Make UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

DIALIGHT PLC'S MEMORANDUM OF LAW IN OPPOSITION TO SANMINA CORPORATION'S MOTION IN LIMINE NO. 4 TO EXCLUDE "CLAIMED COSTS" DAMAGES NOT TIMELY DISCLOSED

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INTRODUCTION

In its fourth motion in limine ("Motion in Limine #4"), Sanmina Corporation ("Sanmina") seeks to preclude Dialight plc ("Dialight") from recovering its out-of-pocket losses at trial on the purported basis that these damages were not timely disclosed in discovery. *See* Dkt. No. 165 (Motion in Limine #4) at 1.[1] The Court should deny this motion because (i) Dialight timely disclosed its out-of-pocket expenditures as damages; and (ii) there would be no basis to impose the drastic remedy of preclusion even if Sanmina's factual narrative were correct (and it is not).

LEGAL STANDARD

The "preclusion of evidence pursuant to Rule 37(c)(1) is a drastic remedy and should be exercised with discretion and caution." *Scism v. Ferris*, 2022 U.S. Dist. LEXIS 131109, at *28 (N.D.N.Y. July 25, 2022) (quoting *King v. Wang*, 2021 U.S. Dist. LEXIS 219059, at *3 (S.D.N.Y. Nov. 12, 2021)). This remedy "will apply only in situations where the failure to disclose represents . . . flagrant bad faith and callous disregard" of the discovery rules. *Lesser v. Camp Wildwood*, 2003 U.S. Dist. LEXIS 16921, at *6 (S.D.N.Y. Sept. 29, 2003). "In considering whether to exclude evidence under [Rule 37(c)(1)], courts refer to a nonexclusive list of four factors: (1) the party's explanation for its failure to disclose, (2) the importance of the evidence, (3) the prejudice suffered by the opposing party, and (4) the possibility of a continuance." *Scism*, 2022 LEXIS 131109, at *28 (citation omitted). A party seeking preclusion must demonstrate the specific testimony and evidence that the party would require if the challenged evidence were admitted. *King*, 2021 U.S. Dist. LEXIS 219059, at *8.

[1] All docket numbers refer to the docket of Case No. 1:19-cv-11710-KPF unless otherwise indicated.

ARGUMENT

I. Dialight Timely Disclosed Its Claimed Costs

Contrary to Sanmina's claim that it was "sandbagged" by Dialight's claim for out-of-pocket losses, Dialight set forth at the very beginning of the case, in its Complaint and its Initial Disclosures, the out-of-pocket losses that it is seeking to recover as damages in this action. *See* Dkt. No. 2 (Dialight Complaint) at ¶ 64-65;[2] Dkt. No. 166-1 (Dialight Initial Disclosures) at 5-6. Dialight then designated a corporate representative to testify on behalf of the company about the damages it is seeking in this action and through this corporate representative identified these amounts. Specifically, Dialight's corporate representative on damages, Ronan Sheehy, testified in this action on May 27, 2021. He testified that Dialight was seeking approximately thirty million dollars in damages for its out-of-pocket costs incurred in the process of out-sourcing production to Sanmina, and he testified as to what these costs consisted of:

> Q. Okay. So what does the $30 million figure consist of?
>
> A. It consists of the entire process that Dialight had to go through in order to outsource production. So within there, there will be the closure of the factory in the UK with associated severances, the scaling down of the Ensenada facility and redundancies, the closing of the machining and painting plant in Ensenada and redundancies. There are all the travel, all the time spent in relation to preparation for the outsourcing. And all the other costs, the – it all forms part of what's in our public filings in relation to the outsourcing process. It's all – it's all available there.
>
> Q. Do you have – so in this public filing, are you saying these individual items are broken down or you just have the big $30 million figure?
>
> A. Well, there are – there are buckets of expenses which relate specifically to outsourcing of – of production to Sanmina.

Dkt. No. 166-4 (Sheehy Tr.) at 330:23-332:1.

[2] Because Dialight's complaint was not filed in 19-Civ-11710 (KPF), the referenced docket number for this citation is from the docket of 19-Civ-11712 (KPF).

