

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

**SECURITIES AND EXCHANGE
COMMISSION,**

Plaintiff,

v.

**JAMES G. TEMME,
STEWARDSHIP FUNDS, LP
Defendants.**

Civil Action No. 4:11cv655

**DEFENDANT’S RESPONSE TO PLAINTIFF’S OBJECTION TO AND MOTION
TO STRIKE PORTIONS OF THE DECLARATION OF KEITH WILLINGHAM**

Defendant James G. Temme (“Mr. Temme”), responds as follows to Plaintiff’s Objection to and Motion to Strike Portions of the Declaration of Keith Willingham (“Willingham Declaration”), and would respectfully show as follows:

I.

INTRODUCTION

The Willingham Declaration’s declarant, Keith Willingham (“Mr. Willingham”), was identified as a fact witness over a year ago in Mr. Temme’s Initial Disclosures. *See App.* in Support of Plaintiff’s MSJ at 553 (Temme Initial Disclosures of June 5, 2012). The Willingham Declaration establishes that Mr. Willingham held multiple sales positions with Stewardship Fund, culminating in Team Sales Leader. Willingham Decl. ¶ 2. As set forth in his Declaration, in those positions, he was involved in, among other things, selling properties, calling homeowners and resetting mortgages as acquired properties were worked, and conducting due diligence on potential asset purchases. Willingham Decl. ¶ 2. Accordingly, Mr. Willingham has personal knowledge of sales and purchases of assets by Stewardship Funds. *See id.*

Mr. Temme submitted Mr. Willingham's Declaration for three purposes: (1) to testify about his personal knowledge of a transaction involving an entity called Harbor V (Willingham Decl. ¶ 3); (2) to explain, in response to assertions in the Receiver's Declaration, why a lack of payment directly to Home Shield, as an owner of assets, does not mean that assets were not purchased from Home Shield (Willingham Decl. ¶ 4); and (3) to testify that, in Stewardship's business, as a matter of fact, asset owners rarely, if ever, release certain types of information about the assets being sold before the closing.

Plaintiff objects to the Willingham Declaration as lacking personal knowledge and as constituting expert opinion testimony. The Court should overrule these objections. The Declaration itself demonstrates that it is based on Mr. Willingham's personal knowledge and that it is factual testimony or admissible lay opinion testimony.

II.

ARGUMENT

A. Paragraph 4 Is Admissible.

Plaintiff asserts that paragraph 4 of the Willingham Declaration contains expert opinion testimony and that the Court should exclude all of it because Mr. Willingham was not designated as an expert witness. Plaintiff is incorrect.

Paragraph 4 of the Willingham Declaration responds to the non-expert assertions in paragraph 29 of the Aurzada Declaration (Mr. Aurzada was neither designated nor offered as an expert), and in the third bullet point starting on page 4 of Plaintiff's Summary Judgment Motion, that a lack of direct payment to a company called Home Shield means that Stewardship Fund did not purchase assets from Home Shield for Stewardship Fund No. 4. *See* Pl. MSJ App. 00016 (Aurzada Decl. ¶ 29); Pl. MSJ at 4-5.

The first three sentences of paragraph 4 describe Mr. Willingham's personal knowledge of the fact that sellers use servicers and that payments for an asset package are often sent to servicers rather than the owners of the assets. These statements are factual and based on his personal knowledge and observation from his work at Stewardship. *See* Willingham Decl. ¶ 2, 4.

To the extent that these statements could be construed as opinions, they are admissible lay opinions under Rule 701, because they are based on particularized factual knowledge that Mr. Willingham has by virtue of his positions at Stewardship. As the Advisory Committee's Notes to Rule 701 explain:

[M]ost courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. *See, e.g., Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (3rd Cir. 1993) (no abuse of discretion in permitting the plaintiff's owner to give lay opinion testimony as to damages, ***as it was based on his knowledge and participation in the day-to-day affairs of the business***). Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, ***but because of the particularized knowledge that the witness has by virtue of his or her position in the business***.

