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5 *Attorney for Plaintiff*

6 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
7 **IN AND FOR THE COUNTY OF MARICOPA**

8 Case No: CV2021-052893

9 Laura Owens,

10 Plaintiff,

11 vs.

12 Gregory Gillespie,

13 Defendant.
14

**PLAINTIFF'S REPLY TO
DEFENDANT'S RESPONSE TO
PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

15 Plaintiff, through undersigned counsel, hereby files this Reply to Defendant's
16 Response to Plaintiff's Motion for Partial Summary Judgment on Defendant's claims.
17 The Court should grant Plaintiff's Motion for Partial Summary Judgment because there
18 are absolutely no genuine issues of material fact regarding Defendant's lack of damages.
19 Defendant's attempt to now, after a summary judgment motion has been filed against him
20 and after the hearing date for the arbitration hearing that was scheduled has passed,
21 provide a damages dollar amount and sparse/deficient information regarding his purported
22 damages, must be flatly rejected. This attempt to supplement the record was not made in
23 an attempt to color the information already provided in his disclosure statements but is an
24 attempt to provide the basic information that was required to be set out in his disclosure
25 statements such that Plaintiff could conduct discovery.
26

This reply is based on the arguments herein and the Court file in whole.





1 **I. FACTS**

2 The damages section of Defendant’s Second Supplemental Disclosure Statement
3 states as follows:

4 Mr. Gillespie has sustained significant monetary damages as a result of
5 being unable to work due to the extreme amount of emotional distress
6 he experienced while being subjected to Plaintiff’s fraudulent
7 representations and intentional infliction of emotional distress and is
8 therefore seeking to be compensated for the same in addition to an
award of his attorneys’ fees and costs pursuant to A.R.S. § 12-341, 12-
349 and Rule 11, *Arizona Rules of Civil Procedure*.

9 Plaintiff’s Statement of Facts, Exhibit A, at 5. No dollar amount was provided and
10 no calculation was provided. *Id.* Mr. Gillespie attached a declaration to his statement of
11 additional facts, which provided that he is seeking “nearly \$50,000” for lost commissions.
12 Declaration of Gregory Gillespie, ¶ 8. Mr. Gillespie alleges that he “suffered severe
13 emotional distress, including increased stress, sleepless nights, loss of enjoyment of life,
14 and overall emotional distress.” *Id.*, ¶ 7.

15 **II. LEGAL ANALYSIS**

16 **A. Defendant is precluded from providing evidence sufficient to raise a
17 genuine issue of material fact regarding damages for all of his claims.**

18 Rule 26.1(a)(7) requires a party to disclose a damages calculation and the
19 information on which that damage calculation would be based. Defendant appears to
20 argue that he was not required to make any disclosure regarding his damages calculation
21 because they are purportedly difficult to calculate. Response, at 2, 3. There is no damages
22 **calculation** in any disclosure statement. He never disclosed how much he was seeking in
damages.

23 Further, it should be noted that Mr. Gillespie’s declaration does **not** appear to
24 comport with the Arizona Rules of Civil Procedure. Rule 80(c)(2) requires that for an
25 unsworn declaration to be considered as evidence in response to a motion for summary
26 judgment, it must be dated. Rule 5.2(b) further requires that all text for any filed document



1 be black and be at least 13-point size. It is almost impossible to discern whether the
2 declaration attached to Defendant’s Controverting Statement of Facts is dated. The
3 declaration appears to have a faint date in much less than size 13 font and not black ink
4 just under what appears to be possibly the electronic signature of Mr. Gillespie.

5 Even if the Declaration is considered, through his Declaration, Mr. Gillespie is, in
6 essence, attempting to supplement his disclosure statement with information on which to
7 calculate his damages after the arbitration hearing date has already passed. That must be
8 flatly rejected as a late disclosure. While disclosure statements are not required to provide
9 every single detail you will testify about, they at least have to provide a starting point so
10 a party can determine whether, and to what extent, discovery is necessary. *See SWC*
11 *Baseline & Crismon Investors, L.L.C. v. Augusta Ranch Ltd. Partnership*, 228 Ariz. 271,
12 284-85, 265 P.3d 1070 (App. 2011) (“*SWC Baseline*”).

