

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

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

**THE TRUSTEES' JOINT RESPONSE TO
ATTORNEY AD LITEM'S SUPPLEMENT TO MOTION TO COMPEL**

The Bank of New York Mellon Trust Company, N.A., as Corporate Trustee of the TEL Offshore Trust (the "Trust"), and Gary C. Evans, Jeffrey S. Swanson, and Thomas H. Owen, Jr., as Individual Trustees of the Trust (collectively, the "Trustees") file their Joint Response to Attorney Ad Litem's ("Ad Litem") supplement to its motion to compel the production of privileged information.

I. Introduction

In his supplement to his motion to compel, Ad Litem purports to "narrow" his demand to invade the attorney-client privilege to "notes, memos, emails, or other documents reflecting the discussions at [the Trustees' meetings]" created by the Trustees' legal counsel, Andrews Kurth Kenyon LLP ("AK"). But documents that AK created for the purpose of providing legal advice to the Trustees are exactly what the attorney-client privilege protects and therefore exactly what Ad Litem cannot discover.

Ad Litem's further demand that the Trustees log on a privilege log seven years' worth of privileged documents that AK created presents no benefit for discovery purposes. Rather, it would do nothing more than create weeks of work—requiring reviewing thousands of documents for responsiveness and privilege and logging each of those documents on a privilege log—solely for the illegitimate purpose of revealing AK's legal advice to the Trustees. The Trustees ask that the Court deny Ad Litem's "narrowed" attempt to disregard the attorney-client privilege.

II. Argument and Authorities

A. The attorney-client privilege protects documents that AK created regarding the Trustees' meetings.

In response to the Court's request that Ad Litem cite legal authority supporting its attempt to discover privileged documents, Ad Litem cites a case—*National Union Fire Insurance Co. of Pittsburgh v. Valdez*¹—bearing no relevance to the types of documents Ad Litem demands here. Ad Litem's Supplement at 4. In *Valdez*, the Texas Supreme Court held that the work-product privilege prevented the production of an attorney's entire file. *Valdez*, 863 S.W.2d at 460-61. *Valdez*'s only mention of the attorney-client privilege was the Court's recognition that "a party may not cloak a document with the attorney-client privilege simply by forwarding it to his or her attorney." *Id.* at 460. But such documents—documents that the Trustees gave to AK—are not what Ad Litem seeks here. Instead, Ad Litem demands documents *created by AK to generate legal advice to the Trustees*:

To the extent AK...created notes, memos, emails or other documents reflecting the discussions at these meetings [quarterly Trustee meetings], they would likely be responsive to multiple requests and relevant to the issues in this case.

Ad Litem's Supplement at 2. The only reason that AK created notes, memorandums, emails, or other documents relating to the Trustee meetings was for the purpose of facilitating the rendition of legal advice to the Trustees—by definition what the attorney-client privilege protects. *See* Tex. R. Evid. 503(b); Exhibit A, Affidavit of M. Kaylen Dunn ¶ 5.

Ad Litem attempts to exclude from the attorney-client privilege documents that AK created to communicate legal advice to the Trustees by claiming that "the attorney client privilege protects only confidential communications between an attorney and his client." Ad

¹ 863 S.W.2d 458 (Tex. 1993).

Litem's Supplement at 4. But the attorney-client privilege is not limited to communications between an attorney and client. Under Texas law, the attorney-client privilege also protects "confidential communications made to facilitate the rendition of professional legal services to the client...among lawyers and their representatives representing the same client." Tex. R. Evid. 503(b)(1)(E). So AK's internal notes, memorandums, and emails regarding the Trustee meetings did not need to be given to the Trustees in order to fall under the attorney-client privilege's protection.

