

United States District Court  
For the Northern District of California

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**\*E-FILED 12-18-2009\***

NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

AVAGO TECHNOLOGIES U.S., INC., a  
Delaware corporation, AVAGO  
TECHNOLOGIES INTERNATIONAL  
SALES PTE. LIMITED, AVAGO  
TECHNOLOGIES JAPAN, LTD.,  
AVAGO TECHNOLOGIES CANADA  
CORPORATION,

No. C08-03248 JW (HRL)

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT  
EMCORE CORPORATION’S MOTION  
TO COMPEL INITIAL DISCLOSURES**

**[Re: Docket No. 65]**

Plaintiff,

v.

EMCORE CORPORATION; VENTURE  
CORPORATION fka VENTURE  
MANUFACTURING (S) LTD.,

Defendants.

Plaintiffs (collectively referred to here as “Avago”) supply optoelectronics products, RF/microwave components, and enterprise ASICs (Application Specific Integrated Circuits). They sue over allegedly defective fiber optic transceivers sold to Avago customers. Defendant Venture Corporation (“Venture”) manufactured the transceivers in question. Defendant Emcore Corporation (“Emcore”) manufactured a component of the transceivers — i.e., Vertical Cavity Surface Emitting Lasers — which allegedly caused the transceivers to be defective. Plaintiffs claim that, as a result, their business and business relationships were adversely affected. Avago asserts claims for breach of contract and breach of express warranty against Venture, as well as

1 a claim for negligent interference with prospective economic advantage against Emcore.

2 Emcore moves to compel further supplemental initial damages disclosures from Avago.  
3 Plaintiffs have supplemented their initial disclosures twice. Emcore maintains that the second  
4 supplemental damages disclosure still does not satisfy the requirements of Fed. R. Civ. P.  
5 26(a)(1)(A).<sup>1</sup> Plaintiffs oppose the motion. Upon consideration of the moving and responding  
6 papers, as well as the arguments of counsel, this court grants the motion in part and denies it in  
7 part.

8 “[A] party must, without awaiting a discovery request, provide to the other parties . . . a  
9 computation of each category of damages claimed by the disclosing party.” FED. R. CIV. P.  
10 26(a)(1)(A)(iii). Additionally, the disclosing party “must also make available for inspection and  
11 copying as under Rule 34 the documents or other evidentiary material, unless privileged or  
12 protected from disclosure, on which each computation is based, including materials bearing on  
13 the nature and extent of injuries suffered.” *Id.* “This obligation applies only with respect to  
14 documents then reasonably available to [the disclosing party] and not privileged or protected as  
15 work product.” FED. R. CIV. P. 26(a) advisory committee’s note (1993). Additionally,  
16 disclosure requirements are to be applied “with common sense in light of the principles of [Fed.  
17 R. Civ. P.] Rule 1, keeping in mind the salutary purposes that the rule is intended to  
18 accomplish” — “the just, speedy, and inexpensive determination of every action and  
19 proceeding.” FED. R. CIV. P. 26(a) advisory committee’s note (1993); FED. R. CIV. P. 1.

20 “Rule 26 does not elaborate on the level of specificity required in the initial damages  
21 disclosure.” *City and County of San Francisco v. Tutor-Saliba Corp.*, 218 F.R.D. 219, 220  
22 (N.D. Cal. 2003). Thus, “guidance as to the adequacy of the disclosures must be gleaned from  
23 Rule 26(a)’s purpose: to ‘accelerate the exchange of basic information’ that is ‘needed in most  
24 cases to prepare for trial or make an informed decision about settlement.’” *Id.* (quoting Fed. R.  
25 Civ. P. 26 advisory committee’s note (1993)). “[E]arly disclosure also functions to assist the  
26 parties in focusing and prioritizing their organization of discovery.” *Id.*

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28 <sup>1</sup> As originally presented, Emcore’s motion also sought, pursuant to Fed. R. Civ. P. 26(a)(1)(A)(ii), the identification of documents that plaintiffs may use to support their claims. Emcore advises that those disclosures are no longer at issue.

1 In the instant case, Avago’s second supplemental disclosures list dollar amounts for  
2 certain categories of claimed damages. The disclosures do not state dollar amounts for others  
3 (e.g. loss of revenue and impact on company reputation), which plaintiffs say “will be the  
4 subject of expert analysis, opinion and testimony.” (See Khoobyarian Decl., Ex. C). Emcore  
5 acknowledges that certain categories of damages may well require expert analysis. However, it  
6 contends that greater detail is required — namely, (1) a breakdown of damages claimed by each  
7 plaintiff (rather than a lump sum for all plaintiffs), (2) a computation by each plaintiff as to the  
8 tort damages claimed from Emcore (as distinguished from the contract damages claimed from  
9 Venture); (3) a statement of damages relating to each contract that Avago was unable to execute  
10 due to Emcore’s alleged negligent interference; (4) an explanation as to the meaning of certain  
11 categories of damages, and (5) an explanation how each plaintiff calculated its claimed  
12 damages. Plaintiffs represent that they have produced all documents supporting their initial  
13 damages disclosure. As for the further detail sought by Emcore, plaintiffs contend that, due in  
14 part to their record-keeping practices, they may not be able to provide the precise information  
15 sought, and further, that such details are not required at this stage of the litigation in any event.

16 Emcore’s assertions as to the prejudice it has suffered are underwhelming.  
17 Nevertheless, defendant’s argument that it should not be liable for alleged damages sustained by  
18 Avago’s foreign subsidiaries provides some justification for requiring plaintiffs to provide at  
19 least some estimates, however tentative or preliminary. See Tutor-Saliba Corp., 218 F.R.D. at  
20 221-22. Accordingly, Emcore’s motion is granted in part and denied in part as follows:

- 21 1. To the extent feasible, each plaintiff should disclose the damages it claims as to  
22 each defendant and to make some effort to allocate the claimed costs between the  
23 named plaintiffs.
- 24 2. Plaintiffs should provide some explanation as to what is meant by the claimed  
25 damages for “Current expenses incurred for customer claims” and “Value of  
26 current and pending customer claims.”
- 27 3. To the extent the methodology used to calculate plaintiffs’ disclosed damages  
28 does not require expert analysis, plaintiffs shall also disclose the same. Id. at

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221 (noting that the initial disclosure of damages under Fed. R. Civ. P. 26 requires “some analysis”). As Emcore acknowledges, some information might well require expert analysis. Accordingly, if plaintiffs contend in good faith that certain categories of damages or the methodology used to calculate those damages are properly the subject of expert reports, plaintiffs need not disclose the precise method of calculation at this time.

4. Plaintiffs need not now provide, by way of their initial disclosures, a breakdown of damages relating to each contract that Avago was unable to execute due to Emcore’s alleged negligent interference.
5. Plaintiffs shall serve their supplemental initial damages disclosure within 30 days from the date of this order.
6. Emcore’s request for what essentially amounts to an evidence-preclusion order is denied. Such an order is a remedy reserved for “extreme situations” not present here. See Tutor-Saliba Corp., 218 F.R.D. at 220-21. Discovery is underway and remains open for approximately eight more months. Although plaintiffs are required to disclose information now known or reasonably available to them, their initial damages disclosure “is merely a preliminary assessment and is subject to revision” under Fed. R. Civ. P. 26(e). Id. at 222.

SO ORDERED.

Dated: December 18, 2009

  
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HOWARD R. LLOYD  
UNITED STATES MAGISTRATE JUDGE

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