

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Tonn Investments LLC, et al. v. Joseph Shapiro

No. CV-19-00076-PHX-GMS (D. Ariz. Jan. 27, 2026) · No. 2:19-cv-00076 · Decided January 27, 2026

SUMMARY

The United States District Court for the District of Arizona grants Plaintiffs’ motion for summary judgment in an action against Joseph Shapiro for breach of a personal guaranty securing loans to Oncam Inc. The court precludes Shapiro from relying on untimely or undisclosed evidence under the Mandatory Initial Discovery Pilot and Federal Rule of Civil Procedure 37(b)(2). It then addresses his defenses concerning deficiency calculations and the commercial reasonableness of a UCC sale of collateral.

OPINION

1 WO 2 3 4 5 6 IN THE UNITED STATES DISTRICT COURT 7 FOR THE DISTRICT OF
ARIZONA 8 9 Tonn Investments LLC, et al., No. CV-19-00076-PHX-GMS 10 Plaintiffs, ORDER
11 v. 12 Joseph Shapiro, 13 Defendant. 14 15 Pending before the Court is Plaintiffs’ Motion for
Summary Judgment (Doc. 45). 16 For the reasons discussed below, Plaintiffs’ motion is granted.
17 BACKGROUND 18 Between 2012 and 2016, Scott Tonn, an investor, and his investment
company Tonn 19 Investments LLC (collectively, “Plaintiffs”) extended multiple loans to Oncam
Inc. 20 (“Oncam”), a video technology corporation.

(Doc. 51 at 1–2). At the time, Joseph Shapiro 21 (“Defendant”) was the Chairman and Chief
Executive Officer of Oncam. (Id.). Mr. Tonn 22 served as the President and Chief Operations
Officer of Oncam. (Id. at 18). 23 During this period, Plaintiffs extended multiple secured loans to
Oncam for millions 24 of dollars (collectively, “Secured Loans”): a secured loan from Mr. Tonn
 (“Mr.

Tonn 25 Secured Loan”); a secured loan from Tonn LLC (“Tonn LLC Secured Loan); and a
second 26 secured loan held by Tonn LCC (“SunWize Secured Loan”). (Id. at 2, 4). One such
asset 27 was “a multi-terabyte hard drive” containing “portions of Oncam’s source code” (the 28
 “Box”). (Doc. 46-2 at 10, 20). 1 Despite positive valuations and attempts to solicit investors,
Oncam’s technology 2 “never reached its goals or plans, never launched a saleable product, and
never generated 3 any substantial revenue.” (Doc.

45 at 2). 4 In 2017, after Oncam defaulted, Plaintiffs sued for nonpayment of the Secured 5 Loans.
(Id.). The parties ultimately entered a Settlement Agreement and Release 6 (“Settlement
Agreement”), which “modified and superseded all inconsistent terms and 7 provisions set forth in

the... secured loan agreements and obligations,” and created “new, 8 extended maturity dates and... revised interest rates.” (Id. at 3–5).

The parties further 9 “acknowledged and confirmed the defaults and amounts owed.” (Id. at 6). Plaintiffs also 10 agreed “to continue a pending UCC sale and forbear on certain loan documents with 11 Oncam” and to enter “a separate escrow agreement” (“Escrow Agreement”) for the Box. 12 (Id. at 7).

The parties agreed that the Escrow Agreement would “govern the... possession, 13 treatment, and disbursement of the” Box.1 (Doc. 46-2 at 20). 14 Oncam again “failed to pay the amounts owed under the Settlement Agreement by 15 the maturity dates.” (Doc. 51 at 7). 16 In early January 2018, “Plaintiffs provided Oncam with written notice of its 17 default.” (Id.).

Tonn LLC also “re-noticed a public UCC sale of all Oncam’s property and 18 assets,” to take place on February 14, 2018, including a detailed description of the property 19 to be sold: 20 All assets, property, and interests of [Oncam],... including without limitation: all personal property of every kind and 21 nature, including, without limitation, all goods (including, without limitation, all intellectual property, iOS and Android 22 app code including source code, software development kit(s)... web-based code, server side code, and cloud development, 23 including all source code(s), code files,... intellectual property rights, including but not limited to, all proprietary 24 technology development code, patents, trademarks or otherwise... and all other assets, property, or interest in any 25 and all property of [Oncam] whatsoever; but specifically EXCLUDING that certain intellectual property of [Oncam], 26 1 Under the Escrow Agreement, the escrow agent’s release of the Box to Plaintiffs 27 “constitute[d] a deemed assignment... of all Intellectual Property Rights that [Defendant and Oncam] possess[]... with the full right and power of [Plaintiffs] to use, exploit, assign, 28 and transfer the [Box] and all such Intellectual Property Rights therein as [Plaintiffs] may determine in [their] sole discretion.” (Doc.

51-2 at 105). 1 including source code [located on the Box]... which is currently subject to that certain Escrow Agreement.... 2 3 (Id.). Two weeks before the scheduled sale, Tonn LLC published the notice in 4 multiple publications of both local and nationwide circulation and in multiple courthouses. 5 (Id. at 8; Doc. 46-6 at 1–12). Tonn LLC also issued a public press release announcing the 6 sale, which reached hundreds of readers.

