

1 **MULCAHY LLP**

2 James M. Mulcahy (SBN 213547)

3 *jmulcahy@mulcahyllp.com*

4 Kevin A. Adams (SBN 239171)

5 *kadams@mulcahyllp.com*

6 Four Park Plaza, Suite 1230

7 Irvine, California 92614

8 Telephone: (949) 252-9377

9 Facsimile: (949) 252-0090

10 *Attorneys for Plaintiffs and Counter-Defendants*

11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**

13 BENNION & DEVILLE FINE
14 HOMES, INC., a California
15 corporation, BENNION & DEVILLE
16 FINE HOMES SOCAL, INC., a
17 California corporation, WINDERMERE
18 SERVICES SOUTHERN
19 CALIFORNIA, INC., a California
20 corporation,

21 Plaintiffs,

22 v.

23 WINDERMERE REAL ESTATE
24 SERVICES COMPANY, a Washington
25 corporation; and DOES 1-10

26 Defendant.

Case No. 5:15-CV-01921 R (KKx)
Hon. Manual L. Real

**OBJECTION TO DECLARATIONS
OF MICHAEL TEATHER AND
PAUL S. DRAYNA FILED IN
SUPPORT OF WINDERMERE
REAL ESTATE SERVICES
COMPANY’S APPLICATIONS FOR
RIGHT TO ATTACH ORDERS
AND ORDERS FOR ISSUANCE OF
WRITS OF ATTACHMENT [D.E.
72]**

Date: December 19, 2016
Time: 10:00 a.m.
Courtroom: 8

27 AND RELATED COUNTERCLAIMS

1 Plaintiffs and Counter-Defendants Bennion & Deville Fine Homes SoCal,
 2 Inc. (“B&D SoCal”), Windermere Services Southern California, Inc. (“Services
 3 SoCal”), and Counter-Defendants Robert Bennion (“Bennion”) and Joseph Deville
 4 (“Deville”) (collectively, the “B&D Parties”) hereby respectfully submit the
 5 following evidentiary objections to the Declaration of Michael Teather and
 6 Declaration of Paul S. Drayna submitted by Defendant Windermere Real Estate
 7 Services Company (“WSC”) in support of its Applications for Right to Attach
 8 Order and Orders for Issuance of Writs of Attachment (“Application for
 9 Attachment”).

10 **OBJECTIONS TO DECLARATION OF MICHAEL TEATHER [D.E. 72-8]**

TEXT CITATION	ASSOCIATED DECLARATION TEXT	OBJECTION
Paragraph 5	“As a result of my discussions with Mr. Sunderland, the parties were able to reach an agreement that resolved all of the issues that were outstanding between them at that time.” (Decl. of Michael Teather in Support of Countercl. Windermere Real Estate Servs. Co.’s App. For Right to Attach Orders and Orders For Issuance of Writs of Attachment (“Teather Decl.”), ¶ 5.)	Improper legal conclusion. Fed. R. Evid. 701. Conclusory testimony about the existence, or interpretation, of a contract constitutes a legal conclusion opinion testimony, in violation of Federal Rule of Evidence 701. <i>See e.g. Aguilar v. Int’l Longshoremen’s Union Local No. 10</i> , 966 F.2d 443, 447 (9th Cir. 1992) (excluding expert testimony arriving at conclusion that a contract exists); <i>Marx & Co., Inc. v. Diners’ club, Inc.</i> , 550 F.2d 505, 509, 511 (2d Cir. 1977) (testimony regarding existence and interpretation of contract was improper “legal conclusion” opinion testimony); <i>Mutual Life Ins. Co. of New York v. Phinney</i> , 178 U.S. 327, 342–43 (1900) (where both parties are privy to the terms of a contract,