Mr. Sheehy also testified that Dialight suffered $13 million as damages in out-of-pocket expenses to transfer its manufacturing back in-house, explaining that these expenses were contained in Dialight's public filings. *See id.* at 332:7-17.

Sanmina never took issue with the sufficiency of this testimony in the two years and ten months since it was given, before challenging it for the first time in this motion in limine. Sanmina never sought additional discovery on this topic from Dialight while discovery was open, never challenged the preparation or sufficiency of the testimony of Dialight's corporate representative, and never expressed in any manner that it did not believe that Dialight's corporate representative sufficiently testified as to Dialight's damages. And for good reason. Dialight's corporate representative gave a damages amount of $43 million in connection with Dialight's out-of-pocket expenditures and identified what constituted these expenses in response to Sanmina's question. Sanmina then did not ask any other follow-up questions. Sanmina cannot reasonably argue nearly three years after this corporate representative deposition testimony was given that Dialight never disclosed its damages claim during discovery and that Sanmina had no opportunity to take discovery on it. Indeed, Sanmina's newfound contention that it never knew what damages Dialight was seeking and could not obtain discovery on them is contradicted by the very discovery that Sanmina took.

Further, Sanmina's argument in its motion that Mr. Sheehy referenced "public filings" that were "unidentified" at his deposition (Dkt. No. 165 (Motion in Limine #4) at 3) ignores Sanmina's decision not to ask for these public filings to be identified at the deposition. Sanmina cannot reasonably claim for the first time 34-months after a deposition took place that a witness's purportedly vague answer disqualifies Dialight's damages claim when Sanmina failed to ask a follow-up question at the deposition about the answer it now claims was vague.

Moreover, Dialight provided further explanation of its out-of-pocket losses in its responses to Sanmina's contention interrogatories, which it served on October 21, 2021. *See* Dkt. No. 166-5 (Dialight Contention Interrogatory Responses). In those responses, Dialight provided tables listing each claimed cost and the dollar amount associated with it. *Id.* at 4-7. This disclosure occurred over two and one-half years before this case is scheduled to go to trial and provided further notice to Sanmina that Dialight would be pursuing these damages. If Sanmina believed that the information Dialight provided in its contention interrogatories prejudiced Sanmina, it could have raised the issue at that time. But doing so would have been meritless, because Dialight's damages were timely disclosed.

One example in particular illustrates the bad faith nature of Sanmina's current motion. In the chart contained on pages 4-5 of Motion in Limine #4, Sanmina claims Dialight did not disclose the $5.6 million in the "Escrow Fund Established to Cover the E&O" before serving its contention interrogatory responses. But Dialight expressly stated in its Complaint that "Sanmina continues to hold approximately $5.3 million of Dialight's funds in an escrow fund established to cover inventory liability, which it has retained without any lawful basis under the MSA." *See* Dkt. No. 2 (Dialight Complaint) at ¶ 65.[3] Sanmina's argument simply disregards the information that Dialight provided.

II. There Would Be No Basis to Impose the Drastic Remedy of Preclusion Even if Sanmina's Factual Narrative Were Correct

Contrary to Sanmina's argument, this is not a case where Dialight is attempting to "sandbag" Sanmina with previously undisclosed damages claims on the eve of trial. Dialight provided Sanmina with notice of its out-of-pocket expenses in its Complaint and initial disclosures,

[3] As noted above, because Dialight's complaint was not filed in 19-Civ-11710 (KPF), the referenced docket number for this citation is from the docket of 19-Civ-11712 (KPF).

designated a corporate representative who testified on the amount of out-of-pocket expenses that Dialight is seeking as damages, and served its responses to Sanmina's contention interrogatories on October 21, 2021 (over two and one-half years before this matter is scheduled to go to trial). Because Sanmina has been aware of these damages and has had ample opportunity to investigate them, the Court should deny Sanmina's motion and decline to exclude Dialight's claimed costs.