13 This case is very similar to that in *SWC Baseline*. In that case, the disclosure
14 statement by the Plaintiff was that it would seek damages for “reasonable rent” and “the
15 value of the deprivation of [its] rights to use and enjoyment of its property.” *Id.*, at 284.
16 At trial, the Plaintiff asserted damages for lost rent of \$765 per month and was awarded
17 damages based on that amount as well as additional damages based on assertions that it
18 could have entered into other leases. *Id.* The court in that case stated as follows:

19 Although Augusta Ranch’s disclosure statements referred to
20 ‘rents’ and the value of the ‘right to use’ the Corner, we see
21 nothing showing that Augusta Ranch ever revealed that it
22 would claim \$765 a month in damages. Although Augusta
23 Ranch disclosed the lease in discovery, it did not disclose its
contention that it could have entered into a lease at the same
rate for the Corner, but for the alleged wrongful recordings.

24 *Id.* The court went on to vacate the damages awarded except for the statutory
25 minimum of \$1,000. *Id.*

26 Further, the information he is attempting to now disclose in response to the motion
for summary judgment falls short, especially when he is claiming damages for lost



1 commissions. He states “I earn my income largely through commissions based on sales.
2 Because my income is earned in this fashion, I know that the more business opportunities
3 that I am presented with, the greater the possibility of closing deals with prospective
4 customers.” He goes on to state that he has an established record of earning high
5 commissions through his experience and efforts and his income is not subject to a
6 consistent calculation. He claims that he would have earned “nearly \$50,000 more in
7 commissions if not for the severe emotional distress.”

8 However, by making these statements in response to a motion for summary
9 judgment, rather than in his disclosure statement, and providing absolutely no
10 documentation or additional information to allow Plaintiff to challenge them, any trial
11 based on this information would be a “trial by ambush.” Defendant has provided no
12 information or documentation regarding (1) his commission rate, (2) his commission
13 earnings history, (3) his alleged “established record of earning high commissions,” or (4)
14 how many days he missed work. He has precluded Plaintiff from preparing for the trial
15 on his damages.

16 Therefore, because he cannot offer any information in support of his damages, and
17 because damages are a required element for claims of fraud and intentional infliction of
18 emotional distress, summary judgment must be granted.

19 **B. Defendant has not created a genuine issue of material fact showing that**
20 **he suffered from severe emotional distress.**

21 Apart from there being no genuine issue of material fact regarding the lack of
22 damages on either claim, Defendant’s declaration does not show that he suffered
23 sufficiently severe emotional distress. Again, no statement regarding what kind of
24 emotional distress he suffered was made to any extent in his disclosure statements.
25 Further, even his declaration falls short of the requirements. He states in his declaration
26 as follows: “I suffered severe emotional distress, including increased stress, sleepless



1 nights, loss of enjoyment of life, and overall emotional distress.” As the *Midas* court held,
2 crying and difficulty sleeping is not enough. *Midas Muffler Shop v. Ellison*, 133 Ariz.
3 194, 199, 650 P.2d 496, 501 (App. 1982). That is essentially what Defendant has alleged
4 in his declaration. It is clear that there is no genuine issue of material fact regarding
5 whether his emotional distress was severe and, as indicated above, this information should
6 have been disclosed in a disclosure statement and not in response to a motion for summary
7 judgment and therefore the Court should determine it is inadmissible and enter summary
8 judgment against him.

9 **III. CONCLUSION**

10 For the foregoing reasons, the Court should grant Plaintiff’s motion for partial
11 summary judgment. His failure to provide any damages calculation precludes him from
12 offering any information or documentation showing damages. Further, even if the Court
13 considers his flawed declaration, the information in it is insufficient to create a genuine
14 issue of material fact.

15
16
17 RESPECTFULLY SUBMITTED this 26th day of September, 2023.

18 **FORTIFY LEGAL SERVICES**

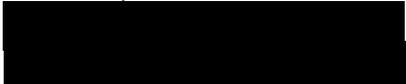
19 */s/ Kyle O’Dwyer*
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22 Mesa, AZ 85206

23 *Attorney for Plaintiff*

24 Filed this 26th day of September 2023
25 with Maricopa County Clerk of Court and
26 served this 26th day of September 2023
by TurboCourt on the following:

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With COPY to the following by email:

Devina Jackson
Court-Appointed Arbitrator



By: Kyle O'Dwyer

