



Texas Rules of Civil Procedure do not require that detail—in effect a marshalling of all of the Trustees' evidence—in response to contention interrogatories.

At base, Ad Litem's motion to compel is frivolous and intended to harass the Trustees. The absence of virtually *any* case law from Ad Litem's motion reflects this intention. The Trustees ask that the Court deny Ad Litem's motion to compel, or alternatively defer ruling on the portion of the motion demanding privileged information until the Trustees decide whether to assert advice of counsel as a defense.

## II. Argument and Authorities

### A. The Trustees have not pleaded the defense of reliance on advice of counsel.

Ad Litem claims that the Trustees pleaded the affirmative defense of reliance on advice of *counsel* by pleading in their answers the Trust Agreement provision permitting the Trustees to consult with *experts*:<sup>1</sup>

The Corporate Trustee pleads that all of its actions were specifically authorized by the Trust Agreement made as of January 1, 1983, including conducting royalty sales, obtaining loans to pay the Trust's expenses, paying the Trustees' compensation, and obtaining D&O insurance. The Corporate Trustee pleads the provisions of the Trust Agreement, including, without limitation, the following:

...1. Section 7.06 of the Trust Agreement provides: "To perform any act required or permitted by this Trust Agreement, the Trustees may ... be required to ... consult with counsel, ... accountants, geologists, engineers and other parties deemed by the Trustees to be qualified as experts on the matters submitted to them ... and the opinion ... of any such parties on any matter submitted to them by the Trustees shall be full and complete authorization and protection in respect to any action taken or suffered by them hereunder in good faith and in accordance with the opinion ...."<sup>2</sup>

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<sup>1</sup> Ad Litem's motion to compel at 1, 3.

<sup>2</sup> Corporate Trustee's Original Answer to Attorney Ad Litem's First Amended Counterclaim ¶ 25(1). *See also* Individual Trustees' Answer to Attorney Ad Litem's First Amended Counterclaim ¶ 25(1).

As shown in Corporate Trustee's answer quoted above, what the Trustees affirmatively pleaded was their contractual right to consult with experts and rely on experts' opinions. Section 7.06 of the Trust Agreement does not limit the "experts" on which the Trustees may rely to attorneys. In fact, § 7.06 is expressly *nonexclusive* as to the types of experts it includes—"accountants, geologists, engineers, and other parties deemed by the Trustees to be qualified as experts...."<sup>3</sup> That § 7.06 also lists "counsel" in that nonexclusive list of potential experts does not compel the Trustees to plead reliance on the opinion of counsel merely by pleading § 7.06 in general.

And even if the Trustees' answers could somehow be construed as incidentally pleading reliance on the advice of legal counsel, that would not be sufficient to demonstrate waiver of privileges. Only the Trustees—not Ad Litem—can determine what defenses the Trustees assert. Accordingly, Texas courts—including the Texas Supreme Court—have found that a party's assertion that it does not intend to rely on attorney advice "is independently sufficient to support a finding that no waiver occurred" despite the party's previous pleadings stating otherwise.<sup>4</sup> In fact, Ad Litem *admits* that the Trustees have already informed Ad Litem in answers to interrogatories that they do not intend to rely on advice of counsel as a defense at this time:<sup>5</sup>

...The Corporate Trustee has also relied upon Andrews Kurth Kenyon LLP and Watt Beckworth in Houston, but **the Corporate Trustee has not yet determined whether to assert the advice from them as a defense.**<sup>6</sup>

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<sup>3</sup> See the Trust Agreement § 7.06, attached as Exhibit A-1 to Corporate Trustee's Motion for Partial Summary Judgment on Claims for Breach of Fiduciary Duty regarding Corporate Trustee's Compensation.

