

MARCEL FONTAINE,
Plaintiff,

V.

ALEX E. JONES, INFOWARS, LLC,
FREE SPEECH SYSTEMS, LLC and
KIT DANIELS,
Defendants.

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

459th JUDICIAL DISTRICT

**DEFENDANTS’ OBJECTION TO PLAINTIFF’S
NOTICE OF FILING SUPPLEMENTAL EXHIBIT**

Defendants Alex Jones, Infowars, LLC, Free Speech Systems, LLC and Kit Daniels (collectively, the “Defendants”), hereby file this Objection to Plaintiff’s Notice of Filing Supplemental Exhibit (the Declaration of Marcel Fontaine), and show the Court the following in support:

1. On August 2, 2018, the Court heard and considered the Defendants’ Motion to Dismiss under the Texas Citizens Participation Act (the “Motion”). The next day, Plaintiff sought to supplement the evidentiary record on the Motion by filing its “Notice of Filing Supplemental Exhibit,” which included a two paragraph unsworn declaration of Plaintiff Marcel Fontaine (the “Declaration”).

2. The Declaration is objectionable and should be stricken because it is untimely. The Plaintiff did not formally move the Court to supplement the record, nor has it put forward any evidence of “good cause” for why such evidence was not in the record at the day of the hearing. A motion to conduct additional discovery is untimely if made on or after the date of the

hearing of the Motion to Dismiss. *See e.g., Whisenhunt v. Lippincott*, 474 S.W.3d 30, 41 (Tex. App.—Texarkana 2015, no pet.).¹

3. In any event, even if admitted for purposes of the record, the Declaration is not legally sufficient evidence of the severity of emotional distress required to establish an intentional infliction of emotional distress under Texas law. Mr. Fontaine’s new testimony that he made the decision to seek therapy “in the past” and that he has been receiving therapy on a “regular basis” is not clear and specific evidence that Mr. Fontaine is suffering “distress so severe that no reasonable person could be expected to endure it without undergoing unreasonable suffering.” *LegacyTexas Bank v. Harlan*, No. 05-18-00039-CV, 2018 Tex. App. LEXIS 4134, at *9 (App.—Dallas June 7, 2018). In addition, there is no authority that making the decision to seek unspecified therapy and attending an unidentified volume of such therapy is direct or even circumstantial evidence of the distress that rises to a level of severity requiring “intervention” under the law, when no particulars as to the physical or emotional manifestations have been offered and no expert has put forward any diagnosis of Plaintiff’s purported condition. *See e.g., David Martin Camp & Bargains for Millionaires LLC v. Patterson*, No. 03-16-00733-CV, 2017 Tex. App. LEXIS 7258, at *31-32 (App.—Austin Aug. 3, 2017).²

¹ In addition, the Declaration’s form is defective. It does not meet the statutory requirements for an unsworn declaration under Texas Civil Practice & Remedies Code § 132.001. It is not dated nor does it contain certain identifying information (date of birth or address) for the declarant as required by Section 132.001(d) of the Texas Civil Practice & Remedies Code. As such, it is ineffective and should be disregarded on the evidentiary record.

² Compare also *Regan v. Lee*, 879 S.W.2d 133, 136 (Tex. App.—Houston [14th Dist.] 1994, no writ) (holding that testimony that as result of defendant's conduct, plaintiff was "'very angry,' humiliated, and suffered from depression [but] did not seek professional help" was legally insufficient to support finding of severe emotional distress); with *Lambert v. Lambert* No. 05-08-00397-CV, 2009 Tex. App. LEXIS 4007, at *10-11 (Tex. App.—Dallas May 29, 2009, no pet.) (mem. op.) (concluding that plaintiff's testimony that as result of defendant's conduct she suffered from weight gain, hair loss, TMJ caused by grinding teeth, damage to gums, loss of sleep, nightmares, fatigue, and depression; psychologist's testimony that he diagnosed plaintiff with "acute stress" and that she was traumatized; and physician's testimony that plaintiff suffered from depression and "stress anxiety syndrome with physical manifestations" were legally sufficient evidence of severe emotional distress).

PRAYER FOR RELIEF

As such, the Court should sustain Defendants' objection to the admissibility of the Declaration, strike it from the record, and grant Defendants such other and further relief to which they may be justly entitled.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served upon the parties listed below via email and the Court's e-filing system on August 7, 2018:

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