Fed. R. Evid. 701, Adv. Comm. Notes to 2000 Amendments (all emphasis added). Likewise, Mr. Willingham's statements about how common it was to make payments to servicers rather than owners were because of his particularized knowledge from his position in Stewardship's business.

The last sentence of paragraph 4 states: "As such, if Home Shield was an owner of assets within an asset package, it would be typical for the purchase money to be sent to someone other than Home Shield." Willingham Decl. ¶ 4. This statement simply applies the prior factual statements in the paragraph to the specific situation of Home Shield. Even without this sentence, a fact finder could and would come to the same conclusion as to Home Shield, specifically, based on the fact that purchase money was often sent to servicers rather than owners. As such,

the statement is within permissible lay opinion testimony under Rule 701, because, based on the facts previously stated, “it would have been apparent to a ‘normal person’ in [the witness’ position].” *Soden v. Freightliners Corp.*, 714 F.2d 498, 512 (5th Cir. 1983). Additionally, because a fact finder could and would come to the same conclusion even without the fourth sentence, its exclusion would not detract from Mr. Temme’s summary judgment proof.

B. Paragraph 5 Is Admissible.

Paragraph 5 of the Willingham Declaration concerns boarding tape information. Plaintiff again objects that this paragraph contains expert opinion testimony and that the Court should exclude all of it because Mr. Willingham was not designated as an expert witness. Plaintiff is incorrect.

The first four sentences set forth factual information for purposes of background—what boarding tapes are, what information they contain, and what information is nonpublic. The sixth sentence states, factually based on Mr. Willingham’s personal knowledge, that property owners “rarely, if ever, release this information prior to a transaction closing.” Each of these statements is factual and based on Mr. Willingham’s personal knowledge. If they could be characterized as opinion, they would be permissible lay opinion within Rule 701 for the reasons set forth above—that they are admissible “not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business.” Fed. R. Evid. 701, Adv. Comm. Notes to 2000 Amendments.

The fifth and seventh sentences state that the fact that a purchaser has boarding tape information indicates that the owner has released the information to the purchaser and that the purchaser has therefore purchased the assets. These are straightforward and logical inferences

that a fact finder can draw from the other factual statements in the paragraph. As such, the statements are within permissible lay opinion testimony under Rule 701, because, based on the facts previously stated, they “would have been apparent to a ‘normal person’ in [the witness’ position].” *Soden v. Freightliners Corp.*, 714 F.2d 498, 512 (5th Cir. 1983). Additionally, because a fact finder could and would come to the same conclusions even without the fifth and seventh sentences, their exclusion would not detract from Mr. Temme’s summary judgment proof.

C. Paragraph 3 Is Admissible.

Plaintiff objects to Paragraph 3 as lacking personal knowledge, lacking “foundation” and being vague. The Court should overrule all of these objections.

Paragraph 3 of the Willingham Declaration responds to one of the Plaintiff’s claims concerning Stewardship Fund No. 6. *See* Defendant’s Response to Plaintiff’s MSJ at 12; Plaintiff’s MSJ at 5-6. Plaintiff claims that an entity called Harbour V acquired 31 properties from Southwest Securities and that these were supposed to go to Stewardship Fund No. 6. *See* Plaintiff’s MSJ at 5 (referring to acquisition of 31 properties for “another entity” and citing ¶¶ 44-46 of the Aurzada Decl.); App. In Support of Plaintiff’s MSJ at 18-19 (Aurzada Decl. ¶¶44-46) (identifying the entity that acquired the 31 properties as Harbour V and citing emails attached to Aurzada Decl. as Exh. 15); App. In Support of Plaintiff’s MSJ at 437 (Aurzada Decl., Exh. 15) (identifying seller as Southwest Securities).