(Doc. 51 at 8). No one reached out to Plaintiffs 7 to inquire about the sale. (Id.). 8 The parties continued the sale after they began to negotiate amendments to the 9 Settlement Agreement. (Id. at 9). By February 16, 2018, the parties entered into a First 10 Amended and Restated Settlement Agreement and Release (“Restated Settlement 11 Agreement”). (Id.).

The Restated Settlement Agreement “modified and superseded all 12 inconsistent terms and provision set forth in” the Settlement Agreement and prior loan 13 documents, setting a new

maturity date of March 30, 2018, with a UCC Sale to take place 14 on April 2, 2018, in the event of default. (Id. at 9–10). Defendant and Oncam again 15 “acknowledged and confirmed [the Secured Loan balances] that Oncam owed Plaintiffs.” 16 (Id. at 9).

As with the Settlement Agreement, the Restated Settlement Agreement’s terms 17 included that Defendant “expressly waived... any and all defenses to payment under the 18 Secured Loans for any reason and... any and all defenses, counterclaims, or offsets to the 19 Secured Loans.” (Id. at 10). 20 The parties contemporaneously entered a Guaranty. (Id. at 11).

Under the 21 Guaranty, Defendant agreed to act as the guarantor, with personal liability, for the Secured 22 Loans until payment was made in full on both principal and accrued interest. (Id.). 23 In late March 2018, the parties entered an amendment to the Restated Settlement 24 Agreement (“Amendment”) which further continued the maturity date of the Secured 25 Loans and the scheduled UCC Sale until July 2, 2018.

(Id. at 12). Defendant agreed to 26 pay a forbearance fee of \$285,000.00 by the maturity date and “reaffirmed his existing 27 personal guarantee of Oncam’s full and complete performance with respect to the Secured 28 Loans.” (Id. at 13). 1 Defendant and Oncam again “failed to pay the outstanding balances owed on the 2 Secured Loans, the Restated Settlement Agreement, and the Amendment by July 2, 2018.” 3 (Id. at 6, 13).

Plaintiffs held the public UCC Sale on July 31, 2018. (Id. at 13). Defendant 4 did not attend, nor did anyone other than Mr. Tonn, on behalf of Tonn LLC. (Id. at 13– 5 14). Ultimately, Plaintiffs bid on and acquired the UCC Sale property, with proceeds of 6 \$145,000. (Id. at 14).

The amount of Plaintiffs’ bid was based on (1) the lack of interest 7 from any other individual or entity in Oncam’s assets; (2) Oncam’s failure to generate any 8 revenue for two years; (3) the outdated nature of Oncam’s technology which was no longer 9 competitive on the market; and (4) legal costs “that Oncam had incurred... in 2016.” (Id.). 10 After the UCC Sale, Plaintiffs demanded that Defendant “pay all sums owed and 11 remedy their default of the Restated Settlement Agreement, the Amendment, the Secured 12 Loans, and the Guaranty” (collectively, Defendant’s “Guaranteed Obligations”).

(Id. at 13 15). Defendant did not respond but ultimately provided his express consent for the escrow 14 agent to release the Box to Plaintiffs. (Id.). 15 In early 2019, Plaintiffs filed this lawsuit to recover the amounts owed to them for 16 Defendant’s alleged Breach of Guaranty. (Doc. 11).

As of June 13, 2022, under the plain 17 terms of his Guaranteed Obligations, Defendant owes Plaintiffs the following amounts: 18 (1) \$2,255,535.60 with \$772.44 per diem interest on the Mr. Tonn Secured Loan; 19 (2) \$654,454.37 with \$224.13 per diem interest on the Tonn LLC Secured Loan; 20 (3) \$4,148,939.292 with \$4,092.10 per diem interest on the SunWize Secured Loan; and 21 (4) the \$285,000 forbearance fee, owed to Tonn LLC under the Amendment.

(Doc. 46 at 22 10; Doc. 51 at 15–16). 23 Plaintiffs filed the instant Motion for Summary Judgment on June 14, 2022. (Doc. 24 45). The Court held oral argument on May 12, 2023, and took the motion under 25 advisement. (Doc. 59). Within a matter of days, Defendant filed for Bankruptcy. (Doc. 26 60).

The Court stayed these proceedings on July 13, 2023. (Doc. 62). On December 8, 27 2025, Plaintiffs notified the Court that Defendant’s Bankruptcy case was dismissed (Doc. 28 2 Plaintiffs’ calculation of this amount factors in a reduction of \$145,000 based on the UCC Sale proceeds. (Doc. 46 at 10). 1 74) and the Court lifted the stay (Doc. 75). 2 DISCUSSION 3 I. Defendant’s Disclosure Obligations 4 A. Legal Standard: Mandatory Initial Discovery Pilot 5 Under the Amended Case Management Order (Doc.