Further, even if Sanmina were correct that Dialight first provided notice of its out-of-pocket expenses as damages in its responses to Sanmina's contention interrogatories on October 21, 2021 (and it is not), courts have declined to preclude a plaintiff's evidence in scenarios where the disclosures were far later. *See, e.g.*, *Gary Price Studios, Inc. v. Randolph Rose Collection, Inc.*, 2006 U.S. Dist. LEXIS 101179, at *7 (S.D.N.Y. Aug. 16, 2006) (declining to preclude the challenged evidence because there was only a "four-month period" between the production of the challenged evidence and the trial date). Courts also have declined to impose a remedy of preclusion even where an actual discovery violation occurred from a late damages disclosure because the defendant failed to demonstrate prejudice. *See Lesser*, 2003 U.S. Dist. LEXIS 16291, at *8 (declining to imposed the drastic remedy of preclusion even where the defendant failed to fulfill its discovery obligations); *Hernandez v NJK Contractors, Inc.*, 2015 U.S. Dist. LEXIS 57568, at *84 (E.D.N.Y. May 1, 2015) (admitting evidence of damages even where plaintiff did not disclose required damages calculations under Rule 26(a) and holding that although it "is true that the inclusion of the prayer for these damages in the complaint did not relieve Plaintiffs of their duty to disclose damage calculations, it does demonstrate notice to Defendants and an opportunity for Defendants to mitigate any potential prejudice"); *King*, 2021 U.S. Dist. LEXIS 219059, at *7-8 ("[T]he Court finds Defendants' argument that allowing Plaintiff to pursue this theory would cause them significant prejudice unpersuasive. Defendants assert that Plaintiff's new damages

theory raises issues of fact and expert testimony that they did not explore or have incentive to explore earlier . . . . But Defendants fail to identify with any specificity the testimony and evidence they would require if Plaintiff is permitted to raise the [challenged damages] theory with the jury in this case or why the discovery that they already took would not be sufficient to address any new arguments that Plaintiff might make based on that theory."). Here, as explained above, Sanmina deposed Dialight's corporate representative on damages and never complained that he was inadequately prepared. Thus, Sanmina had an opportunity to explore discovery on this topic. Sanmina never indicated what additional testimony or evidence it would require.

By contrast, the cases that Sanmina relies upon to argue that Dialight should be precluded from presenting its damages are markedly different from the situation here. For example, in *Agence France Presse v. Morel*, the plaintiff claimed at the beginning of the case that it was "seeking up to $400,000 in statutory damages." 293 F.R.D. 682, 684 (S.D.N.Y. 2013). Thereafter, "when Defendants sought further elaboration on his damage calculation, Plaintiff confirmed that the calculation provided in his initial disclosure was the one that he would continue to pursue." *Id*. It was not until three years later when, "as part of a pretrial exchange of information for the preparation of the parties' joint pretrial order, Plaintiff indicated for the first time that he was seeking damages for up to 527 violations (up to $13,175,000 in total)." *Id.* The court found that plaintiff's "failure to disclose his new damages theory until soon before trial is particularly troubling in light of Defendants' *repeated requests* for more information." *Id.* at 685 (emphasis added). The facts in *Agence* are not like the facts here. In that case, the defendant was not aware of the total amount of damages that the plaintiff was seeking until the parties' pre-trial exchange. By contrast, Dialight's corporate representative, who Dialight designated to testify on the topic of Dialight's damages, set forth the total amount of out-of-pocket expenditures that Dialight is

seeking to recover as damages, and Dialight repeated this information in detailed fashion in its contention interrogatories served nearly three years ago. Sanmina cannot claim that it is being "sandbagged" at trial by information it received three years ago, unlike the defendants in *Agence* who received updated damages information for the first time in pre-trial exchanges on the eve of trial.

Likewise inapposite is *Martin v. Walmart Inc.*, where the court found that the plaintiff "did not disclose *any* computation of her damages until April 17, 2023—nearly two months after the fact discovery cutoff date" and "after . . . the deadline to designate expert witnesses had passed." 2023 U.S. Dist. LEXIS 152753, at *6-7 (C.D. Cal. July 10, 2023) (emphasis added). By contrast, here, Dialight timely disclosed its computation of its damages during discovery itself, including in its responses to Sanmina's contention interrogatories, which were timely served before Sanmina's deadline to designate an expert witness. Thus, *Martin* is inapplicable. *Spotnana, Inc. v. American Talent Agency Inc.* 2010 U.S. Dist. LEXIS 86457 (S.D.N.Y. Aug. 17, 2010) also has no relevance here, because in that case the plaintiff never disclosed its computation of damages until four months after discovery closed. *Id*. at *4-5.

