

NO. C-1-PB-14-001245

IN RE: § IN THE PROBATE COURT
§
§ NO. 1 OF
§
TEL OFFSHORE TRUST § TRAVIS COUNTY, TEXAS

THE CORPORATE TRUSTEE’S FIRST AMENDED RESPONSE TO RNR PRODUCTION LAND AND CATTLE’S REQUEST FOR DISCLOSURE

TO: RNR PRODUCTION LAND AND CATTLE, by and through its attorney of record, Shannon H., Ratliff, Ratliff Law Firm, P.L.L.C., 600 Congress Avenue, Suite 3100, Austin, Texas 78701.

Pursuant to Rule 194 of the Texas Rules of Civil Procedure, The Bank of New York Mellon Trust Company, N.A., as Corporate Trustee of the TEL Offshore Trust Company (“The Corporate Trustee”) hereby responds to RNR’s Request for Disclosure.

REQUEST FOR DISCLOSURE (a):

The correct names of the parties to this lawsuit.

RESPONSE:

The Bank of New York Mellon Trust Company, N.A., as Corporate Trustee, and Gary C. Evans, Jeffrey S. Swanson, Thomas H. Owen, Jr., and Daniel Conwill, as Individual Trustees of the TEL Offshore Trust.

REQUEST FOR DISCLOSURE (b):

The names, address, and telephone number of any potential parties.

RESPONSE:

The Corporate Trustee is not aware of other potential parties.

REQUEST FOR DISCLOSURE (c):

The legal theories and, in general, the factual basis of Bank of New York Mellon’s claims and or defenses.

RESPONSE:

The Corporate Trustee's Counterclaim asks the Court to modify the Trust Agreement to allow the Trust to terminate by approval of a court of competent jurisdiction, and further asks the Court to terminate the Trust. The Corporate Trustee also seeks reimbursement of expenses incurred by the Corporate Trustee and fees owed to the Corporate Trustee, pursuant to Sections 6.06, 7.04, 7.05, and 7.06 of the Trust Agreement. The Trust further seeks attorneys fees and costs pursuant to Section 114.064 of the Texas Trust Code and Section 7.06 of the Trust Agreement. Further, the Corporate Trustee is entitled to indemnification and full reimbursement from the Trust Estate against and from any and all liability, expense (including counsel fees and expenses incurred in preparing for and defending claims or suits), claim, damage, or loss incurred by the Trustees pursuant to Section 7.03 of the Trust Agreement. The Corporate Trustee also asserts a first priority lien pursuant to Section 7.03 of the Trust Agreement to the monies in the segregated Trust account holding the proceeds of the sale of the Trust's Overriding Royalty Interest that was created pursuant to the Final Judgment and Order of the Court dated January 15, 2016 in Cause No. C-1-PB-16-000096. For additional legal theories and facts supporting the Corporate Trustee's claims, see the Corporate Trustee's operative Answer and Counterclaim.

The DeGolyer & MacNaughton ("D&M") report dated May 15, 2009 was not a year-end report, and therefore, pursuant to the Trust Agreement, could not be the basis for an automatic termination of the Trust, as alleged by RNR. RNR's claims are also barred by the applicable statute of limitations, and the discovery rule does not apply to prevent such bar by limitations. Further, the Corporate Trustee did not breach any fiduciary duty to RNR. At the time of the May 15, 2009 D&M report, RNR owned no units in the Trust and no duties were owed by the Trust to RNR. Further, the Corporate Trustee's compensation never exceeded what the Trust Agreement allows. In fact, the Corporate Trustee obtained less fees than the Trust Agreement expressly permits and in certain years, no fees at all. Charging no compensation or less compensation than the Trust Agreement allows is not a breach of any duty that the Corporate Trustee owes to Trust beneficiaries. Moreover, the Trust Agreement's exculpatory clause shields the Corporate Trustee from liability for breach of fiduciary duty unless that breach was committed with gross negligence, bad faith, or fraud. No such breaches occurred by the Corporate Trustee, and RNR is therefore unable to demonstrate any bad faith or gross negligence on the part of the Corporate Trustee. The Corporate Trustee has at all times acted competently, prudently, in good faith, in the interest of the Trust, and in accordance with its obligations under the Trust Agreement. RNR is not entitled to any damages, including attorneys' fees and costs, from the Trust.

The Trustees' responsibilities are set forth in the Trust Agreement. The Trustees have no power to "engage in any business or investment activity, except as permitted in Section 6.09, of any kind whatsoever." Trust Agreement at ¶ 6.05. In addition, "[t]he Trustees shall be under no obligation to diversify the Trust's assets or to dispose of any wasting assets." *Id.* at ¶ 6.14. In other words, the Trustees have no duty to do what the Ad Litem claims they have should have done – i.e., sell the Trust assets earlier than they did.