41), the parties are bound to 6 comply with the discovery procedures set out by the Mandatory Initial Discovery Pilot 7 (“MIDP”). (Doc. 5 at 3–12). As relevant here, the MIDP establishes that the parties have 8 a duty to disclose “the names and, if known, the addresses and telephone numbers of all 9 persons who [the parties] believe are likely to have discoverable information relevant to 10 any party’s claims or defenses, and provide a fair description of the nature of the 11 information each such person is believed to possess”; to disclose “the documents, [and] 12 electronically stored information (“ESI”)... known by [the parties] to exist, whether or 13 not in [their] possession”; and for “each of [the parties’] claims or defenses, state the facts 14 relevant to it and the legal theories upon which it is based.” (Id. at 6–7).

15 Further, the MIDP clearly established that Rule 37(b)(2)—which governs a party’s 16 failure to comply with a court order regarding discovery—would apply to all mandatory 17 discovery responses. (Id. at 4); Fed. R. Civ. P. 37(b)(2).

The rule authorizes many 18 sanctions, one of which is a preclusionary order, “prohibiting the disobedient party from 19 supporting or opposing designated claims or defenses, or from introducing designated 20 matters in evidence.” Fed. R. Civ. P. 37(b)(2)(A)(ii). “Preclusionary orders ensure that a 21 party will not be able to profit from its own failure to comply.” *United States v. Sumitomo 22 Marine & Fire Ins.*

Co., Ltd., 617 F.2d 1365, 1369 (9th Cir. 1980) (quoting *Cine Forty- 23 Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1066 (2d Cir. 24 1979)). 25 In both the original Case Management Order and the Amended Case Management 26 Order, the Court clearly stated that “[p]arties who fail to timely disclose relevant 27 information will be precluded from using it in the case.” (Doc.

35 at 2 n.1; Doc. 41 at 2 28 n.1). As the Court has previously noted (Doc. 47), a “scheduling conference order is not a 1 frivolous piece of paper, idly entered, which can be cavalierly

disregarded without peril.” 2 *Johnson v. Mammoth*, 975 F.2d 604, 610 (9th Cir. 1992). 3 Thus, the disclosures at issue here are governed by the MIDP which explicitly 4 invokes Rule 37(b)(2).

(Doc. 5 at 4). Unlike Rule 37(c)(1),³ which requires the Court to 5 provide the non-compliant party with “an opportunity to be heard” and only excludes 6 evidence when the failure to disclose was not “substantially justified or harmless,” Rule 7 37(b)(2) simply requires that the Court’s use of the litany of sanction it provides is “just” 8 and “specifically related to the particular ‘claim’... at issue.” *Ins.*

Corp. of Ir., Ltd. v. 9 Compagnie des Bauxites de Guinee, 456 U.S. 694, 707 (1982). District courts’ discretion 10 under Rule 37(b)(2) is broadest when a party’s non-compliance is due to “willfulness, bad 11 faith, or any fault” of that party. *Sumitomo*, 617 F.2d at 1369 (quoting *Societe Int’l Pour 12 Participations Indus. et Com. v. Rogers*, 357 U.S. 197, 212 (1958)).

13 B. Application 14 Under the MIDP and Rule 37(b)(2), Defendant cannot use any evidence or any 15 argument which Defendant did not disclose in compliance with the Court’s Amended Case 16 Management Order.⁴ 17 From the beginning of this case, the Court repeatedly made it clear to the parties 18 that it intends to enforce its deadlines and that parties who fail to comply with those 19 deadlines will face the consequences.

(Doc. 5 at 4; Doc. 35 at 2 n.1, 5; Doc. 41 at 2 n.1, 20 5). The Court warned the parties that failure “to timely disclose relevant information 21 3 Plaintiffs’ Reply in Support of Motion for Summary Judgment sets forth the standard for 22 excluding evidence under Rule 37(c)(1), which requires exclusion unless the party’s “failure [to disclose] was substantially justified or harmless.” *Fed.*

R. Civ. P. 37(c)(1); Yeti 23 by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1107 (9th Cir. 2001). Rule 37(c)(1), however, only applies to disclosures of evidence made under 26(a) or (e). *Santa 24 Clarita Valley Water Agency v. Whittaker Corp.*, 99 F.4th 458, 470–71 (9th Cir. 2024) (quoting *PCT Int’l v. Holland Elecs., LLC*, No. 12-CV-01797, 2015 WL 875200, at *5 (D.

25 *Ariz. Mar. 2, 2015*)). As such, Rule 37(b)(2) applies here, rather than Rule 37(c)(1), because the MIDP “supersedes the disclosures required by Rule 26(a)(1).” (Doc. 5 at 3). 26 4 This includes any attempt by Defendant to recharacterize evidence as expert testimony. (Doc. 52 at 4–6). Defendant never made any expert disclosures and much of the potential 27 expert testimony that Plaintiffs identify is based entirely on untimely MIDP disclosures.