<sup>4</sup> *Nat'l Union Fire Ins. Co. v. Valdez*, 863 S.W.2d 458, 461-62 (Tex. 1993) (defendant did not waive privilege, in part, because defendant had amended its motion for summary judgment to delete all references to the attorney's testimony and represented to the trial and appellate court that it did not intend to rely on the attorney's testimony); *In re Carbo Ceramics Inc.*, 81 S.W.3d 369, 379 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

<sup>5</sup> Ad Litem's motion to compel at 2.

<sup>6</sup> Corporate Trustee's Response to Ad Litem's Interrogatory No. 3 (emphasis added), Exhibit B to Ad Litem's motion to compel; Individual Trustees' Response to Ad Litem's Interrogatory No. 3, Exhibit C to Ad Litem's motion to compel.

And regardless, prior to filing this Response, the Trustees have filed amended answers expressly clarifying that they are not pleading reliance on the advice of legal counsel at this time. Therefore, the Trustees have not waived the attorney-client privilege as to any privileged information regarding attorney advice, precluding Ad Litem's discovery of the Trustees' communications with their attorneys or other privileged information.

**B. The Trustees have not disclosed or used the advice of their counsel offensively in this litigation.**

Ad Litem claims that the Trustees have “asserted a reliance on experts defense, both by pleading it in their answers and in argument to this court and the court of appeals.”<sup>7</sup> But nothing the Trustees have pleaded, asserted, or argued waives the attorney-client privilege. Nor have the Trustees disclosed the substance of any advice of counsel—by testimony, production of documents, or otherwise. In fact, the Trustees have consistently objected to disclosure of attorney-client information.

A litigant can waive the attorney-client privilege by asserting “as an essential element of his defense reliance upon the advice of counsel.”<sup>8</sup> By using the advice of his counsel offensively—“as a sword rather than a shield”<sup>9</sup>—“the client has made the decision and taken the affirmative step in the litigation to place the advice of the attorney at issue.”<sup>10</sup> But “[a]dvice is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorney’s advice might affect that client’s state of mind in a relevant manner.”<sup>11</sup> Rather, “[t]he issue that controls [this] inquiry is whether the defendants *voluntarily* injected a

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<sup>7</sup> Ad Litem’s motion to compel at 3.

<sup>8</sup> *Ward v. Succession of Freeman*, 854 F.2d 780, 787-88 (5th Cir. 1988).

<sup>9</sup> See *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 163 (Tex. 1993) (“In an instance in which the privilege is being used as a sword rather than a shield, the privilege may be waived.”).

<sup>10</sup> *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994).

<sup>11</sup> *Id.*

reliance-on-advice-of-counsel issue into” the case.<sup>12</sup> Thus, to waive the attorney-client privilege, a litigant must place “information protected by the attorney-client privilege in issue through some *affirmative act for his own benefit.*”<sup>13</sup>

The sole case that Ad Litem cites in his motion to compel—*Bailey v. State*<sup>14</sup>—demonstrates the type of offensive use of privileged information required to waive the attorney-client privilege. In *Bailey*, a criminal defendant appealed her conviction for failure to appear for a pretrial hearing, arguing that her counsel disclosed privileged communications without her consent.<sup>15</sup> But the Houston First District Court of Appeals affirmed the trial court’s finding that the defendant waived her privilege by basing her defense of reasonable excuse for failure to appear on her communications with her former counsel.<sup>16</sup> To establish that defense at trial, she “affirmatively introduced evidence of communications with her lawyer” while cross-examining her former lawyer.<sup>17</sup> The defendant’s offensive use of privileged attorney-client communications “placed in issue all her communications with [her former counsel] about the need to actually appear for hearings” and therefore waived the privilege as to that subject matter.<sup>18</sup>

Such offensive use of privileged information has not happened here. Unlike the defendant in *Bailey*, the Trustees have not disclosed *any* privileged communications to establish any defense or claim. The Trustees do not plead in their answers the affirmative defense of

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<sup>12</sup> *Ward*, 854 F.2d at 788 (emphasis in original).

