

IN RE: § IN THE PROBATE COURT
§
§ OF
§
TEL OFFSHORE TRUST § TRAVIS COUNTY, TEXAS

THE TRUSTEE’S OBJECTIONS
TO ATTORNEY AD LITEM’S FEBRUARY 2017 FEE APPLICATION

The Bank of New York Mellon Trust Company, N.A., as Corporate Trustee (the “Trustee”) of the TEL Offshore Trust (the “Trust”) files its Objections to the Attorney Ad Litem’s (“Ad Litem’s”) February 2017 Fee Application, filed February 14, 2017, which seeks \$136,592.47 in fees and expenses. The Trustee incorporates by reference its prior Objections to Ad Litem’s October 2016 and January 2017 Fee Applications and its Joint Objections to Attorney Ad Litem’s November 2016 Fee Application and further shows the Court as follows:

I. Objections

A. Fees should not be allowed for the prosecution of affirmative claims by the Ad Litem.

1. The fees sought in the February Fee Application are almost entirely for the prosecution by Ad Litem of affirmative claims for damages and other relief sought in the Amended Counterclaims, Original Petition, and now in the Second Amended Petition as Realigned Plaintiff (filed January 31, 2017). By these claims, Ad Litem is improperly seeking to sue derivatively on behalf of the whole Trust, or improperly bringing representative claims on behalf of thousands of unit holders, in violation of *In re XTO Energy Inc.*, 471 S.W.3d 126, 137 (Tex. App.—Dallas 2015, orig. proceeding). Ad Litem’s claims are legally unsupportable and should be dismissed. No fees should therefore be awarded to Ad Litem for pursuing those claims.

B. Texas Rule 244 and the Texas Trust Code do not allow recovery of fees for Ad Litem to pursue affirmative class claims such as breach of fiduciary duty purportedly for thousands of absent unit holders.

2. The fees sought by Ad Litem are unprecedented and not at all routine or usual. Ad Litem has exceeded the limited authority for which he was appointed to defend certain beneficiaries served by publication who did not answer the suit brought by the Trustees to modify the Trust to allow the sale of remaining assets and terminate the Trust, relief that Ad Litem did not oppose. Tex. R. Civ. P. 244 only authorized Ad Litem “to defend the suit” on behalf of parties served by publication. Further, neither Section 53.104 nor Section 115.014 of the Property Code authorize Ad Litem to file representative class-like claims for affirmative relief against the Trustee on behalf of thousands of unit holders, and to recover fees for prosecuting such claims.

3. Ad Litem has cited no case law in support of awarding fees to an attorney ad litem for pursuing affirmative claims, let alone the representative class-like claims asserted here. Tex. R. Civ. P. 244 only allows an attorney ad litem “a reasonable fee for his services, to be taxed as part of the costs” “to defend the suit on behalf of the defendant.” Section 115.014 (c) of the Texas Property (Trust) Code only allows an attorney ad litem compensation “in the manner provided by Section 114.064.” Section 114.064 states: “In any proceeding under this code the court may make such award of costs and reasonable and necessary attorney’s fees as may seem equitable and just.” The continued award of substantial monthly fees to Ad Litem, his “trial” counsel, and experts to pursue affirmative class-action claims, before the merits of those claims are finally determined, is neither equitable nor just. Further, Ad Litem is actually doing precisely what he (incorrectly) accuses the Trustee of doing—exhausting the remaining assets of the Trust estate (now held in a segregated account in the amount of approximately \$1.3 million) to pay

fees to himself, leaving nothing for the unit holders if and when his claims are proven unsuccessful. The court should not allow Ad Litem to gamble away the remaining limited assets of the Trust to pursue claims against the Trustee that will ultimately be shown to lack any basis in law or fact.

C. Interim fee awards to Ad Litem constitute improper fee-shifting to the Trustee.

4. Texas law is clear that attorneys' fees are not recoverable for a breach of fiduciary duty claim. See *Western Reserve Life Assur. Co. of Ohio v. Graben*, 233 S.W.3d 360, 377-78 (Tex. App.—Fort Worth 2007, no pet.). Yet Ad Litem is seeking to obtain just such a fee award in this case under the guise of "ad litem" fees. Further, to add insult to injury, Ad Litem is seeking to recover attorney's fees for his fiduciary duty claims even before he prevails on such claims in a final judgment, using the vehicle of "interim" fee awards.