(*Id.*). Regardless, the Court will not allow any use of evidence—even timely MIDP 28 disclosures—to the extent that Defendant attempts to use such evidence as expert testimony. 1 [would]... preclude [the party] from using [that information] in the case,” and that 2 “unreasonably postpon[ing] disclosure of relevant information to the end of the discovery 3 period” would subject the party to sanctions.

(Doc. 35 at 2 n.1; Doc. 41 at 2 n.1). 4 When the parties made a good cause stipulation to extend a discovery deadline for 5 the explicit purpose of conducting depositions (Doc. 40 at 1), the Court granted the 6 stipulation. (Doc. 41 at 1). At that point, the Court explicitly advised the parties that 7 “[t]here [would] be no further extensions.” (Id.). Despite the Court’s clear directive and 8 prior warnings, on the day of the extended deadline for expert disclosures, Defendant again 9 —this time without any good cause—moved the Court to amend its scheduling orders.

10 (Doc. 42). The Court denied Defendant’s motion. (Doc. 47). 11 Despite clear Orders and repeated warnings, Defendant now attempts to use his 12 untimely disclosures in support of his asserted defenses. Defendant filed thirty exhibits 13 (Doc. 51-1; Doc. 51-2; Doc. 51-3; Doc. 51-4) in support of his Response to Plaintiffs’ 14 Motion for Summary Judgment (Doc.

50) and his corresponding Statement of Facts (Doc. 15 51). While some of these exhibits contain evidence which was timely disclosed, many 16 others are based on or contain evidence that was either untimely or never disclosed to 17 Plaintiffs.

For instance, Defendant attaches as Exhibits 7 and 28 the declarations of John 18 Chiapetti (Doc. 51-2 at 90–92) and Ralph Garramone (Doc. 51-3 at 79–81). Both 19 declarations are dated July 15, 2022, long after the April 15, 2022 discovery deadline. 20 (Doc. 51-2 at 92; Doc. 51-3 at 81). Further, Chiapetti and Garramone were never disclosed 21 as potential witnesses in this case.

(See Doc. 52-1 at 67-68). Defendant’s exhibits also 22 include many pages of documents which he never disclosed. (Doc. 51-1 at 12–33, 84–89, 23 92–128; Doc. 51-3 at 46–64; Doc. 51-4 at 1–10). 24 In terms of untimely disclosures, Defendant attaches Exhibits 24, 25, 26, 27, and 25 29. Exhibits 24 and 25 consist of documents that Defendant only disclosed after the April 26 15, 2022 deadline.

(Doc. 52-1 at 69). Exhibits 26, 27, and 29 are the declarations of 27 Michael Hyman, dated July 15, 2022 (Doc. 51-3 at 40–45); Dylan Tinker, also dated July 28 15, 2022 (id. at 71–77); and James Loh, dated July 14, 2022 (id. at 83–86). Hyman’s 1 declaration is further accompanied by exhibits which were either never disclosed (id. at 2 46–64) or untimely disclosed (id. at 66–69).

3 Defendant also provides his own declaration, dated July 15, 2022, as Exhibit 1 to 4 his Response. (Doc. 51-1 at 2–14). The entirety of the declaration is based on information 5 provided in its eleven accompanying exhibits, each of which were untimely disclosed (id. 6 at 35–66, 68–83) or never disclosed (id. at 12–33, 84–89, 92–128). 7 Defendant’s untimely disclosures to Plaintiffs on May 25, 2022, and May 27, 2022 8 (Doc.

52-1 at 48–64, 118–75), and his non-disclosures, were in clear violation of the 9 Court’s Order, which set the relevant discovery deadline for April 15, 2022. (Doc. 41 at 10 2). Defendant’s use of the non-disclosed and untimely disclosure information in his 11 Response further violates the scheduling order, which stated that parties would be 12 precluded from using such information.

(Id. at 2 n.1). 13 Given Defendant's willful and repeated failure to follow the Court's clear Orders 14 and consistent warnings regarding the MIDP, the Court will not allow Defendant to rely 15 on the evidence disclosed for the first time after the April 15, 2022 deadline (or not 16 disclosed at all), which he presented for the first time in his Response, attempting to 17 substantiate his defenses.

Fed. R. Civ. P. 37(b)(2)(B)(iii); see, e.g., *Ins. Corp. of Ireland*, 18 456 U.S. at 707–09 (holding that a court's sanction under Rule 37(b)(2) was both (1) "just" 19 and (2) "specifically related to the particular 'claim'" where, (1) despite the court's 20 repeated orders, warnings, and clear notice of consequences, the party acted in "obvious 21 disregard" of the court, and (2) the sanction established facts which the non-complying 22 party refused to produce in discovery, on an issue that it had raised).

Nor will the Court 23 allow Defendant's attempt to file his own declaration and its supporting exhibits to use 24 evidence that was untimely or never disclosed. 25 Accordingly, the following summary judgment analysis will proceed without 26 consideration of this evidence.⁵ 27 28 5 The background section above also excludes this evidence. 1 II. Motion for Summary Judgment 2 A. Legal Standard 3 A court must grant summary judgment "if the movant shows that there is no genuine 4 dispute as to any material fact and the movant is entitled to judgment as a matter of law." 5 Fed.

