

unsuccessfully to cure the defects three times by amendment. For the reasons set out in the pending Trustees' Special Exceptions and Plea to the Jurisdiction to Ad Litem's "Original Petition as Realigned Plaintiff" and "First Amended Petition as Realigned Plaintiff," 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 for parties served by publication "to defend the suit." 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 Trustees 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 Trustees object that the continued award of huge monthly fees to Ad Litem and his “trial” counsel and experts to pursue affirmative claims before the merits of those claims has even been determined is neither equitable nor just. Further, Ad Litem is effectively doing precisely what he accuses the Trustees of improperly doing—exhausting the remaining assets of the Trust estate (now held in a segregated account in the amount of approximately \$1.7 million before payment of the September Fee award) to pay fees to himself and his trial counsel and his experts, leaving nothing for any unit holders if his claims are unsuccessful. The court should not allow Ad Litem to gamble away the remaining limited assets of the Trust to pursue at best risky claims against the Trustees.

C. Interim fee awards to Ad Litem improperly allow fee-shifting to the Trustee defendants for claims for breach of fiduciary duty and other claims for which attorney’s fees are not recoverable under Texas law.

4. Texas law is clear that attorney’s 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, but indirectly 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, using the vehicle of “interim” fee awards in advance of trial and final judgment. Because there is a limited fund of approximately \$1.7 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 Trustees unable to pay on-going Trust administrative expenses and existing liabilities of the Trust, including a \$1 million debt, and the Trustees’ own on-going legal fees and expenses, through June 2017. The end result is the improper shifting of the attorney’s fees of the plaintiff (Ad Litem) to the defendants (the Trustees) 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 First 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 Trustees' lien on Trust account funds.

5. 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 attorneys' fees. Granting Ad Litem's demand for his attorney's 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.

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.

6. Ad Litem cannot recover attorneys' 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).

7. 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.

8. 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.

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

9. Ad Litem’s attempt to use the Trust account to fund his expert witnesses—namely Bruce Wallace—violates Texas law regarding the allocation of expert witness fees. *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.’”). Ad Litem is not entitled to recover from the Trust account any fees for any of his expert witnesses.

10. 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.

11. 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.

12. Finally, the Court has not yet authorized Ad Litem to retain Bruce Wallace as an expert. Yet Ad Litem has already incurred \$4,200.00 charged by Bruce Wallace’s firm, Eggleston & Briscoe, LLP. Ad Litem should not be able to recover fees that he incurred when the Court has not even authorized Ad Litem to retain Bruce Wallace, which the Trustees oppose. *See* The Trustees’ Joint Objections to Attorney Ad Litem’s Motion to Retain Bruce Wallace as Consulting Expert.

G. Ad Litem cannot recover fees expended in pursuing its fee applications.

13. Ad Litem’s fee application includes charges totaling \$67,388.95 for Scott, Douglass & McConnico (“Scott Douglass”). Included within that amount are charges for litigating Ad Litem’s fee application. For example, Scott Douglass has included charges related

to preparation for and attendance at the last hearing on Ad Litem's September 2016 fee application, as well as time preparing the response to the objections to fees. See invoices for Scott Douglass at 7, attached to Ad Litem's October 2016 Fee Application. But Ad Litem is not entitled to recover fees incurred to pursue its fees. See *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2168 (2015) ("In our legal system, no attorneys, regardless of whether they practice in bankruptcy, are entitled to receive fees for fee-defense litigation absent express statutory authorization."); *Tow v. Speer*, No. H-II-3700, 2015 U.S. Dist. LEXIS 108553 at *27 (S.D. Tex. Aug. 17, 2015) (holding that charge for "attending a hearing 'to approve fees in Bankruptcy Court'" was not recoverable). Ad Litem Glenn Karisch on his own fee application for October reduced his fee request for "work on fee application" and "attend hearing on fee application" by a grand total of 4.9 hours, apparently in recognition that fees to recover fees are not recoverable. But Scott Douglas failed to make the same reduction.

H. Ad Litem cannot recover fees for clerical work.

14. Scott Douglass's invoice includes charges for time that legal assistants spent performing clerical work on the case. But 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.*, 216 F.3d 659, 681 (5th Cir. 2001) (denying recovery for clerical work that legal assistants performed); *Tow*, 2015 U.S. Dist. LEXIS 108553, at *24 ("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 at Scott Douglass performed.

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

15. There are limited funds available in the Trust account. To permit Ad Litem to disperse 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 Trustees ask that the Court (1) sustain their Joint Objections to Ad Litem’s October 2016 Fee Application; (2) deny Ad Litem’s October 2016 Fee Application; and (3) award such other and further relief to which the Trustees show themselves justly entitled.

Respectfully submitted,

/s/ Craig A. Haynes

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Respectfully submitted,

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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
Rachelle H. Glazer

Ad Litem's Fees and Expenses

Motion	Glenn Karisch	Scott Douglass McConnico	Michael L. Wiggins	Bruce Wallace	Total Requested	Total Awarded
To Retain Expert			\$15,000		\$15,000	\$15,000
Nov. 2015 Fee App.	\$19,516.85				\$19,516.85	\$18,284.85
Jan. 2016 Fee App.	\$12,947.04		\$2,620.80		\$15,567.84	\$15,567.84
May 2016 Fee App.	\$11,531.25	\$13,920.42			\$25,451.67	\$25,303.67
July 2016 Fee App.	\$9,736.52	\$67,948.53	\$37,240.53		\$114,925.58	\$111,974.58
Sept. 2016 Fee App.	\$10,904.44	\$60,923.87	\$46,375.00		\$118,203.31	\$118,203.31
Totals Before 10-1-2016	\$64,636.10	\$142,792.82	\$101,236.33		\$308,665.25	\$304,334.25
Oct. 2016 Fee App.	\$16,127.78	\$67,388.95		\$4,200.00	\$87,716.73	\$87,716.73
Totals If Oct. App Granted	\$80,763.88	\$210,181.77	\$101,236.33	\$4,200.00	\$396,381.98	\$392,050.98