5. Because there is a limited fund of approximately \$1.3 million in remaining Trust liquid assets, the likely exhaustion of those funds at the current burn rate by Ad Litem through trial in June 2017 will leave the Trustee unable to pay the Trust's on-going administrative expenses and existing liabilities of the Trust, including a \$1 million debt, and the Trustee's own on-going legal fees and expenses, through June 2017.

6. The end result is the improper shifting of the attorney's fees of the plaintiff (Ad Litem) to the defendant (the Trustee) on a claim for which Texas law does not allow such fee-shifting. Nor does any other Texas statute permit the recovery of fees for any of the other claims (including negligence and bad faith) asserted by Ad Litem in the Second Amended Petition. Indeed, even if Ad Litem were to bring his claims as a class action of all unit holders, he would not be entitled to recover attorney's fees unless and until he prevailed and obtained a common

fund recovery. In short, Ad Litem is attempting to misuse the ad litem fee statute to turn traditional Texas law of attorney's fees on its head.

D. Granting Ad Litem's fee application would ignore the Trustee's lien on Trust account funds.

7. Section 7.03 of the TEL Offshore Trust Agreement (the "Trust Agreement") provides that "[t]he Trustees shall have a lien upon the Trust Estate to secure them for such indemnification and reimbursement and for compensation to be paid to the Trustees." The Trustee's lien has priority over Ad Litem's unsecured demand for attorneys' fees. Granting Ad Litem's demand for his attorney's fees would violate the Trust Agreement and the Trustee's due process rights because the Court would, in effect, be determining the validity and priority of the Trustee's lien without a trial. Given the limited funds remaining in the Trust's segregated account, the continued award of substantial interim fees to Ad Litem through trial in June 2017 will result in insufficient funds remaining to satisfy the Trustee's rights to reimbursement and compensation.

E. Ad Litem cannot recover fees from the segregated Trust account for attempting to seek relief on behalf of the Trust and beneficiaries he has no authority to represent.

8. Ad Litem cannot recover attorneys' fees for asserting claims in his Second Amended Petition purportedly on behalf of the Trust and beneficiaries he admittedly has no authority to represent. Ad Litem admits that he has been appointed as attorney ad litem only "for the unit holders of [the Trust] who were served by publication and did not answer or appear in this proceeding...." Ad Litem's Second Amended Petition as Realigned Plaintiff at ¶ 1. But Ad Litem's suit nevertheless purports to seek relief for the *entire Trust* and on behalf of *all* the beneficiaries. Ad Litem's Second Amended Petition as Realigned Plaintiff ¶¶ 4 ("Other beneficiaries of the Trust are before the Court and are parties to this proceeding."); ¶ 54 (alleging

that “the conduct of the Trustees was so egregious that it probably constituted bad faith, gross negligence, reckless indifference or intentional breach of trust that would enable *the Beneficiaries* to recover damages for the Trustees’ breaches.”) (emphasis added); ¶ 64-66 (“BNYM owes the AAL parties (and, of course, *all the Beneficiaries*) a duty to act competently and prudently By their actions and inactions described above, BNYM failed to act competently and prudently. These breaches of BNYM’s duty have damaged *the Trust estate....*”) (emphasis added); ¶ 81 (“BNYM’s actions and inactions constitute gross negligence that proximately and directly caused damage and injury to *the Trust estate and the AAL Parties.*”) (emphasis added); ¶ 91 (“...[I]f all of Ad Litem’s compensation and expenses are not awarded against BNYM personally, *the Court can determine whether Ad Litem’s actions have benefitted all Beneficiaries of the Trust. Under the common fund doctrine, Ad Litem’s fees and expenses and those of his litigation counsel and experts should be borne by all who benefitted by his actions* and not solely by the AAL Parties.”) (emphasis added).