The Trust Agreement makes clear that the Trustees owe no duties other than those specifically enumerated in the agreement. As set forth in Section 3.04, "[t]he sole interest of each owner of a Unit shall be his pro rata portion of the Beneficial Interest and the obligations of the

Trustees expressly created under this Trust Agreement with respect to the Beneficial Interest.” Trust Agreement at ¶ 3.04. As stated above, not only does the Trust Agreement not “expressly create” any duty to sell “wasting assets,” but it specifically eliminates any such duty.

Nothing in the Trust Agreement imposes, let alone expressly creates, any affirmative duty on the Trustees to seek a judicial modification or termination of the Trust. To the contrary, Section 10.01 states that “[n]o person shall have the right or power to terminate, revoke, alter, amend or change this Trust Agreement or any provisions hereof except as expressly provided in Article IX or in this Article X.” Trust Agreement at ¶ 10.01. Articles IX and X permit termination only in narrow circumstances, such as where “the total future net revenues attributable to the Overriding Royalty Interest, as determined by independent petroleum engineers as of the end of any year, are less than \$2 million” or where termination was approved by the affirmative vote of unitholders holding a majority of the Trust units. Trust Agreement at ¶ 9.01(a)-(b). Nothing in the Trust Agreement obligates the Trustees to call a meeting to seek termination, let alone to seek a judicial modification of the agreement.

The Trust Agreement likewise forecloses RNR’s claim that the Trustees breached their duties by continuing to pay Trust expenses and accept compensation during the years after Hurricane Ike (and by borrowing funds from the a third party to pay Trust expenses). The Trust Agreement expressly authorizes the Trustees to “use all money received by the Trust for the payment of all liabilities of the Trust, including but not limited to all expenses, taxes, and liabilities incurred of all kinds, compensation to the Trustees for their services pursuant to Sections 7.04 and 7.05 hereof, and compensation to such parties as may be consulted pursuant to Section 7.06 hereof.” Trust Agreement at ¶ 6.06. In the event “the cash on hand is not sufficient to pay liabilities of the Trust then due . . . , the Trustees are authorized, but not required, to borrow . . . such amounts as are required after use of any available Trust funds to pay such liabilities” *Id.* at ¶ 6.08. “In the event of such borrowings, the Trustees shall suspend further Trust distributions . . . until the indebtedness created by such borrowing has been paid in full.” *Id.* The Trust Agreement also permits the Trustees to “sell all or a portion of” any Trust assets to pay liabilities. *Id.* at ¶ 6.04.

During the years after Hurricane Ike, investors in TELOZ were free to sell their units if they disagreed with the Trustees’ decisions regarding the future of the Trust. TELOZ’s public SEC filings expressly disclosed the challenges posed by Hurricane Ike and the risks that redevelopment may not occur. Investors could thus decide for themselves whether they wanted to buy or sell units in light of TELOZ’s public disclosures. While RNR asserts it should have been obvious to the Trustees from day one that a profitable redevelopment of the Trust properties was hopeless, the market plainly did not share that view.

For further answer, see the Corporate Trustee’s operative pleadings (Answer and Counterclaim) regarding RNR’s claim, which is incorporated herein for all purposes.

REQUEST FOR DISCLOSURE (d):

The amount and method of calculating economic damages.

RESPONSE:

The Corporate Trustee is seeking its attorneys' fees and costs in this probate proceeding, which are accruing, and seeking reimbursement for services and expenses incurred out of the Trust Estate. The amount of the attorneys' fees are set forth in the Corporate Trustee's Amended Designation of Expert Witnesses, and continue to accrue. The expenses include (1) a Note in the amount of \$1,056,885.00, which became due and payable on January 1, 2017; (2) invoices from Merrill Corporation; (3) invoices from American Stock Transfer & Trust Company, LLC; (4) invoices from Andrews Kurth Kenyon LLP for SEC Reporting; (5) invoices from Deloitte & Touche LLP; (6) invoices from Martindale Consultants, Inc.; (6) invoice from Melanie S. Carter, CPA; and (7) invoices from Sirius Solutions, which have been and will be the subject of the Corporate Trustee's Motion(s) to Approve Payment of the Trust's Ordinary Business Expenses Owed to Third Parties. The Corporate Trustee also seeks its expenses for consultants; its payments of the Attorney Ad Litem Fees, including expert expenses; and the compensation owed to the Corporate Trustee.

REQUEST FOR DISCLOSURE (e):

The name, address and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case.

RESPONSE:

Gary C. Evans
c/o Daniel M. McClure
Norton Rose Fulbright US, L.L.P.
1301 McKinney, Suite 5100
Houston, TX 77010
Telephone: (713) 651-5159

Mr. Evans is an individual trustee of the Trust and has knowledge concerning the Trust.

Jeffrey S. Swanson
c/o Daniel M. McClure
Norton Rose Fulbright US, L.L.P.
1301 McKinney, Suite 5100
Houston, TX 77010
Telephone: (713) 651-5159

Mr. Swanson is an individual trustee of the Trust and has knowledge concerning the Trust.