R. Civ. P. 56(a); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). The 6 movant bears the initial responsibility of presenting the basis for its motion and identifying 7 those portions of the record which it believes demonstrate the absence of a genuine dispute 8 of material fact. *Celotex*, 477 U.S. at 323. When considering motions for summary 9 judgment, courts should construe the facts in the light most favorable to the non-moving 10 party and draw all reasonable inferences in their favor.

Leisek v. Brightwood Corp., 278 11 F.3d 895, 898 (9th Cir. 2002). 12 If the movant fails to carry its initial burden of production, the nonmovant need not 13 produce anything. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Co., Inc.*, 210 F.3d 1099, 14 1102–03 (9th Cir. 2000). But if the movant meets its initial responsibility, the burden shifts 15 to the nonmovant to demonstrate the existence of a material, factual dispute.

Anderson v. 16 Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Specifically, "[o]nly disputes over facts 17 that might affect the outcome of the suit under the governing law will properly preclude 18 the entry of summary judgment." Id. at 248.

Although the nonmovant need not establish 19 a material issue of fact conclusively in its favor, *First Nat'l Bank of Ariz. v. Cities Serv. 20 Co.*, 391 U.S. 253, 288 (1968), it must "come forward

with specific facts showing that 21 there is a genuine issue for trial.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 22 475 U.S. 574, 587 (1986) (citation omitted).

Consequently, “[a] summary judgment 23 motion cannot be defeated by relying solely on conclusory allegations unsupported by 24 factual data.” *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). 25 “The inquiry performed is the threshold inquiry of determining whether there is the 26 need for a trial—whether, in other words, there are any genuine factual issues that properly 27 can be resolved only by a finder of fact because they may reasonably be resolved in favor 28 of either party.” *Anderson*, 477 U.S. at 250.

1 B. Application 2 The parties agree that Arizona law governs Defendant’s Guaranteed Obligations. 3 (Doc. 46-9 at 27). Under Arizona law, Plaintiffs must prove “the existence of the contract, 4 its breach, and the resulting damages.” *Graham v. Asbury*, 540 P.2d 656, 657, 112 Ariz. 5 184, 185 (1975). There is no dispute regarding the existence of the Defendant’s 6 Guaranteed Obligations as defined by the Settlement Agreement, Restated Settlement 7 Agreement, Guaranty, and Amendment.

(Doc. 45 at 9; Doc. 51 at 4–5, 7, 9–13). Nor is 8 there any dispute regarding Defendant’s material breach of those agreements. (Doc. 45 at 9 9–10; Doc. 51 at 13). 10 What remains are Plaintiff’s damages. The parties “do[] not dispute the amounts 11 asserted as owed” under Defendant’s Guaranteed Obligations. (Doc. 50 at 2; Doc. 51 at 12 13). Defendant argues, however, that the Court cannot grant summary judgment because 13 there are genuine disputes of material fact regarding Plaintiffs’ compliance with the 14 Arizona Uniform Commercial Code (“AUCC”), which may affect the amount of 15 Defendant’s deficiency liability.

(Doc. 50 at 9). Defendant’s asserted defenses are that 16 (1) Plaintiffs’ calculation of Defendant’s deficiency following the UCC Sale was incorrect; 17 and (2) that Plaintiffs failed to conduct a commercially reasonable UCC Sale. (*Id.*). 18 Plaintiffs contend that Defendant’s express waiver of defenses in the agreements governing 19 Defendant’s Guaranteed Obligations bar his defenses here.

(Doc. 45 at 9–10). 20 The Court will first consider the threshold issue of the effect of Defendant’s waiver 21 before discussing Defendant’s asserted defenses. 22 1. Effect of Waiver 23 As an initial matter, the express waiver in the agreements governing Defendant’s 24 Guaranteed Obligations does not render Defendant defenseless.

The AUCC generally 25 prohibits parties’ waiver or variance of rule governing the “disposition of collateral,” “the 26 explanation” and “calculation of a deficiency or surplus when a disposition is made to the 27 secured party,” or “the secured party’s... failure to comply with” the AUCC. A.R.S. § 47- 28 9602(7)-(9), (13).

The AUCC also, however, provides some exceptions to this prohibition. 1 Id. § 47-9624. One such exception, as relevant here, is waiver of the right to reasonable 2 notice. Id. §§ 47-9611(B), -9624(A). “A debtor... may waive the right to [reasonable 3 authenticated] notification of disposition of collateral... by an agreement to that effect 4 entered into and authenticated after default.” Id. § 47-9624(A).

5 In the Settlement Agreement, which was entered into by the parties after 6 Defendant’s initial default (Doc. 51 at 3–4), Defendant agreed to a provision which stated 7 that Plaintiffs “reserve[d] their right to pursue immediately without notice of any kind, 8... their rights and remedies for all defaults.” (Doc. 46-2 at 24). He further agreed to a 9 specific “Waiver of Notice,” which waived Defendant’s “right, if any, to any future notice 10 under th[e] Agreement,” such that Plaintiffs had “no obligation to provide Oncam or 11 [Defendant] with any notice prior to exercising any of their rights and remedies.” (Id. at 12 25).