9. Under Texas law, a beneficiary of a trust—which Ad Litem purports to represent—cannot bring a derivative claim on behalf of the trust against the trustee. *In re XTO Energy Inc.*, 471 S.W.3d 126, 138 (Tex. App.—Dallas 2015, no pet.). But in no event does Ad Litem have authority to seek relief for other beneficiaries that he was never appointed to represent—beneficiaries other than those beneficiaries who were served by publication and did not answer or appear in this proceeding. Ad Litem cannot possibly recover his attorneys’ fees for representation of anyone other than the persons he was appointed to represent, which he estimates are about 42% of all unit holders in the Trust, about 2,700 out of a total of about 6,500 unit holders. *See* Ad Litem’s Response to Trustees’ Objections to September 2016 Fee Application, at 1.

10. Ad Litem should not be allowed to force the 58% of unit holders he was never appointed to represent to involuntarily fund his ill-advised class action against the Trustee for the 42% of unit holders he purports to represent. The accounts that hold the \$1.3 million in sales proceeds of the remaining assets of the Trust exist for the benefit of the entire Trust estate, including all beneficiaries and creditors, and Ad Litem should not be allowed to tap, and ultimately exhaust, those Trust funds to pay his fees for representation of only 42% of the beneficiaries.

F. Ad Litem cannot recover fees for overhead expenses.

11. Ad Litem's fee application includes charges totaling \$85,754.84 for Scott, Douglass & McConnico ("Scott Douglass"). Included within that total are \$947.02 in charges for overhead expenses, such as postage and photocopying. *See* Scott Douglass invoice attached to Ad Litem's February 2017 Fee Application at p. 17. It also includes charges totaling \$22,200.67 from William M. Cobb & Associates, Inc. ("William Cobb"). Included within that total are \$71.60 in "miscellaneous including reproduction etc." Such overhead expenses—akin to charges for air conditioning—are not properly chargeable to a client. Ad Litem should not be able to charge them to the Trust account.

G. Ad Litem cannot recover fees for clerical work.

12. Scott Douglass's invoice includes \$7,337.00 in charges for time that legal assistants spent performing clerical work on the case. Specifically, Scott Douglass seeks \$1,026.00 for 5.4 hours spent by its Litigation Support Manager Chris R. Stephens, including 1.3 hours on February 9, 2017 to "[c]ompile production data for uploading to vendor for hosting; Meet with vendor to review project scope." Scott Douglass seeks \$5,861.50 for 61.7 hours spent by one of its paralegals, Linda Martel, including numerous entries to "organize email

correspondence” and to “update case information document.” Finally, Scott Douglass seeks \$450.00 for 9.0 hours spent by Alex Petit for such tasks as “updat[ing] hearing notebooks,” and “prepar[ing] exhibit notebooks.”

13. Such “[c]lerical work is not recoverable in an award of attorneys’ fees.” *Black v. SettlePou, P.C.*, No. 3:10-CV-1418-K, 2014 U.S. Dist. LEXIS 97033, 2014 WL 3534991, at *6 (N.D. Tex. July 17, 2014); *see also Vela v. City of Hous.*, 276 F.3d 659, 681 (5th Cir. 2001) (denying recovery for clerical work that legal assistants performed); *Tow v. Speer*, 2015 WL 12765414, at *8 (“The approach in this circuit is that neither attorneys nor legal assistants may recover a fee award for clerical work.”); *Lewallen v. City of Beaumont*, No. Civ. A. 1:05-CV-733TH, 2009 U.S. Dist. LEXIS 62503, 2009 WL 2175637, at *7 (E.D. Tex. July 20, 2009), *aff’d*, 394 F. App’x 38 (5th Cir. 2010) (subtracting the number of clerical hours two attorneys worked from the total number of hours submitted). Ad Litem is not entitled to recover fees for clerical work that legal assistants and secretaries at Scott Douglass performed.