Thomas H. Owen, Jr.
c/o Daniel M. McClure
Norton Rose Fulbright US, L.L.P.
1301 McKinney, Suite 5100
Houston, TX 77010
Telephone: (713) 651-5159

Mr. Owen is an individual trustee of the Trust and has knowledge concerning the Trust.

Daniel Conwill
601 Poydras Street, Suite 2525
New Orleans, Louisiana 70130
(504) 527-0333

Mr. Conwill is a former individual trustee for the Trust and has knowledge concerning the Trust.

Michael Ulrich
c/o Craig A. Haynes
Thompson & Knight LLP
1722 Routh Street, Suite 1500
Dallas, Texas 75201
Telephone: (214) 969-1700

Mr. Ulrich is a representative of Bank of New York Mellon Trust Company and has knowledge concerning the Trust.

Sarah Newell
c/o Craig A. Haynes
Thompson & Knight LLP
1722 Routh Street, Suite 1500
Dallas, Texas 75201
Telephone: (214) 969-1700

Ms. Newell is a Vice President of the Bank of New York Mellon Trust Company and has knowledge concerning the Trust.

George Wilson
Robert K. Hempel
DeGolyer and MacNaughton
5001 Spring Valley Road
Suite 800 East
Dallas, Texas 75244
(214) 368-6391

Mr. Wilson and Mr. Hempel have knowledge concerning the Trust's assets.

Robert W. Poindexter
Alex Kuiper
Chevron
6001 Bollinger Canyon Road, D2062
San Ramon, California 94583-2324
(925) 842-0752

Mr. Poindexter and Mr. Kuiper work with Chevron and may have knowledge concerning the Trust.

RNR Production Land and Cattle Company, Inc.
Roy T. Rimmer
Paul Willingham
c/o Shannon H. Ratliff
Ratliff Law Firm PLLC
600 Congress Avenue, Suite 23100
Austin, Texas 78701
Telephone: (512) 493-9601

RNR Production Land and Cattle Company is a unit holder and a Plaintiff in this lawsuit.

Albert and Joyce Speisman, Unit Holders
c/o R. James George, Jr.
Attorney at Law
114 West 7th Street, Suite 1100
Austin, Texas 78701
Telephone: (512) 495-1400

The Speismans are unit holders and Plaintiffs in this lawsuit.

Broadridge
33 Boston Post Road, Floor 1
Marlborough, MA 01752
Telephone: (631) 254-7067

Broadridge acts on behalf of certain brokers/owners to distribute proxies, quarterly reports and other communications from the Trust to the unit holders.

All Unit Holders of the TEL Offshore Trust, consisting of known Record Holders, known Non-Objecting Beneficial Owners, and known Objecting Beneficial Owners.

The Corporate Trustee incorporates by reference all of those persons identified in any other parties' Responses to Request for Disclosure and reserves the right to call as a

witness at trial any person listed by any other party in response to requests for disclosure under Tex. R. Civ. P. 194.

The Corporate Trustee further states that its investigation continues and it reserves its right to supplement its responses to these disclosures as further information becomes available.

REQUEST FOR DISCLOSURE (f):

- (f) for any testifying expert:
 - (1) the expert's name, address and telephone number;
 - (2) the subject matter on which the expert will testify;
 - (3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;
 - (4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party:
 - (A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and,
 - (B) the expert's current resume and bibliography.

RESPONSE:

Please refer to Petitioners' Designation of Expert Witnesses filed on November 16, 2015, and the Corporate Trustee's Amended Designation of Expert Witnesses. The Corporate Trustee will supplement in accordance with the Scheduling Order.

REQUEST FOR DISCLOSURE (g):

Any discoverable and insuring agreements described in Rule 192.3(f).

RESPONSE:

Any responsive document will be produced.

REQUEST FOR DISCLOSURE (h):

Any settlement agreements described in Rule 192.3(g).

RESPONSE:

None.

REQUEST FOR DISCLOSURE (i):

Any witness statements described in Rule 192.3(h).

RESPONSE:

None.

REQUEST FOR DISCLOSURE (l):

- (l) the name, address, and telephone number of any person who may be designated as a responsible third party.

RESPONSE:

As settling parties, Gary C. Evans, Jeffrey S. Swanson, Thomas H. Owen, Jr., and Daniel Conwill are responsible third parties in this action.

THOMPSON & KNIGHT LLP

Respectfully submitted,

/s/ Craig A. Haynes

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ATTORNEYS FOR THE BANK OF NEW YORK
MELLON TRUST COMPANY, N.A., as
CORPORATE TRUSTEE OF THE TEL
OFFSHORE TRUST

CERTIFICATE OF SERVICE

I hereby certify that, on January 31, 2017, a true and correct copy of the foregoing has been served by email on counsel for RNR Production Land and Cattle, the Ad Litem and counsel for the Ad Litem, and counsel for Albert and Joyce Speisman. All other interested parties in this matter will be served in accordance with the Court's Order Directing Method of Service of Discovery dated June 9, 2016.

/s/ Rachelle H. Glazer

Rachelle H. Glazer