

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

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

**THE TRUSTEES' JOINT OBJECTIONS TO  
ATTORNEY AD LITEM'S MOTION TO  
RETAIN BRUCE WALLACE AS CONSULTING EXPERT**

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 Objections to Attorney Ad Litem's ("Ad Litem") Motion to Retain Bruce Wallace as Consulting Expert. The Trustees incorporate by reference the Individual Trustees' Objection to Ad Litem's Fee Application, the Corporate Trustee's Objection and Supplemental Objection to Ad Litem's September 2016 Fee Application, and the Trustees' Joint Objections to Attorney Ad Litem's October 2016 Fee Application. The Trustees show the Court as follows:

**I. Objections**

**A. Texas law does not permit Ad Litem to recover his expert witness fees.**

1. Texas law does not permit Ad Litem to recover the fees he has expended on his consulting expert, Bruce Wallace. Absent a statute or rule permitting the recovery of expert witness fees, such fees are not recoverable. *See 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).

2. None of the Texas Property Code provisions Ad Litem cites—§§ 115.014, 114.064, or 115.001—provide *any* authority for awarding expert witness fees to Ad Litem. Texas Property Code § 115.014(e) provides that “[a]n attorney ad litem is entitled to reasonable compensation for services...*in the manner provided by Section 114.064.*” Tex. Prop. Code Ann. § 115.014(e) (West 2016) (emphasis added). Section 114.064 provides only that “the court may make such award of *costs* and reasonable and necessary *attorney’s fees* as may seem equitable and just.” Tex. Prop. Code Ann. § 114.064 (West 2016) (emphasis added). But expert witness fees are not “costs.” *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.”). Nor are expert witness fees “attorney’s fees.” *See 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.’”).

3. Texas Property Code § 115.001 merely gives district courts jurisdiction over “all proceedings by or against a trustee and all proceedings concerning trusts...”, subject to certain exceptions. *See* Tex. Prop. Code Ann. § 115.001 (West 2016). There is no mention of permitting awards of fees or any other compensation to an attorney ad litem.

4. Tex. R. Civ. P. 244 similarly does not provide for retention of expert witnesses or allow recovery of expert witness fees by an attorney ad litem. Rule 244 was the basis for Ad Litem’s appointment in the first place to represent persons who did not answer after service by

publication. Rule 244 only provides that “the court shall allow such attorney a reasonable fee for his services, to be taxed as costs.” No case has interpreted that to include expert witness fees.

**B. Awarding expert witness fees to Ad Litem would amount to a predetermination of the outcome of Ad Litem’s claim.**

5. 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. 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.

6. Further, Bruce Wallace’s rate of \$600 per hour exceeds the rate approved by the Court of \$350 per hour. If the Court is inclined to award Ad Litem any expert witness fees, the Trustees ask that the Court limit such an award to fees not exceeding the Court-approved rate of \$350 per hour.

**C. Awarding Ad Litem his expert witness fees would ignore the Trustees’ 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 Trustees’ lien has priority over Ad Litem’s unsecured demand for expert witness fees. Granting Ad Litem’s demand for his expert witness fees would violate the Trust Agreement and the Trustees’ due process rights because the Court would, in effect, be determining the validity and priority of the Trustees’ 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 Trustees' rights to reimbursement and compensation.

**D. 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 expert witness fees for asserting claims in his First 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 First 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 First Amended Petition as Realigned Plaintiff ¶¶ 8 ("Other beneficiaries of the Trust are before the Court and are parties to this proceeding."); ¶ 53 (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); ¶ 65 ("The Trustees also owe *the Beneficiaries* the duty of loyalty....By their actions and inactions described above, the Trustees have breached their duty of loyalty. These breaches of the Trustees' duty have damaged *the Trust estate*....") (emphasis added); ¶ 79 ("The Trustees' actions and inactions constitute gross negligence that proximately and directly caused damage and injury to *the Trust and its Beneficiaries*.") (emphasis added); ¶ 89 ("...[I]f all of Ad Litem's compensation and expenses are not awarded against Trustees 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 expert witness 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 the affirmative claims he is asserting against the Trustees for the 42% of unit holders he purports to represent. The segregated account that holds the \$1.7 million in sales proceeds of the remaining assets of the Trust exists 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.

## II. Conclusion

For these reasons, the Trustees ask that the Court enter an order denying Ad Litem’s Motion to Retain Bruce Wallace as Consulting Expert.

Respectfully submitted,

/s/ Craig A. Haynes

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ATTORNEYS FOR THE BANK OF NEW YORK  
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OFFSHORE TRUST

Respectfully submitted,

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ATTORNEYS FOR INDIVIDUAL TRUSTEES  
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AND THOMAS H. OWENS, JR.

**CERTIFICATE OF SERVICE**

I hereby certify that, on October 28, 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 28, 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*  
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Rachelle H. Glazer