13 Accordingly, while Defendant may still assert both of his defenses—his deficiency 14 calculation defense and his commercial reasonableness defense—Defendant has waived 15 the right to reasonable notice by entering an agreement after default to that effect and, thus, 16 cannot argue that the UCC Sale was commercially unreasonable on the basis of notice. 17 2.

Deficiency Calculation 18 “After default, a secured party may sell, lease, license or otherwise dispose of any 19 or all of the collateral in its present condition or following any commercially reasonable 20 preparation or processing.” A.R.S. § 47-9610(A). Such disposition may include a public 21 auction where the secured party purchases the collateral. Id. § 47-9610(C).

After any 22 proceeds from the sale have been used to pay reasonable expenses and satisfy any 23 outstanding secured obligations, the secured creditor may be left with either a surplus or a 24 deficiency. Id. § 47-9615(A), (D). Any surplus must be paid to the debtor. Id. § 47-9615 25 (D)(1). 26 On the other hand, the debtor remains “liable for any deficiency.” Id. § 47- 27 9615(D)(2).

Deficiency is generally calculated using the actual net proceeds of the sale. 28 Id. § 47-9615(A), (D). In cases where the secured creditor acquires the collateral at the 1 disposition, however, the calculation may change. Id. § 47-9615(F). If “[t]he amount of 2 proceeds of the disposition is significantly below the range of proceeds that a complying 3 disposition to a person other than the secured party[] [or] a person related to the secured 4 party... would have brought,” then “[t]he surplus or deficiency... is calculated based on 5 the amount of proceeds that would have been realized” in the complying disposition.

Id. 6 The debtor—here, Defendant—bears “the burden of establishing that the amount of 7 proceeds of the disposition is significantly below the range of prices that a complying 8 disposition to a person other than the secured party[] [or] a person related to the secured 9 party...

would have brought.” Id. § 47-9626(A)(5). 10 Defendant has failed to demonstrate a genuine issue of material fact with this 11 defense.

Though Defendant complains about the amount of proceeds from the UCC Sale, 12 arguing that it is “significantly below the range of proceeds” for an AUCC-compliant 13 disposition to someone other than Plaintiffs or someone associated with Plaintiffs, he does 14 so without providing any evidence—or pointing to any evidence in the record—of what 15 the “range of proceeds” might be for such a sale.

(Doc. 50 at 14–16). His attempt to raise 16 a material, factual dispute, relies entirely on evidence which he cannot use in this case. 17 (See id.); see, e.g., *Sumitomo*, 617 F.2d at 1369–70 (upholding a district court’s preclusion 18 order under Rule 37(b)(2), which resulted in a default judgment against the non-compliant 19 party, even where there was no showing of bad faith or willfulness, because of the court’s 20 repeated warnings and prejudice to the other party).

With no “factual data,” *Taylor*, 880 21 F. 2d at 1045, or “specific facts,” *Matsushita Elec. Indus.*, 475 U.S. at 587, to which a fact 22 finder could compare the \$145,000 of UCC Sale proceeds to determine whether it was 23 “significantly below” the proper “range of proceeds,” there is no factual dispute which 24 could reasonably be resolved in Defendant’s favor at trial.

Accordingly, Defendant’s 25 arguments regarding this defense are not sufficient to defeat Plaintiffs’ motion. 26 3. Commercial Reasonableness of UCC Sale 27 A debtor’s deficiency liability will be limited or eliminated if the secured creditor 28 failed to comply with the AUCC. A.R.S. § 47-9625(A).

To comply with the AUCC’s 1 rules governing disposition of collateral after default, “[e]very aspect of a disposition of 2 collateral, including the method, manner, time, place and other terms, must be 3 commercially reasonable.” Id. § 47-9610(B). 4 The AUCC provides further insight into whether the manner of a collateral 5 disposition is reasonable.

First, “[t]he fact that a greater amount could have been obtained 6 by... disposition... at a different time or in a different method from that selected by the 7 secured party is not of itself sufficient to preclude the secured party from establishing that 8 the... disposition... was made in a commercially reasonable manner.” Id. § 47-9627(A). 9 Second, a disposition will be considered commercially reasonable if “made: (1) [i]n the 10 usual manner on any recognized market; (2) [a]t the price current in any recognized market 11 at the time of the disposition; or (3) [o]therwise in conformity with reasonable commercial 12 practices among dealers in the type of property that was the subject of the disposition.” Id. 13 § 47-9627(B)(1)–(3).

14 Overall, “the determination of whether a particular sale is commercially reasonable 15 depends upon the circumstances, and the decision is considered one of fact rather than 16 law.” *Gulf*

Homes, Inc. v. Goubeaux, 602 P.2d 810, 813, 124 Ariz. 142, 145 (1979); FL 17 Receivables Trust 2002-A v. Ariz. Mills, LLC, 281 P.3d 1028, 1041, 230 Ariz. 160, 173 18 (Ct.

