17, 21 (1st Dep't 1999)); *Fairway Prime Estate Mgt., LLC v. First Am. Intl. Bank,* 99 A.D.3d 554, 952 N.Y.S.2d 524, 527 (1st Dep't 2012).[4]

B. Dialight's Seven Claimed Misrepresentations Fail to Raise a Triable Issue of Fact.

Dialight argues that its complaint should not foreclose it from relying on evidence uncovered in discovery. Without any need for discovery, however, parties to a contract know why they signed it; and through the course of performance of the contract, they find out what promises were made to them that turned out to be false. Dialight claims it signed the MSA because Sanmina said it would be able to handle the allegedly unique challenges of Dialight's business from a single profit center and it could not. Those misrepresentations overlap supposed misrepresentations 2 and 7, below. The new claimed representations are not genuine both because the undisputed evidence does not support them and because Dialight would have known of these representations and their falsity before suing and did not allege them.

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[3] Dialight contends this case is different because it seeks different damages for its fraud and contract claims. However, it cites only its expert's report that identifies numerous *categories* of damage, but does not distinguish between damages attributed to the fraud claim and those attributed to the contract claim. [Fact no. 62.]

[4] The authorities Dialight cites involve entirely different fact patterns than exists here: in one, the defendant's fraud in no way related to an intent to perform, but involved the use of fraudulent financial statements to facilitate the sale of a business (*Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 500 F.3d 171 (2nd Cir. 2007)); in the other, the defendant failed to disclose that it didn't actually have authority to fund the loan it agreed to make (*Wild Bunch, SA v. Vendian Entm't, LLC*, 256 F. Supp. 3d 497, 507 (S.D.N.Y. 2017)).

1. DIALIGHT CANNOT ALLEGE NEW MISREPRESENTATIONS THAT IT MUST HAVE KNOWN WHEN IT SUED.

Without any apt citation,[5] Dialight argues: "A party cannot make numerous false representations, wait until discovery for the full picture of its misconduct to emerge, and then claim immunity for those additional false statements not pled in the Complaint *that the other party had no way of learning about earlier.*" Opp. at 20 (emphasis added). But Dialight's own allegations and evidentiary support demonstrate that it *did* know, *before it sued*, about the facts it now cites as evidence of fraud. And, if Sanmina's document production truly revealed some new fraud, Dialight could have sought leave to amend. It did not because Dialight could not have shown good cause. *Parker v. Columbia Pictures Ind.*, 204 F.3d 326, 339-41 (2nd Cir. 2000) (good cause for amendment not shown when plaintiff was aware of facts he sought to add by amendment before filing his initial complaint). Dialight is left with its complaint.

2. DIALIGHT FAILS TO SUPPORT ANY OF ITS SEVEN MISREPRESENTATIONS.

Even if the Court considers all seven alleged misrepresentations in the opposition (not just the 1½ alleged in the complaint), Sanmina would still be entitled to judgment – particularly under the undisputed clear and convincing burden of proof, which requires evidence that leaves the ultimate factfinder with "an abiding conviction that the truth of [the party's] factual contentions are 'highly probable.'" "This would be true, of course, only if the material it offered instantly tilted the evidentiary scales in the affirmative when weighed against the evidence [] offered in opposition." *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (citations omitted).

Dialight's now-seven claimed misrepresentations fall far short of this standard:

1. Sanmina Conceals its Lack of Capacity to Provide Required Services. (Opp. p. 2).

As Dialight's opposition makes clear (Opp., p. 17), this concerns *machining and paint*

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[5] Dialight cites *Cruz v. Coach Stores, Inc.,* 202 F.3d 569-70 (2nd Cir. 2000). *Cruz* does not address information uncovered in discovery. It affirmed the trial court's consideration of a claim on the merits because, although plaintiff's complaint did not use the term "hostile work environment," it "did describe the harassment [she] experienced in enough detail to put the claim before the court." *Id.* at 569. In addition to the fact that *Cruz* is not a fraud case, it did not involve adding new fact allegations.

