

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 "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 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 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 have even been determined, is neither equitable nor just. Further, Ad Litem is actually doing precisely what he (incorrectly) accuses the Trustees of 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, 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 Trustees that lack any basis in law or fact.

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

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, 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 the Trust's on-going 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 his ill-advised class action 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 cannot recover fees for overhead expenses.

9. Ad Litem's fee application includes charges totaling \$77,681.63 for Scott, Douglass & McConnico ("Scott Douglass"). Included within that total are charges for overhead expenses, such as postage and legal research database expenses. *See* Scott Douglass invoice attached to Ad Litem's November 2016 Fee Application at 17. 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 expended in pursuing its fee applications.

10. Scott Douglass again attempts to charge attorney's fees for time incurred to pursue its fees, which it is not entitled to do. *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 has not charged for the 4.5 hours he spent litigating his previous fee application, for a total \$1,191.50 discount (or roughly 7%). See Ad Litem’s invoice attached to his November 2016 Fee Application at 1-2. But Scott Douglass reduced the hours he charged for litigating *the same fee application* by only 1 hour (or roughly 0.928%). See Scott Douglass invoice attached to Ad Litem’s November 2016 Fee Application at 9. Scott Douglass should be required to reduce its fee by the same percentage (7%).

H. Ad Litem cannot recover fees for clerical work.

11. 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.

12. 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.

J. The Trustees ask that the Court approve the Agreed Order authorizing payment of the entire mediation fee from the segregated Trust account.

13. Ad Litem asks the Court to direct the Trustees to pay only Ad Litem's share of the mediation fee from the Trust account. The Trustees are not opposed to the payment of mediation fees from the Trust account, but only so long as the Trustees' share of the mediation fee is treated in the same manner.

14. Ad Litem, the Trustees, Counter-Plaintiffs Albert Speisman and Joyce E. Speisman (the "Speisman Counter-Plaintiffs") and Plaintiff RNR Production Land and Cattle ("RNR") have agreed to the form of an Order authorizing Corporate Trustee to pay the entire mediation fee of \$5200.00 out of the segregated Trust account. If that Order is entered, Corporate Trustee has no objection to such payment on Ad Litem's behalf.

15. Corporate Trustee asks that the Court approve and enter the attached Agreed Order and authorize payment of \$5200 from the Trust account to the Mediator, Dean Kilgore.

II. Conclusion

For these reasons, the Trustees ask that the Court (1) sustain their Joint Objections to Ad Litem's November 2016 Fee Application; (2) deny Ad Litem's November 2016 Fee Application; (3) enter the attached Agreed Order authorizing the payment of \$5200 from the segregated Trust account to the mediator; and (4) award such other and further relief to which the Trustees show themselves justly entitled.

Respectfully submitted,

/s/ Craig A. Haynes

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MELLON TRUST COMPANY, N.A., as
CORPORATE TRUSTEE OF THE TEL
OFFSHORE TRUST

Respectfully submitted,

NORTON ROSE FULBRIGHT US, L.L.P.

/s/ Paul Trahan

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ATTORNEYS FOR INDIVIDUAL TRUSTEES
GARY C. EVANS, JEFFREY S. SWANSON,
AND THOMAS H. OWENS, JR.

CERTIFICATE OF SERVICE

I hereby certify that, on December 7, 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 December 7, 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

Exhibit A

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

IN RE:

§ IN THE PROBATE COURT

§

§ OF

§

TEL OFFSHORE TRUST

§ TRAVIS COUNTY, TEXAS

**AGREED ORDER ALLOWING CORPORATE TRUSTEE
TO PAY MEDIATION FEE FROM THE SEGREGATED ACCOUNT**

On this day came on to be considered the request to pay out of the segregated account holding the proceeds of the sale of the Trust's Overriding Royalty Interest pursuant to the Final Judgment and Order of this Court dated January 15, 2016, in Cause No. C-1-PB-16-000096 ("the segregated Trust account") the mediation fee charged by the Mediator, Dean Kilgore, in the amount of \$5200. This request is agreed to by Glenn M. Karisch, Attorney Ad Litem, RNR Production Land and Cattle, Albert and Joyce E. Speisman, The Bank of New York Mellon, N.A. as the Corporate Trustee, the Individual Trustees Gary C. Evans, Jeffrey S. Swanson, and Thomas H. Owen, Jr. (collectively "the Parties to the mediation"). The Court finds, pursuant to the approval below, that all Parties to the mediation have agreed to the entry of this Order, and that it is meritorious.

It is therefore ORDERED that the Corporate Trustee pay the following third party expense out of the segregated Trust account: \$5200.00 to Dean M. Kilgore, Attorney-Mediator, for his mediation fee in this case.

JUDGE PRESIDING

AGREED AS TO FORM AND CONTENT:

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November 21, 2016

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 Trustees' Joint Objections to Attorney Ad Litem's
November 2016 Fee Application and Application for Payment of Mediation
Expenses.

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