H. Ad Litem is not entitled to recover his expert witness fees.

14. As discussed above in Section B, there is no statutory authority for Ad Litem to recover his attorneys’ fees for pursuing affirmative claims, nor is there any authority for Ad Litem to recover fees he has paid to expert witnesses retained in support of those affirmative claims. Here, Ad Litem seeks \$17,100.00 for expert witness fees charged by Eggleston & Briscoe, LLP and \$22,200.67 for expert witness fees charged by William M. Cobb & Associates, Inc. None of these fees are recoverable under Texas law. *See Messier v. Messier*, 458 S.W.3d 155, 168 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (“Generally speaking, the fee of an expert witness constitutes an incidental expense in preparation for trial and is not recoverable as costs.”); *Bundren v. Holly Oaks Townhomes Ass’n*, 347 S.W.3d 421, 440 (Tex. App.—Dallas

2011, pet. denied) (“Because there is no statute or rule pertaining to the subject matter of this suit that authorizes the recovery of expert witness fees and expenses as costs, the trial court did not err by refusing to award appellees the requested fees and expenses.”); *Stanley Stores, Inc. v. Chavana*, 909 S.W.2d 554, 563 (Tex. App.–Corpus Christi 1995, writ denied) (holding the trial court erred in making an equitable award of expert witness fees absent statutory authorization); *Griffin v. Carson*, No. 01–08–00340–CV, 2009 WL 1493467, at *7 (Tex. App.-Houston [1st Dist.] May 28, 2009, pet. denied) (mem. op.) (“It is well-settled that, ‘regardless of any good cause shown, costs of experts are merely incidental expenses in preparation for trial and not recoverable.’”).

15. Additionally, by demanding fees only for his expert witnesses, Ad Litem, in effect, asks the Court to adjudicate his claim in his favor. No doubt Ad Litem would be opposed to the Trustees recovering their expert witness fees from the Trust account. Yet Ad Litem demands that the Court take sides in this lawsuit by awarding Ad Litem his expert witness fees. It would be inequitable to award Ad Litem his expert witness fees without awarding the Trustees their expert witness fees.

I. Ad Litem should not be allowed to waste the limited Trust account funds on claims that are uncertain and unlikely to succeed.

16. There are limited funds available in the Trust account. To permit Ad Litem to disburse those limited funds to his attorneys and expert witnesses litigating an uncertain and likely unsuccessful claim for a subset of the beneficiaries—before the claim has even been decided—would do nothing more than waste the Trust’s limited remaining funds.

II. Conclusion

For these reasons, the Trustee asks that the Court (1) sustain its Objections to Ad Litem's February 2016 Fee Application; (2) deny Ad Litem's February 2017 Fee Application; (3) award such other and further relief to which the Trustee shows itself justly entitled.

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 February 21, 2017, a true and correct copy of the foregoing has been served via Texas e-filing and email on Ad Litem, counsel for Ad Litem, Albert Speisman, and counsel for RNR Production Land and Cattle. I hereby certify that all other interested parties in this matter will be served in accordance with the Court's Order Directing Method of Service dated January 21, 2016.

/s/ Rachelle H. Glazer

Rachelle H. Glazer

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February 21, 2017

Via e-file

Probate Clerk
Travis County Probate Court
Travis County Court House
100 Guadalupe, Room 217
Austin, TX 78701

Re: *In Re Tel Offshore Trust*; Cause No. C-1-PB-14-001245; In the Probate Court of
Travis County, Texas.

Dear Clerk:

On behalf of The Bank of New York Mellon Trust Company, N.A., as Corporate Trustee,
I am this date e-filing with the Court the following:

(1) Proposed Order as to the Trustee's Objections to Attorney Ad Litem's February 2017
Fee Application.

I am also paying the \$2.00 fee for the signature for the Order, and am requesting a
conformed copy, when ready, be delivered to this office via email.

Thank you for your assistance with this filing.

Very truly yours,

/s/ Rachelle H. Glazer

Rachelle H. Glazer

Enclosure

c: All counsel of record, *via e-file*

CAUSE NO. C-1-PB-14-001245

IN RE: § IN THE PROBATE COURT
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TEL OFFSHORE TRUST § TRAVIS COUNTY, TEXAS

ORDER DENYING AD LITEM’S FEBRUARY 2017 FEE APPLICATION

On this day came on to be considered the Attorney Ad Litem’s February 2017 Fee Application filed by Glenn M. Karisch of the law firm of The Karisch Law Firm, PLLC. The Court, having considered the Ad Litem’s February 2017 Fee Application, and the Objections filed by the Corporate Trustee, finds that the February 2017 Fee Application should be DENIED.

It is therefore ORDERED that the Attorney Ad Litem’s February 2017 Fee Application is hereby DENIED.

DATED: _____

JUDGE PRESIDING