Paragraph 3 of the Willingham Declaration sets forth Mr. Willingham’s personal knowledge concerning this transaction. He describes the transaction as involving “31 high-end properties [that] were to be purchased by an entity called Harbour V...for the benefit of our investors” and that “[t]he seller was Southwest Securities.” Willingham Decl. ¶ 3. Plaintiff does

not claim there was another Stewardship-related transaction involving 31 properties, Harbour V, and Southwest Securities. Mr. Willingham is clearly discussing the same transaction as Plaintiff, and his testimony is not inadmissibly vague.

Contrary to Plaintiff's objection, the Willingham Declaration shows that Mr. Willingham bases all of the statements in paragraph 3 on his personal knowledge. In paragraph 2, he states that his duties at Stewardship Fund included "conducting due diligence on potential purchases." In paragraph 3, he states that he personally participated in the due diligence on this transaction. He therefore has personal knowledge of it, which he declares. *See Willingham Decl.* ¶ 1. All of the statements in paragraph 3, including the statements about the individual who represented Harbour V, Charles Vose, concern the transaction on which Mr. Willingham participated in the due diligence. He has personal knowledge and an adequate foundation.

D. The Court Should Overrule Plaintiff's Objections Regarding Initial Disclosures About Mr. Willingham.

Plaintiff also asks the Court to strike the Willingham Declaration because Plaintiff says that his declaration covers matters outside of what Mr. Temme's Initial Disclosures describe as the general subject matter of his testimony. The Court should reject this.

In June 2012, Mr. Temme identified Mr. Willingham as a fact witness, gave his address and phone number, and described the relevant subject areas that Mr. Temme believed he knew. This was done in good faith at the time. In connection with responding to Plaintiff's summary judgment motion, Mr. Temme's counsel began trying to identify individuals other than Mr. Temme, who is exercising his Fifth Amendment rights, who knew about specific issues that Plaintiff raised in its summary judgment motion. Counsel interviewed Mr. Willingham, determined that he had relevant knowledge, and his declaration was served on Plaintiff promptly thereafter.

The prompt disclosure of the Willingham Declaration satisfies Mr. Temme's duty to supplement his initial disclosures. Rule 26(e)(1)(A) provides that a party must supplement initial disclosures "in a timely manner if the party learns in some material respect the disclosure or response is incomplete or incorrect, *and* if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(1)(A) (emphasis added). In this case, the declaration "made known" the information to Plaintiff "in writing" and in "a timely manner." Therefore, Mr. Temme satisfied his duty to supplement. Plaintiff does not claim otherwise and does not claim prejudice. Nor could Plaintiff claim prejudice, since Plaintiff had over a year to contact Mr. Willingham and since discovery is still ongoing.

E. Mr. Temme's Invocation Of His Fifth Amendment Rights Does Not Preclude Him From Offering Testimony From Others.

Finally, Plaintiff argues that Mr. Temme should not be able to respond to a summary judgment motion by presenting a declaration from someone else because *Mr. Temme* is invoking his Fifth Amendment rights. This is incorrect. Although Mr. Temme may be precluded from offering his *own* testimony in response to a summary judgment motion (which he has not done), his invocation of his Fifth Amendment rights does not preclude him from calling witnesses at trial or offering, in response to a summary judgment motion, declarations from others, such as Mr. Willingham, who are not invoking their Fifth Amendment rights. Plaintiff's cases concern excluding testimony by persons who have invoked their Fifth Amendment rights, not testimony from other witnesses. *See* Motion to Strike Willingham Decl. at 4 (referring to Plaintiff's MSJ at 21-22); Plaintiff's MSJ at 21-22 (citing cases).

III.

CONCLUSION

Mr. Temme respectfully requests that the Court overrule Plaintiff's objections and deny the motion to strike.

Respectfully submitted:

/s/ John Helms, Jr.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document has been served on counsel of record via the Court's CM/ECF system.

/s/ John Helms, Jr.

John Helms, Jr.