line capacity – i.e., did Sanmina have the equipment to make Dialight's products? It did not. And Dialight *knew* Sanmina did not because, pursuant to Sections 13.1(a) and 19.7(a) of the MSA, Dialight agreed to install "CNC" machines and a paint line at Sanmina. [Ex. 24.] Nor was this issue sprung on Dialight at the last minute. Freid's initial report, dated September 28, 2015 (5+ months before the MSA was signed) observes that Sanmina had "limited available paint capacity" (Ex. 128, p. 12) and references Dialight supplying "consigned CNC machines" (*id.* at p. 19). Freid prepared another report in November 2015, stating that Dialight would order a new paint system to be installed at Sanmina and move 10 (it later became 14) CNC machines from Dialight in Ensenada to Sanmina. [Ex. 251.] Dialight then, in fact, paid the cost to install this equipment without objection (actually thanking Sanmina for its reasonableness) (Rader Ex. 44), and its expert confirmed that Sanmina honored its obligations at reasonable cost (Ex. 266 ("This is a reasonable NRE charge given the high complexity of this program. Brian [Smillie - Sanmina P4] is "going the length to meet his commitment of adequate paint/CNC space.")).

If, despite Freid's observations and the clear evidence to the contrary, Dialight thought it could allege that Sanmina represented that it already had the machining and paint line capacity Dialight agreed to install and pay for, Dialight could have pled that theory in its complaint. It did not because it is not a *bona fide* issue.

2. <u>Sanmina Makes False Representations to Dialight in its RFQ Responses.</u> (Opp. p. 3). This is partly alleged in the complaint. Specifically, the "No problem we can support this," RFQ response, addresses the general subject matter of Sanmina's high mix/low volume experience. This statement, however, is too vague and insufficiently factual to be an actionable misrepresentation of existing fact. It is, at most, an insincere promise of future performance (with no evidence of insincerity offered) that, as discussed above, is not actionable. The MSA also directly addresses unforecasted orders, stating that "upside Orders outside of Forecast" were to be handled by Sanmina on a "reasonable efforts" basis (not on a "no problem" basis). [Ex. 24, § 3.4.] As to the other alleged misrepresentation in the RFQ response, Sanmina did not state that no integration was required between IT systems; the statement was: "No requirement *for the*

initial engagement however Sanmina has the capability to integrate ERP systems . . . ." [Sep. Stmt., p. 46 (emphasis added).] A Dialight TMS shipment management system allegedly did not integrate well with Sanmina's systems. Dialight offers no evidence that Sanmina knew this would be an issue before signing the MSA. This issue also clearly was known contemporaneously to Dialight (*e.g.*, Ex. 498) but not alleged.

3. Sanmina Misrepresents its Supply Chain Capabilities. (Opp. p. 3). Dialight contends that a presentation about Sanmina's supply chain capabilities was fraudulent because "Sanmina's Guadalajara plant was in fact not using these tools." Opp. p. 3. However, the only specific evidence offered is Dialight COO Luis Ramirez's equivocal testimony regarding a tool called "Kinaxis RapidResponse" ("I don't believe that those tools were used"). [Fact no. 113.] But Kinaxis *was* used, and Dialight's reliance on Ramirez's vague testimony on this point is particularly misleading given that numerous contemporaneous documents (*many produced by Dialight* and easily identifiable by a Dialight word search of its own document production) demonstrate that Kinaxis was used (and not at an additional cost, which Luis Ramirez also testified Sanmina demanded). [Camacho Supp. Decl., ¶¶ 3-7, Exs. 1-5.] And, of course, if Ramirez actually was told by Sanmina that it would not use Kinaxis, with or without an additional charge, Dialight could have alleged this in its complaint, which it did not.[6]

4. Sanmina Misrepresents its Support of the Dialight Opportunity. (Opp. p. 4). Not only is it not fraud to present a united front to a customer, even while the "back office" may fret over contract terms, but as the Motion demonstrates (and Dialight ignores), in this case the concerns someone in the back office had regarding extending credit to Dialight were ameliorated by a discussion (five months before the MSA was signed) with Dialight's COO Fariyal Khanbabi (Soule 36:5-48:8; 118:3-120:13; Ex. 385), and the actual credit terms were fully negotiated (Soule 61:13-65:4; Ex. 391) and memorialized in the fully-integrated MSA (Ex. 24, § 11.6).

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[6] Dialight also points to an internal email that the plant hardly uses any of its tools. But as the Rule 56.1 response shows [Fact no. 109], the email is hearsay and not a party admission; and the statement is not specific. The only "tool" Dialight specifically identifies that Sanmina supposedly did not use is Kinaxis, which Sanmina undeniably used.