And because AK's notes, memorandums, and emails relating to the Trustee meetings were created for the purpose of communicating legal advice to the Trustees, they necessarily reveal the content of that legal advice. The internal work that AK performed in order to generate legal advice is thus no less protected than AK's communications to the Trustees that rendered that legal advice. *See, e.g., In re Monsanto Co.*, 998 S.W.2d 917, 931 (Tex. App.—Waco 1999, no pet.) (accepting affiant's assertion that documents containing attorney's mental impressions, conclusions, and legal theories were "communications" for purposes of the attorney-client privilege).

B. Ad Litem's request for production to the Trustees does not obligate AK to produce its internal documents to Ad Litem.

Ad Litem claims that, because an attorney's work product generated for the client belongs to the client, Ad Litem's request for production to the Trustees obligates AK—a non-party to this lawsuit—to produce its internal documents. Ad Litem's Supplement at 5-6. But the fact that, as between an attorney and his client, the attorney's work for the client belongs to the client does not indicate whether the attorney is obligated to produce his internal documents to his client's adversary in response to the adversary's request for production to the client.

AK is not a party to this case. But a Rule 196 request for production applies only to *parties to the lawsuit* in which it was served, not the parties' legal counsel or any other third party. *See Hobley v. Burge*, 433 F.3d 946, 950 (7th Cir. 2006) ("Yet, by its terms, Rule 34 [the federal rule governing requests for production] applies only to parties. It is the City, not Jones Day [the law firm that represented the City in a related proceeding], that is the responsive party in this suit. And even if Jones Day were the City's current counsel, Rule 34 would not be the correct discovery tool for gaining access to work product held by an attorney."); *Novelty, Inc. v. Mountain View Mktg., Inc.*, No. 1:07-cv-01229-SEB-JMS, 2010 U.S. Dist. LEXIS 35082, at *17 (S.D. Ind. Jan. 29, 2010) ("[T]rial counsel preparing the client's response to a Rule 34 document request need not produce materials in counsel's file that counsel created during the representation; a Rule 45 subpoena to counsel would be required to obtain them, if they are not otherwise privileged or exempt from discovery"); 8B Charles Alan Wright et al., *Federal Practice and Procedure* § 2208 (3d ed. 2016) ("Rule 34 allows 'a party' to request production of documents and things from 'any other party.' Thus, the rule creates a device that may be used to obtain discovery only from parties to a pending action. It does not run apply [sic] directly to counsel for a party or anyone who is not a party, even if a witness to the matter in dispute.").

Nor do the Trustees have possession, custody, or control, for purposes of a Rule 196 request for production, over AK's internal documents. "The issue of whether documents in the possession of a party's attorney are under the control of the party [for purposes of requests for production] is resolved by tracing their origin; if the items were originally produced by the party or the party's agents and then turned over to the attorney, they are considered under the party's

² Ad Litem claims that it cannot find *Novelty, Inc. v. Mountain View Mktg., Inc.*, No. 1:07-cv-01229-SEB-JMS, 2010 U.S. Dist. LEXIS 35082 (S.D. Ind. Jan. 29, 2010). The Trustees would be happy to provide a copy of this case to Ad Litem if Ad Litem requests it.

control.” *Novelty*, 2010 U.S. Dist. LEXIS 35082, at *18 (quoting John Kimpflen, *Federal Procedure, Lawyers Edition*, § 26:629 (Westlaw 2009)). But Ad Litem does not seek documents that the Trustees gave to AK; Ad Litem wants documents that *originated from AK*. Those legal documents generated by and originating from AK are not within the Trustees’ control. The Trustees have no obligation to produce documents that AK created in response to a Rule 196 request for production to the Trustees.

C. The burden of logging on a privilege log the documents Ad Litem wants far outweighs any purported benefit.

Texas Rule of Civil Procedure 192.4(b) provides that a court should limit discovery if it determines that “the burden or expense of the proposed discovery outweighs its likely benefit.” That is exactly the case with respect to what Ad Litem demands here. Ad Litem wants the Trustees to log on a privilege log *every single document that AK created* reflecting “the discussions of the quarterly meetings of the Trustees” for *seven years*—from 2007 to 2014. Ad Litem’s Supplement at 6. But the enormous burden and expense of undertaking that task far outweighs the unauthorized “benefit” to Ad Litem—to discover what legal advice AK gave to the Trustees.