		<p>one party's statement of his interpretation thereof is an “expression of an opinion as to the law of the contract, and not a declaration or admission of a fact”). Teather improperly characterizes discussions with Mr. Sunderland as an agreement, which is nothing more than a legal conclusion.</p>
<p>Paragraph 5</p>	<p>“As a part of the parties’ agreement, WSC agreed to extend Bennion and Deville’s balloon payment over time and to credit B&D Fine Homes and B&D Fine Homes SoCal for amounts they claimed to have expended in combatting Windermere Watch. In exchange, Mr. Sunderland’s clients agreed that WSC was not in breach of the Modification Agreement and that there was nothing more WSC was required to do under that agreement unless the activities of Windermere Watch changed in a material way.” (Teather Decl., ¶ 5.)</p>	<p>Improper legal conclusion. Fed. R. Evid. 701. Conclusory testimony about the existence, or interpretation, of a contract constitutes a legal conclusion opinion testimony, in violation of Federal Rule of Evidence 701. <i>See e.g. Aguilar</i>, 966 F.2d at 447; <i>Marx & Co., Inc.</i>, 550 F.2d at 509, 511; <i>Mutual Life Ins. Co. of New York</i>, 178 U.S. at 342–43. By conclusively stating that the parties had an agreement, then interpreting the terms of the putative agreement, Teather offers nothing more than improper legal conclusions.</p>
<p>Paragraph 5</p>	<p>“WSC would not have entered into this agreement without the Liable Parties’ agreement in this regard.” (Teather Decl., ¶ 5.)</p>	<p>Improper legal conclusion. Fed. R. Evid. 701. Conclusory testimony about the existence, or interpretation, of a contract constitutes a legal conclusion opinion testimony, in violation of Federal Rule of Evidence 701. <i>See e.g. Aguilar</i>, 966 F.2d at 447; <i>Marx & Co., Inc.</i>, 550</p>

1		F.2d at 509, 511; <i>Mutual Life Ins. Co. of New York</i> , 178 U.S. at 342–43. This statement is improper as a legal conclusion because it states that the parties entered into an agreement.
2		
3		
4		
5	Page 2, Line	“On June 3, 2014, I drafted a letter to Mr. Sunderland confirming the parties’ agreements on these issues and attaching an amendment to the Promissory Note issued by Bennion and Deville to WSC’s principals that extended out the balloon payment.” (Teather Decl., at 2.)
6	10	
7		
8		
9		
10		
11		
12		
13		
14		
15		Improper legal conclusion. Fed. R. Evid. 701. Conclusory testimony about the existence, or interpretation, of a contract constitutes a legal conclusion opinion testimony, in violation of Federal Rule of Evidence 701. <i>See e.g. Aguilar</i> , 966 F.2d at 447; <i>Marx & Co., Inc.</i> , 550 F.2d at 509, 511; <i>Mutual Life Ins. Co. of New York</i> , 178 U.S. at 342–43. This statement improperly characterizes the letter as confirming the parties’ agreement. Whether the parties entered into an agreement is a legal conclusion.

OBJECTIONS TO DECLARATION OF PAUL S. DRAYNA [D.E. 72-6]

TEXT CITATION	ASSOCIATED DECLARATION TEXT	OBJECTION
19		
20	Paragraph 14,	Lacks foundation. Fed. R. Evid. 602. Improper opinion testimony. Fed. R. Evid. 701. Drayna does not have the personal knowledge to lay the proper foundation or support his opinion as to what Mr. Sunderland perceived, or his thought process when drafting the March 3rd letter. <i>See Redwind v. W. Union, LLC</i> , No. 3:14-CV-01699-AC, 2016 WL 1732871, at *7 (D. Or. May 2, 2016) (excluding portion of declaration where
21	Lines 1-3	
22		
23		
24		
25		
26		
27		
28		

1 2 3 4 5 6 7 8	Issuance of Writs of Attachment (“Drayna Decl.”), ¶ 5.)	declarant testified as to other person’s mental state as speculative and conjectural for lack of personal knowledge); <i>see also Spurlock v. Fox</i> , No. 3:09-CV-0756, 2010 WL 3807167, at *21 (M.D. Tenn. Sept. 23, 2010) (rejecting testimony relating to state of mind of third party as not be based on personal knowledge thus speculative and inadmissible opinion testimony).
9 10 11 12 13 14 15	Paragraph 15 “I never received any notification that this email was not transmitted to Mr. Sunderland.” (Drayna Decl., ¶ 15.)	Lacks foundation. Fed. R. Evid. 602. Drayna offers this statement in an attempt to imply that the e-mail was received by Mr. Sunderland. However, Drayna lacks personal knowledge about whether the e-mail was in fact transmitted, and whether Mr. Sunderland received the e-mail. Therefore, this statement is improper under Federal Rule of Evidence 602.

16 In light of the above objections, the B&D Parties respectfully request that
17 the Court not consider the corresponding declaration testimony in its analysis of
18 WSC’s Application for Attachment.

19 Dated: November 29, 2016

MULCAHY LLP

20
21 By: /s/ Kevin A. Adams

22 Kevin A. Adams
23 *Attorneys for Plaintiffs/Counter-*
24 *Defendants Bennion & Deville Fine*
25 *Homes, Inc., Bennion & Deville Fine*
26 *Homes SoCal, Inc., Windermere*
27 *Services Southern California, Inc.,*
28 *and Counter-Defendants Robert L.*
Bennion and Joseph R. Deville