Dialight also admits that Sanmina did not breach the MSA credit provisions. [Sutsko 364:21-365:5; Harris 45:8-19.] If Sanmina had breached them, Dialight could have alleged that, and the effect on Dialight, without the need for any discovery. It did not.

5. Sanmina Provides Misleading Financial Information. (Opp. p. 4). There is no evidence that any of the information Sanmina provided was false. Dialight relies on an email suggesting that Sanmina put together a "[b.s.] matrix with a few general ideas . . ." to address Freid's request to compare Guadalajara labor rates with those of Ensenada. This is in response to a statement that Freid was "looking for a general range of labor costs." Sanmina's Jorge Rios, who provided the information for the matrix, testified that his understanding was that he was to provide "some sort of explanation of the information [Freid] was looking for." [Rios 186:8-188:8.] Dialight's counsel could have asked Rios how he compiled the information or whether any of the data were false. They did not. They did not even show him or anyone else the matrix (which is a simple labor market (not Sanmina-specific) wage range compilation that *Dialight* produced in discovery), which is completely accurate. [Rios Decl., ex. 3, ¶¶ 2-4, Ex. A.] Dialight also does not offer any evidence of reliance on this matrix.

6. Sanmina Falsely Represents its Available Space. (Opp. p. 5). Sanmina's Plant 4 space constraints were fully discussed with Dialight (Freid 198:23-201:17; Ex. 265) and the MSA disclaims any representation that Sanmina offered Dialight any specific space (Fact no. 28). Indeed, Freid acknowledged that the parties had not identified the space to be used for Dialight's work prior to execution of the MSA. [Freid 203:10-204:5 ("Plant 4 space planning issues were not resolved prior to the execution of the MSA.")] Furthermore, even during the MSA negotiation process, Dialight was unsure how it would address the painting of Sanmina-produced products, and was considering the possibility of using a third-party vendor. [Exs. 250, 251, 266; Rader Ex. 44; Freid 108:17-109:7; 134:22-136:6.] And, again, any falsity about any supposed space planning issues would have been known to Dialight when it saw where the work was being done. Yet there's not a single word about this issue in Dialight's complaint.

7. Sanmina Makes False Representations in its Recitals to the MSA. (Opp. pp. 5-6).

This is a restatement of the complaint's allegation that Sanmina misrepresented that it could handle Dialight's high mix/low volume production from a single profit center, and it is addressed in Section II.A., above. Simply put, there is no evidence – much less clear and convincing evidence – that any of the MSA recitals were false. Part of Recital D (the only recital cited by Dialight) is a statement of intended performance under the contract; the other part is Dialight's intentional mischaracterization of its own "single profit center" wording, despite clear testimony that the issue of whether the plants operated under separate P&Ls was never even discussed (let alone a material concern for Dialight).[7]

This is not a fraudulent inducement case; it is a breach of contract case pleaded as fraud to try to evade bargained-for limitations of liability. The complaint, however, fails to plead fraudulent inducement adequately and the evidence on which Dialight relies, including that which could have been alleged in the complaint, but was not, does not raise a triable issue of fact to support a clear and convincing claim of fraudulent inducement.

C. Dialight Cannot Avoid the Contractual Limitations of Liability by Claiming Gross Negligence and Willful Misconduct.

1. Sanmina is Entitled to Judgment on Dialight's Third Claim for Gross Negligence/Willful Misconduct.

Dialight's fact arguments in support of its Third Cause of Action are primarily addressed in Sanmina's responsive Rule 56.1 statement. But John Kender, whose job at Dialight was "[o]verseeing everything that has to do with the [Sanmina] account" (9-17-21 Kender at 32:18-33:3), pointedly refuted Dialight's willful misconduct claim:

> "Q. Are you aware of anything that Sanmina did that you would view as intentionally refusing to comply with their obligations under the MSA?
> "A. No."

[9-17-21 Kender 269:17-21.] Reinforcing this testimony, *after* he so testified, Dialight

7 That Sanmina's P2 and P4 maintained separate P&Ls also was known to Dialight from the start – it is apparent from the MSA's pricing schedules, which treat P4 separately from P2. [Ex. 24 (MSA, ex. C (pp. 34-36)).]

designated Mr. Kender as an expert witness, confirming in that designation that he "oversaw the Sanmina account," "worked closely with Sanmina," and "spent a significant amount of time at Sanmina's campus in Guadalajara." [Ex. 564, p.3; 12-15-21 Kender Depo. 8:3-9:5.] Dialight designated Kender as an expert on Sanmina's performance under the MSA. [*Id.*]

2. APPLICATION OF NEW YORK LAW MEANS THE NEW YORK COMMERCIAL CODE APPLIES TO THIS DISPUTE.

Even were there a triable issue of fact on Dialight's Third Cause of Action, Dialight does not dispute that the limitations of liability would still stand if the UCC applies.