Finally, Sanmina relies on *24/7 Records, Inc. v. Sony Music Entertainment, Inc*., to argue that Dialight's computation of its out-of-pocket damages should be precluded. 566 F. Supp. 2d 305 (S.D.N.Y. 2008). But in that case, the court found that the "loss of an income-producing asset theory has been asserted just weeks before trial in the joint pre-trial order, long after the close of discovery." *Id.* at 318 (emphasis added). By contrast, Dialight's damages were disclosed three years before the pre-trial order is due, during discovery itself. Consequently, Sanmina has no valid basis to argue that Dialight's damages claim should be precluded based on the case law that it relies upon.

III. Dialight Can Recover Its Claimed Out-of-Pocket Expenditures as Damages in This Action

Sanmina alludes in Motion in Limine #4 to the argument it has made in other motions: that Dialight's out-of-pocket expenditures cannot be recovered by Dialight in this action because the MSA has a limitation of liability provision. *See* Dkt. No. 165 (Motion in Limine #4) at 1. But, as Dialight has explained in its oppositions to those other motions (Dialight's Opp'n to Sanmina's Motion in Limine #1 at 7-9; Dialight's Opp'n to Sanmina's Motion in Limine #2 at 2-3), this argument is incorrect because, where a contract is procured by fraud, the limitation of liability provision does not apply. *See, e.g.*, *Turkish v. Kasenetz*, 27 F.3d 23, 27-28 (2d Cir. 1994) ("It is well settled that parties cannot use contractual limitation of liability clauses to shield themselves from liability for their own fraudulent conduct") (citation omitted); *Aplications, Inc. v. Hewlett-Packard Co.,* 501 F. Supp. 129, 136 (S.D.N.Y. 1980) (holding in a UCC case that a contractual liability cap could not be enforced at summary judgment because where a "plaintiff's claims for fraudulent misrepresentation is heard at trial, the contractual limitation precluding recovery of consequential damages is ineffective") (citation omitted), *aff'd*, 672 F.2d 1076 (2d Cir. 1982).

Further, the law is well-established in New York that a fraud victim can recover its out-of-pocket losses suffered from the fraud, which these out-of-pocket expenditures represent. *See Cayuga Harvester, Inc. v. Allis-Chalmers Corp.*, 95 A.D.2d 5, 22 (4th Dep't 1983) (explaining that in New York a fraud victim can obtain "indemnity for the actual loss sustained"). Moreover, a contractual liability cap does not limit fraud-based damages or damages relating to a party's willful misconduct under the contract. *Kalisch-Jarcho, Inc. v. City of New York*, 58 N.Y.2d 377, 385 (1983) (explaining that a contractual limitation on liability is unenforceable when it "smacks of intentional wrongdoing . . . as when it is fraudulent"); *Air China Ltd. v. Kopf*, 473 F. App'x. 45, 49 (2d Cir. 2013) ("Notwithstanding [plaintiff's] election to proceed on its breach of contract

theory at trial, we find no error in the District Court's nullification of the limitations on damages provisions in the Contract because of the jury's finding of fraudulent inducement"); *Soroof Trading Dev. Co. v. GE Fuel Cell Sys., LLC*, 842 F. Supp. 2d 502, 516 (S.D.N.Y. 2012) (holding that limitation on liability may be unenforceable where plaintiff has a good faith basis for alleging that defendant "misrepresented material facts"); *Sussman Sales Co. v. VWR Int'l*, LLC, 2021 U.S. Dist. LEXIS 243974, at *12 (S.D.N.Y. Dec. 21, 2021) (holding that the plaintiff "alleged facts sufficient to show that Defendant may have acted intentionally and in bad faith" in breaching the warranties and granting "Plaintiff's motion for reconsideration to reinstate Plaintiff's demand for lost profits"). Consequently, Dialight can pursue the recovery of its out-of-pocket losses in this action.

CONCLUSION

For the foregoing reasons, Sanmina's Motion in Limine #4 should be denied.

Respectfully submitted,

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