

NO. C-1-PB-14-001245

In Re: § **In the Probate Court No. 1**
§
§ **of**
§
TEL Offshore Trust § **Travis County, Texas**

**ATTORNEY AD LITEM'S RESPONSE TO THE TRUSTEES' JOINT
OBJECTIONS TO OCTOBER 2016 FEE APPLICATION**

Glenn M. Karisch, as Attorney Ad Litem representing the interests of the unit holders of TEL Offshore Trust (“Ad Litem”) who were served by publication and did not answer or appear in this proceeding (“AAL Parties”) responds to the Trustees’ Joint Objections to Attorney Ad Litem’s October 2016 Fee Application (“Objections”) as follows:

I. Ad Litem Has Asserted Meritorious Claims, and His Entitlement to Compensation is Not Contingent on Prevailing on Any or All of them.

Much of the Objections simply rehashes the Trustees’ arguments in their objections to the Ad Litem’s September 2016 Fee Application—arguments the Court rejected. Ad Litem fully incorporates Attorney Ad Litem’s Response to Trustees’ Objections to September 2016 Fee Application (“September Response”). The Trustees continue to insist that Ad Litem should receive no compensation—including no expenses for expert witnesses and trial counsel—because he lacks authority to pursue the claims against the Trustees. This argument fails for two reasons.

First, as the Court found in denying the Trustees’ first special exceptions, they are wrong. The Ad Litem is pursuing claims on behalf of the AAL Parties, whose interests

he was appointed to represent—at Trustees’ request. *See* September Response at 6-9 and Attorney Ad Litem’s Response to Trustees’ Special Exceptions and Plea to the Jurisdiction to Ad Litem’s Original Petition as Realigned Plaintiff and to Ad Litem’s First Amended Petition as Realigned Plaintiff at 3-6.

Second, although he is confident he will prevail on his claims, Ad Litem’s entitlement to compensation is not contingent on prevailing. Under Texas Trust Code § 115.004(e), Ad Litem is entitled to reasonable compensation in an amount set by the Court. The Court determines the reasonableness of the fee but not whether or not it should be paid. Nothing in this statute requires the Court to wait until the case is over to determine if an award of fees is equitable and just. Any requirement that an ad litem not be compensated until the end of the case would have a severe chilling effect on an attorneys’ willingness to serve as attorneys ad litem. Moreover, the Trustees did not object to interim payment of any of the Ad Litem’s fee applications until the September 2016 application.

At the October 3, 2016 hearing, the Ad Litem submitted evidence showing that the Trustees had committed serious breaches of fiduciary duty including:

1. By the end of 2009 the Trustees knew that as a result of Hurricane Ike the Trust was in dire financial condition. The situation was so bad they considered resigning. They also considered selling some or all of the overriding royalty interest, borrowing money, and calling a vote of the unit holders—as allowed under the Trust Agreement—to terminate the Trust. They did not disclose any of this to the beneficiaries, however;
2. Instead of pursuing any of the options they considered—including letting the beneficiaries decide whether to sell the overriding royalty

interest when it still had value and terminate the Trust—the Trustees chose to borrow money from the Corporate Trustee’s affiliate bank and sell portions of the property to make sure they themselves got paid, while the beneficiaries got nothing; and

3. The Corporate Trustee did not follow the Trust Agreement’s formula for compensating itself; rather, it arbitrarily determined that Ulrich spent half of his time on the TEL Trust and charged the same amount of hours every year, regardless of the actual time spent.

Tellingly, in all their sound and fury about the Ad Litem’s alleged lack of authority to sue, the Trustees have never denied that they did these things. If the Court determines that Ad Litem’s fees are reasonable, the Court is well within its discretion to determine on an interim basis that an award of fees to the Ad Litem for his work in discovering and suing for these breaches is equitable and just. As with their Motion to Stay, the Trustees hope to avoid having to answer for their breaches by depriving Ad Litem of the resources with which to pursue the claims. If, as the case progresses, facts emerge that made the Court change its view of what is equitable and just, the Court can always act accordingly.