While Ad Litem has narrowed the scope of the documents he wants—at least, as Ad Litem warns, “at this stage”—the identification of those documents is nevertheless a burdensome and costly task both for AK and the Trust. Exhibit A, Affidavit M. Kaylan Dunn ¶ 4. AK has represented the Trustees for well over a decade, and various attorneys have provided legal counsel to the Trustees during that time. *Id.* ¶ 4. AK’s paper and electronic files are voluminous. *Id.* ¶ 6. In an attempt to segregate the documents specifically requested by Ad Litem, AK has limited its search to the paper files and email boxes for those individuals that attended the quarterly meeting of the Trustees. *Id.* These individuals include Phillip Haines,

Lance Schuler, Jesse Myers, Craig Stahl, Bill McDonald, and David Buck. *Id.* The process that Ad Litem demands—that the Trustees gather, scan, process, review, perform quality control, and log on a privilege log thousands of electronic and hard copy documents—is estimated to cost between \$40,000 and \$50,000 and take approximately three weeks. *Id.* ¶¶ 7-10. So in addition to the significant cost, the time it would take to perform this project would delay pretrial proceedings as well as the trial. If, however, the Court is inclined to grant Ad Litem’s demand that AK undertake this project, the Trustees ask that the Court order that the expense incurred be charged to the segregated Trust account.

III. Conclusion

For these reasons, and for the reasons explained in the Trustees’ Joint Response to Ad Litem’s Motion to Compel, the Trustees ask that the Court enter an order (1) denying Ad Litem’s motion to compel; or (2) alternatively allowing the Trustees time to find and log the documents reflective of the quarterly Trustee meetings at the expense of the Trust account and file affidavits supporting the privilege and/or submit the documents at issue to the Court for *in camera* inspection.

Respectfully submitted,

/s/ Craig A. Haynes

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AND THOMAS H. OWENS, JR.

CERTIFICATE OF SERVICE

I hereby certify that, on October 17, 2016, 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, counsel for RNR Production Land and Cattle, and counsel for Individual Trustees Gary C. Evans, Jeffrey S. Swanson, and Thomas H. Owen, Jr.. I hereby certify that, on October 17, 2016, 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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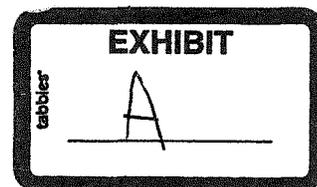
IN RE: § IN THE PROBATE COURT
§
§ OF
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TEL OFFSHORE TRUST § TRAVIS COUNTY, TEXAS

AFFIDAVIT OF M. KAYLAN DUNN

STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared M. Kaylan Dunn, known to me to be a credible person of lawful age, and being by me first duly sworn, upon her oath deposed and stated that she has personal knowledge of the facts stated in this Affidavit as follows:

1. My name is M. Kaylan Dunn. I am authorized and competent to make this Affidavit, and I am over the age of 21 years and have never been convicted of a crime involving moral turpitude. I swear and affirm that the statements contained in this Affidavit are true and correct. The matters attested herein are within my personal knowledge.
2. I am an attorney with the law firm of Andrews Kurth Kenyon LLP ("AKK"). I am duly licensed to practice law in the State of Texas. I am former counsel for The Bank of New York Mellon Trust Company, N.A., as Corporate Trustee, and Gary C. Evans, Jeffrey S. Swanson, and Thomas H. Owen, Jr., as Individual Trustees (collectively, "Trustees") of the TEL Offshore Trust ("Trust") in the above-styled matter.
3. Glenn M. Karisch, as Attorney Ad Litem for the beneficiaries of the TEL Offshore Trust who were served by publication and did not answer or appear ("Ad Litem") has filed Ad Litem's Supplemental Motion to Compel ("Motion to Compel"). In the Motion to Compel, Ad Litem has asked Trustees to review the files of AKK related to the Trust and prepare a privilege log identifying all "notes, memorandum, emails and any other documentation of the discussions of the quarterly meetings of the Trustees that were prepared prior to the Trustees anticipation of litigation in 2014."