App. 2012) (holding that whether a secured creditor “has acted in a commercially 19 reasonable manner... depends on various factors” specific to the context of the 20 disposition). 21 The AUCC employs a burden-shifting framework to determine whether a sale is in 22 compliance with the AUCC.

First, “[a] secured party need not prove compliance with the 23 [AUCC]... unless the debtor... places the secured party’s compliance in issue.” A.R.S. 24 § 47-9626(A)(1). But once the issue is raised, “the secured party has the burden of 25 establishing that the... disposition... was conducted in accordance with” the AUCC. Id. 26 § 47-9626(A)(2). 27 If the secured creditor fails to prove that it complied with the AUCC, it may not be 28 able to recover any deficiency from the debtor.

Id. § 47-9625(A)(3)–(4). Indeed, a non- 1 compliant secured party can only recover if it proves that “the amount of proceeds that 2 would have been realized” if the disposition complied with the AUCC would still have 3 been less than “the sum of the secured obligation, expenses and attorney fees.” Id. If the 4 secured party does so prove, its deficiency will be calculated by subtracting “the sum of 5 the secured obligation, expenses and attorney fees” from the greater of (a) the actual 6 proceeds or (b) the amount of proceeds that should have been realized.

Id. 7 Here, Defendant raises three arguments regarding Plaintiffs’ AUCC compliance: (1) 8 that the manner of Plaintiffs’ UCC Sale was commercially unreasonable in the video 9 technology industry; (2) that Plaintiffs’ exclusion of the Box from the UCC Sale was 10 commercially unreasonable; and (3) that Plaintiffs provided commercially unreasonable 11 notice of the UCC Sale.

(Doc. 50 at 10–13). As noted above, under A.R.S. § 47-9624(A), 12 Defendant’s waiver of the right to notice was effective, which is fatal to the third issue he 13 attempts to raise. To defeat Plaintiff’s motion for summary judgment, Defendant must 14 place the commercial reasonableness of Plaintiffs’ UCC Sale at issue by demonstrating a 15 genuine issue of material fact.

Each of Defendant’s remaining arguments, which are 16 addressed in turn below, fail to do so. 17 a. Manner of UCC Sale 18 Defendant’s first argument—that the manner of Plaintiffs’ sale was not “in 19 conformity with reasonable commercial practices among dealers in the type of property 20 that was the subject of the disposition”—again depends entirely on evidence which he is 21 not allowed to use in this case because of his failure to comply with the MIDP.

(Doc. 50 22 at 10–11). Without “specific facts,” Matsushita Elec. Indus., 475 U.S. at 587, that illustrate 23 the “industry norm” (Doc. 50 at 11), Defendant fails to demonstrate any material,

factual 24 dispute regarding the manner of the UCC Sale which a reasonable fact finder could resolve 25 in his favor.

In other words, because Defendant provides no evidence—and does not point 26 to any existing evidence in the record—of the “typical process” for “market[ing] and 27 s[elling]” similar “advanced video technology” (Doc. 50 at 11), his conclusory allegation 28 that the UCC Sale did not comply with that “typical process” does not place Plaintiffs’ 1 AUCC compliance at issue and cannot defeat Plaintiffs’ motion for summary judgment.

2 b. Plaintiffs’ Exclusion of the Box 3 Defendant’s second argument—that Plaintiff’s exclusion of the Box from the UCC 4 Sale rendered the sale commercially unreasonable—also fails to place Plaintiffs’ AUCC 5 compliance at issue or to demonstrate a genuine dispute of material fact. Defendant asserts 6 that the material, factual disputes are: (1) whether the Box contained more than a mere 7 copy of the source code, such that it had its own “substantial value,” worth millions of 8 dollars; and (2) that Plaintiffs’ use of the Escrow Agreement to take title to the Box 9 rendered the UCC Sale commercially unreasonable.

(Doc. 50 at 11–13). 10 As to whether the Box contains a mere copy of the source code or has its own 11 “substantial value,” there is no genuine factual dispute. Both parties agree that the Box 12 contains Oncam’s source code⁶ and that the UCC Sale included Oncam’s source code. (See 13 Doc. 46-2 at 10; Doc. 50 at 11–13; Doc. 51 at 21).

In fact, Defendant never even suggests 14 that anything other than Oncam’s source code was stored on the Box. (See Doc. 50 at 11– 15 13). Moreover, although Defendant insists that the Box had “substantial value” (Doc. 51 16 at 21), the value of the Box is the same as the value of the source code it contains,⁷ and is 17 therefore redundant with the value of the source code sold at the UCC Sale such that the 18 inclusion of the Box would have been immaterial to the disposition of Oncam’s property.

19 Given that there is no genuine factual dispute over the contents of the Box or the value of 20 those contents, there can be no genuine factual dispute over the Box’s value. 21 Defendant’s subsequent claim—that Plaintiffs’ execution of the Escrow Agreement 22 to take title to the Box in lieu of a public sale—is not material to whether the UCC Sale of 23 Oncam’s other property was commercially reasonable.