Further, because Ad Litem has a statutory right to compensation, awarding it is not improper fee shifting. And it is not pre-adjudicating the case on the merits. Texas Trust Code § 115.004(e) provides that an ad litem is entitled to reasonable compensation, in an amount set by the Court, in manner determined by § 114.064. Under §114.064 the Court may award costs and reasonable and necessary attorney’s fees “as may seem equitable and just.” This compensation includes payment of Ad Litem’s expenses for experts and litigation counsel whom the Court authorized him to hire (without any prior objections by the Trustees.) This is not a case of a plaintiff, who is not otherwise entitled to

compensation, seeking to recover attorney's fees for pursuing a breach of fiduciary duty claim. It is also not a case of a plaintiff, who is not an ad litem entitled to compensation, attempting to recover expert witness fees. This is a case of an ad litem doing the work he was appointed to do, and using the experts and trial counsel that the Court authorized, to pursue claims on behalf of the AAL Parties he was appointed to represent.

The Trustees asked for the Ad Litem to be appointed in the first place. They needed him to represent the interests of the AAL Parties so they could obtain the relief that they wanted. For them to now take the position that Ad Litem is not entitled to compensation simply because in representing the AAL Parties' interests he has discovered serious breaches of fiduciary duty and is pursuing claims for those breaches, is inequitable and unjust.

There are, in effect, only two sources of funds with which to provide the compensation to which Ad Litem is statutorily entitled: the segregated funds or the Trustees themselves. If the Trustees would prefer to pay the compensation of the Ad Litem—who, again, they requested be appointed—themselves, they can. But he is entitled to compensation. And it is not contingent on the ultimate outcome of this case.

II. The Trustees Lien Does not Trump the Court's Final Judgment.

The Trustees again argue that their lien under the Trust Agreement defeats the Court's ability to order that the segregated funds not be used to pay trust expenses. The Ad Litem previously addressed this argument in the September Response and won't

repeat it here. The simple fact is that the Court's Final Judgment requiring the segregated funds eliminated any superior rights to use those funds to pay trust expenses.

III. Because the Trustees' Challenges to the Ad Litem's Fees Went to the Merits of His Claim, Compensating Him and His Counsel For Opposing Those Challenges is Appropriate.

The Trustees complain about Scott Douglass & McConnico's charges for litigating Ad Litem's fee application. They cite bankruptcy cases, which, of course, are not binding in this Court. But more importantly, even if in a typical case the Court would not award fees for presenting a fee application, this is far from a typical case. The Trustees' challenges to the Ad Litem's fees, including those of his trial counsel and expert witness—went to the merits of his claims. They made the same arguments in their special exceptions. Defending the fee application required the same work as defending against the special exception. In this instance, the Ad Litem believes it is appropriate to compensate his trial counsel for work done defending his claims on the merits, even if that work arose in the context of an opposition to a fee application.

IV. The Only Way the Beneficiaries Stand to Recover Anything is if the Ad Litem Can Proceed On His Claims.

The Trustees continue to make the fallacious suggestion that if the segregated funds are used to pay the Ad Litem's compensation, there will be nothing left for the beneficiaries. But as previously shown, if allowed, the Trustees will completely deplete the segregated funds to pay their own expenses, leaving nothing for the beneficiaries. *See* September Response at 4-6 and testimony cited therein. Allowing the Ad Litem to

proceed with his claims is the only hope that the beneficiaries have of recovering anything. And that can only happen if he, his experts and his litigation counsel are paid.

WHEREFORE, PREMISES CONSIDERED, Ad Litem prays that the Court grant his October 2016 Fee Application and grant him such other and further relief, both at law and in equity, to which he may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on counsel of record on October 31, 2016 and will be served in accordance with the Court's orders regarding service dated September 28, 2015 and January 21, 2016.

/s/Daniel C. Bitting
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