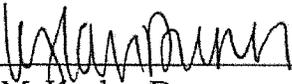
4. While Ad Litem has requested a limited scope of documents, identification of such documents is a burdensome and costly task both for AKK and the Trust. AKK has represented Trustees for well over a decade; various attorneys have provided legal counsel to the Trust during that time.
5. We believe that the notes, memoranda, emails and other documents that the Ad Litem seeks would have been created by AKK attorneys for the purpose of facilitating the rendition of legal advice to the Trustees.
6. AKK's paper and electronic files are voluminous. In an attempt to segregate the documents specifically requested by Ad Litem, AKK has limited its search to the paper files and email boxes for those individuals that attended the quarterly meeting of the Trustees. These individuals include Phillip Haines, Lance Schuler, Jesse Myers, Craig Stahl, Bill McDonald, and David Buck.
7. Each individuals' email box, to the extent it still exists¹, was searched for all correspondence from January 2007 - January 2014 that contains "TEL Offshore" or "TELOZ" in the subject line. That search rendered 2301 emails (excluding attachments). After eliminating any message that was sent outside the firm to a recipient with a @bnymellon domain address, 1,231 emails (excluding attachments) remain to be processed and reviewed. The production team at Consilio, which has assisted in the management of the Trust's document database for this matter, charges \$150/hour for document processing. Processing of these emails is anticipated to take approximately 2-3 hours. Review of these emails for privilege and responsiveness by contract reviewers, quality control by counsel for Trustees, and logging responsive emails is estimated to take approximately 50-60 hours of attorney time.
8. With regard to AKK's paper files, we have limited our review to folders that have been identified as containing attorney notes or which reference quarterly meetings. There are approximately 1000 pages of paper documents that will be required to be scanned, reviewed for responsiveness and privilege, and logged, as necessary. The lowest-quoted document scanning service charges \$.15/page. Processing the scanned documents by Consilio for review purposes is estimated to take approximately 1-2 hours. Review of these documents for

¹ The mail boxes of Lance Schuler and Jesse Myers are no longer in existence because Mr. Schuler and Mr. Myers left in 2012 and 2011, respectively. Their email boxes were destroyed one year after they left AKK in accordance with AKK's document retention policies.

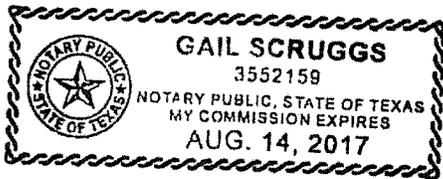
responsiveness and privilege, quality control by counsel for Trustees, and logging responsive emails is estimated to take approximately 15-20 hours of attorney time.

9. AKK's internal document management system contains 676 documents (which includes various versions) related to AKK's corporate representation of the Trust. While it is unlikely that the vast majority of these documents will be responsive to Ad Litem's request, they must nonetheless be gathered, processed, and reviewed. Processing of these documents by Consilio is anticipated to take approximately 1-2 hours. Review of these documents for privilege and responsiveness by contract reviewers, quality control by counsel Trustees, and logging responsive documents is estimated to take approximately 5-10 hours of attorney time.
10. The gathering, scanning, processing, review, quality control, and logging of these documents is estimated to take approximately three weeks. The total anticipated cost associated with this project is estimated to be between \$40,000 to \$50,000.

Further Affiant sayeth not.


M. Kaylan Dunn

SUBSCRIBED AND SWORN to before me on this the 17th day of October, 2016 to certify which witness my hand and seal of office.




Notary Public, State of Texas