Defendant challenges Plaintiffs’ 24 6 The Settlement Agreement describes the Box as “a multi-terabyte hard drive” containing 25 “portions of Oncam’s source code.” (Doc. 46-2 at 10). Defendant himself contends that the information of value stored on the Box was the Oncam source code. (Doc. 51 at 21). 26 And though Mr. Tonn lacked specific knowledge about the contents of the box, his understanding was that the Box contained a “backup” of intellectual property otherwise 27 stored on “Oncam’s cloud computers.” (Doc.

50 at 12). 7 Though Defendant's Response includes arguments about the value of the Box—and by 28 proxy, the value of the source code—he again relies entirely upon evidence which he cannot use in this case. (Doc. 50 at 12). 1 conduct under subsections (A) and (C) of § 47-9610, which governs the disposition of 2 collateral. (Doc. 50 at 13).

As noted above, subsection (A) gives secured parties the right 3 to “sell, lease, license or otherwise dispose of any or all of the collateral.” A.R.S. § 47- 4 9610(A). Subsection C allows a secured party to “purchase collateral... at a public 5 disposition.” Id. § 47-9610(C).

The AUCC itself provides these rights to a secured party, 6 but the rights also can be provided through an agreement of the parties. Id. § 47-9601(A). 7 And though parties may not waive or vary certain rules governing the disposition of 8 collateral, subsections (A) and (C) of § 47-9610 are not among those rules. Id. § 47- 9 9602(7). 10 Here, the parties agreed that the Escrow Agreement would “govern the...

11 possession, treatment, and disbursement of the” Box. (Doc. 46-2 at 20). The execution of 12 the Escrow Agreement upon Defendant's default, and with his express consent, gave title 13 to Plaintiffs, including “the full right and power... to use, exploit, assign, and transfer the 14 [Box] and all such Intellectual Property Rights therein.” (Doc. 51-2 at 105).

Defendant 15 protests Plaintiffs' execution of the agreement, arguing that Plaintiffs were required to 16 dispose of the Box under subsection (A) and that Plaintiffs were only allowed to purchase 17 the Box if they held a public sale under subsection (C). (Doc. 50 at 13). Subsection (C) 18 does not apply because Plaintiffs did not “purchase” the Box; they took title to the Box 19 according to the Escrow Agreement and Defendant's consent.

A.R.S. § 47-9610(C). 20 Subsection (A) provides methods by which a secured creditor may dispose of collateral but 21 does not mandate a particular disposition for “any or all” collateral. Id. §§ 47-9610(A), 22 -9602(7). Plaintiffs' alleged failure to comply with sections of the AUCC which did not 23 apply to the transfer of the Box under the Escrow Agreement does not raise any material 24 issue as to the commercial reasonableness of the UCC Sale of Oncam's other property.

25 In sum, though Defendant makes a conclusory assertion that the UCC Sale was 26 commercially unreasonable, his arguments in support of this defense do not demonstrate 27 that there is any genuine dispute of material fact as to the UCC Sale's commercial 28 reasonableness. Taylor, 880 F.2d at 1045 (“A summary judgment motion cannot be 1 || defeated by relying solely on conclusory allegations.”).

Defendant therefore fails to place 2|| Plaintiffs' compliance with the AUCC at issue to trigger the burden shifting provision of 3|| § 47-9626(A)(2) and, again, fails to demonstrate any material, factual dispute regarding the extent of his deficiency liability.

As such, Defendant cannot defeat Plaintiff's motion. 5 CONCLUSION 6 There are no genuine disputes of material fact as to the existence of the Guaranty between Plaintiffs and Defendant; Defendant's breach of that Guaranty; or the amount of 8 || damages that Plaintiffs suffered because of Defendant's breach. Plaintiffs, by a || preponderance of the evidence, have thus proven all elements of their Breach of Guaranty claim, as required under Arizona law.

Graham, 540 P.2d at 657, 112 Ariz. at 185. 11 |} Accordingly, without any genuine, material, factual issues that a fact finder could 12 || reasonably resolve in Defendant's favor, Plaintiffs are entitled to judgment as a matter of law. 14 IT IS THEREFORE ORDERED that Plaintiffs' Motion for Summary Judgment |} (Doc. 45) is GRANTED. 16 IT IS FURTHER ORDERED that the Clerk of Court enter judgment in favor of 17|| Plaintiff Scott Tonn in the amount of \$3,278,246.16° with \$772.44 per diem post-judgment 18 || interest and in favor of Plaintiff Tonn Investments LLC in the amount of \$10,803,082.18 |) with \$4,316.23 per diem post-judgment interest.

The Clerk shall terminate this action. 20 Dated this 27th day of January, 2026. 23 Senior United States District Judge 24 25 26 27 || 8 Amount owed as of J anuary 27, 2026, non-inclusive of per diem interest to accrue by the end of the day on January 27, 2026. -17-