

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

SECURITIES AND EXCHANGE COMMISSION,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No.
	:	4:11-CV-00655-MHS
JAMES G. TEMME, and	:	
STEWARDSHIP FUND, LP,	:	
	:	
Defendants,	:	
	:	

**OBJECTION TO AND MOTION TO STRIKE
PORTIONS OF THE DECLARATION OF KEITH WILLINGHAM**

COMES NOW the Securities and Exchange Commission (the “Commission”) and submits this Objection to and Motion to Strike Portions of the Declaration of Keith Willingham as follows:

1. In response to Plaintiff’s motion for summary judgment, Defendant submitted a declaration from Keith Willingham. In his declaration, Mr. Willingham testifies that he held sales positions with Stewardship Fund, LP from November 2006 through June 2011. In his initial disclosures, the Defendant identified Mr. Willingham only as a former employee of another company (not a corporate affiliate of Stewardship Fund) known as Halo. [See Plaintiff’s Appendix in Support of Motion for Summary Judgment at 555 (Defendant’s Initial Disclosures), which is incorporated herein]. He further specified that Mr. Willingham had knowledge of Halo’s operations and certain interactions between Halo and Stewardship Fund. Yet, his declaration does not relate to those issues. [Id.]. For this reason alone, the Court should strike the Willingham Declaration.

2. In addition, Defendant was required to disclose proposed expert testimony pursuant to Federal Rule of Civil Procedure 26(a)(2) and Local rule CV-26(b) by June 5, 2013. [See Doc. No. 184, Scheduling Order]. Defendant did not identify any proposed expert witnesses or offer any expert-related disclosures. Yet, as discussed below, Mr. Willingham's proposed declaration consists almost entirely of testimony that would be admissible, if at all, by an expert. Because Mr. Willingham is only a lay witness, that testimony should be excluded.

3. Specifically, the Court should strike paragraphs 4 and 5 of the Willingham Declaration as an improper attempt to introduce expert testimony. Paragraphs 4 and 5 offer no alleged personal observations or any testimony based on any alleged personal knowledge. Instead, these paragraphs contain an attempt by Mr. Willingham to opine on industry standards, apparently in a misguided attempt to suggest that Temme's conduct fell within that standard. But Rule 701 prohibits this type of testimony from a lay witness. Rule 701 prohibits a lay witness to express an opinion as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness. And that is precisely how Defendant attempts to use Mr. Willingham's testimony: to attempt to provide expert-like testimony about industry standards.

Because Mr. Willingham has not been designated as an expert, this testimony is inadmissible. *See, e.g., Certain Underwriters at Lloyds, London v. Sinkovich*, 232, F.3d 200, 204-206 (4th Cir. 2000); FED. R. EVID. 701. Rule 701's prohibition is particularly true here, where Mr. Willingham offers no explanation about his background other than five years working for a single company, Stewardship Fund, LP. And even in that role, according to his Declaration, his work included calling homeowners and resetting mortgages and there is no

reason to believe this work was related to the opinion testimony he offers. There is no basis on which Mr. Willingham may properly testify about industry standards and customs.

4. In addition, the Court should strike paragraph 3 of the Willingham Declaration because Mr. Willingham fails to establish any personal knowledge and the offered testimony otherwise lacks foundation. For example, Mr. Willingham states without any elaboration that “[t]hese properties were to be purchased by an entity called Harbour V, which was controlled by Chad Vose, for the benefit of our investors.” But Mr. Willingham fails to state how he knows of Mr. Vose’s control and, more importantly, the purpose of that control. Although he states that “I participated in the due diligence on a group of 31 high-end properties,” he does not explain what that entailed and how he learned the information he purports to offer in his declaration. The likely reason is that it is based on inadmissible hearsay and Mr. Willingham cannot avoid that problem by not identifying the source of his alleged knowledge. That is particularly true since it is likely based on hearsay from statements by the Defendant, Jay Temme, who has refused to participate in discovery and has invoked his Fifth Amendment privilege. Similarly, Mr. Willingham’s statement that “[t]hat is why the assets were acquired by Harbour V” lacks foundation and is presumably based, if there is a basis at all, on inadmissible hearsay. Indeed, all of paragraph 3 suffers from that defect.

5. Finally, the Court should also strike paragraph 3 because it is sufficiently vague that its any possible probative value is outweighed by its unfairly prejudicial effect. Indeed, its vagueness confirms that it lacks any proper foundation. For example, Mr. Willingham discusses an alleged due diligence he participated in regarding “a group of 31 high-end properties.” But he does not provide even a generic description of those properties, much less identify them or describe when he conducted the alleged due diligence. Nor does he offer even a single activity that was

included in this alleged “due diligence.” This type of vague testimony should not be considered as probative evidence in considering Plaintiff’s motion for summary judgment.

6. In addition, the Willingham Declaration should be stricken because the Defendant has used his privilege under the Fifth Amendment to shield himself from discovery. See, e.g., Plaintiff’s Motion for Summary Judgment and Brief at pp. 21-22 (Doc. No. 194, page 29 and 39), which is incorporate herein.

Because of the defects noted above, the Commission respectfully asks the Court to strike Paragraphs 3, 4, and 5 of the Declaration of Keith Willingham.

Respectfully submitted,

/s/ David B. Reece

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CERTIFICATE OF CONFERENCE

I certify that I have complied with the meet and confer requirement in Local Rule CV-7(h). On August 22, 2013, I telephoned and spoke with counsel for Defendant, John Helms, regarding this motion. Given the nature of the relief sought and the fact that the evidence at issue relates to a dispositive motion, no agreement could be reached.

/s/ David B. Reece

David B. Reece

CERTIFICATE OF SERVICE

I certify that on August 22, 2013, I electronically filed the foregoing *Objection to and Motion to Strike Portions of the Declaration of Keith Willingham* with the Clerk of the Court for the Eastern District of Texas, Sherman Division, using the CM/ECF system. The electronic case filing system will send a “Notice of Electronic Filing” to all counsel of record who has consented in writing to accept service of this document by electronic means.

/s/ David B. Reece
David B. Reece