Dialight argues without authority that, although New York law applies, New York's adoption of the UCC does not. Dialight reasons that, because the choice of law provision bars application of the Uniform Laws of the United Nations Convention of Contracts for the International Sale of Goods (the "Convention"), that language reflects an intent also to disclaim application of the UCC. Dialight has it exactly backwards.

Where it applies, the Convention *supersedes* state law, including the state's adopted version of the UCC. *VLM Food Trading Int'l v. Ill. Trading Co.,* 748 F.3d 780, 787 (7th Cir. 2014); *Usinor Industeel v. Leeco Steel Prods*., 209 F. Supp. 2d 880, 884 (N.D. Ill. 2002). Thus, merely selecting state law without disclaiming application of the Convention potentially leaves the Convention in place because the Convention may be deemed part of state law. *Travelers Prop. Cas. Co. of Am. v. Saint-Gobain Tech. Fabrics Can., Ltd.*, 474 F. Supp. 2d 1075, 1081-82 (D. Minn. 2007) ("A majority of courts interpreting similar choice of law provisions, however, conclude that a reference to a particular state's law does not constitute an opt out of the CISG; instead, the parties must expressly state that the CISG does not apply."); *see also BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333, 337 (5th Cir. 2003) (holding that an Ecuador choice of law provision did not preclude application of the Convention because Ecuador had adopted the Convention).

Thus, the parties' rejection in the MSA of the Convention is not a rejection of the UCC, but the opposite – confirmation that the Convention does not displace the UCC.

Repudiation of the Convention also confirms the parties' understanding that the MSA is a contract for the sale of goods because the Convention only addresses contracts for the sale of goods and not contracts for services. *See* Convention at Art.1(1); 3(2).

Nor do the authorities upon which Dialight relies support its contention that the MSA is a contract to provide services. Citing *Marbelite Co. v. National Sign & Signal Co.,* 2 Fed. Appx. 118, 120 (2nd Cir. 2001), Dialight acknowledges the Court must look to the "essence" of the agreement. But in *Marbelite* (not the most compelling case given the standard of review), the court found the plaintiff served as an "interface" between the defendant manufacturer and the ultimate buyers of defendant's signs. *Arrow Elecs., Inc. v. Delco Lighting, Inc.,* 2019 U.S. Dist. LEXIS 179988 (D. Col. 2019) also involved a middleman that didn't manufacture anything.

Sanmina manufactured goods and invoiced Dialight for the goods it manufactured. [Ex. 24 (MSA), exs. B, C.] *Dialight's complaint* also admits that Sanmina manufactured goods:

- Sanmina was Dialight's "manufacturing partner." Complaint, ¶¶ 1, 13, 15.
- Sanmina misrepresented its "expertise in complex low-volume high-mix manufacturing." *Id.* ¶¶ 1, 18.
- Sanmina allegedly breached by failing to deliver products timely. *Id.* ¶¶ 25-27, 31.

Dialight's termination letter reinforces the point: "Dialight entered into the MSA based on Sanmina's representations of its expertise and capacity to produce goods in sufficient quantity and quality to fulfill Dialight's needs . . . ." [Ex. 59.]

The MSA thus memorializes transactions in goods, and the MSA's contractual liability cap is enforceable because gross negligence and willful misconduct do not void limitations of liability under the UCC. N.Y. U.C.C. Law § 2-719.

III. CONCLUSION

As addressed in the separately-filed evidentiary objections and Rule 56.1 response, Dialight's arguments are not only unalleged after-thoughts, but its efforts to create triable issues of fact are built on hearsay, inadmissible non-expert opinion testimony, and out-of-context citations. Sanmina's motion should be granted in all respects.

Dated: July 18, 2022

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PROOF OF SERVICE

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

On July 18, 2022, I served true copies of the following document(s) described as **SANMINA CORPORATION'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT** on the interested parties in this action as follows:

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

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

Executed on July 18, 2022, at Beverly Hills, California.

/s/ Ayesha Rector
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