<sup>13</sup> *OneBeacon Ins. Co. v. T. Wade Welch & Assocs.*, No. H-11-3061, 2012 WL 393309 at \*4 (S.D. Tex. Feb. 6, 2012) (emphasis added).

<sup>14</sup> Ad Litem’s motion to compel at 3 (citing *Bailey v. State*, 469 S.W.3d 762, 775-77 (Tex. App.—Houston [1st Dist.] 2015, no pet.)).

<sup>15</sup> *Bailey*, 469 S.W.3d at 765.

<sup>16</sup> *Id.* at 776-77.

<sup>17</sup> *Id.* at 765.

<sup>18</sup> *Id.* at 765, 777. Ad Litem does not explain the scope of the privilege waiver he claims, but the scope of any waiver should be limited to the Trustees’ communications with their attorneys about whether and when to sell the Trust assets or attempt to terminate the Trust. See *Bailey*, 469 S.W.3d at 777 (explaining that a waiver of privilege is “narrowly construed” and is limited to the “communications...relevant to that particular subject at issue”).

reliance on advice of counsel. The Trustees' pleading of § 7.06 of the Trust Agreement—reliance *on experts in general*—does not affirmatively assert reliance *on counsel* as a defense. And regardless, the Trustees have filed amended answers clarifying exactly that.

Nor do the Trustees' answers identifying legal counsel as one of the experts the Trustees relied upon in response to Ad Litem's interrogatories asking what experts the Trustees relied upon inject attorney advice in issue for the Trustees' benefit.<sup>19</sup> That is especially true given the Trustees' express exception that they have "not yet determined whether to assert the advice from [counsel] as a defense."<sup>20</sup>

And contrary to Ad Litem's misleadingly selective quotation of parts from the background section of the Trustees' Petition for Writ of Mandamus, nowhere did the Trustees assert, argue, or even mention the defense of reliance on advice of counsel. The Petition for Writ of Mandamus challenges Ad Litem's standing to assert his claims.<sup>21</sup> It does not involve the Trustees' reliance on the advice of counsel and it did not disclose what specific advice was received from counsel. The quotations Ad Litem cites about the Trustees' consultation with counsel are nothing more than background facts.<sup>22</sup>

**C. The Trustees have adequately answered and produced documents responsive to Ad Litem's written discovery requesting information on the Trustees' reliance on experts.**

Ad Litem claims that, in response to his interrogatories, he is entitled to "information on *each instance* that Trustees sought the experts' advice and *the substance of the advice* relied

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<sup>19</sup> Corporate Trustee's Response to Ad Litem's Interrogatory No. 3 (emphasis added), Exhibit B to Ad Litem's motion to compel; Individual Trustees' Response to Ad Litem's Interrogatory No. 3, Exhibit C to Ad Litem's motion to compel.

<sup>20</sup> Corporate Trustee's Response to Ad Litem's Interrogatory No. 3 (emphasis added), Exhibit B to Ad Litem's motion to compel; Individual Trustees' Response to Ad Litem's Interrogatory No. 3, Exhibit C to Ad Litem's motion to compel.

<sup>21</sup> See the Trustees' Petition for Writ of Mandamus, Exhibit A to Ad Litem's motion to compel.

<sup>22</sup> See the Trustees' Petition for Writ of Mandamus at 12-13, Exhibit A to Ad Litem's motion to compel.

upon.”<sup>23</sup> But Texas Rule of Civil Procedure 197.1 expressly forbids requiring the “marshalling of all evidence” that Ad Litem wants:

An interrogatory ... may ask the responding party to state the legal theories and to *describe in general* the factual bases for the party's claims or defenses, but **interrogatories may not be used to require the responding party to marshal all of its available proof ....**<sup>24</sup>

In fact, nothing more than “a basic statement” of a party’s legal and factual contentions is required in response to written discovery.<sup>25</sup>

The Trustees have provided more than the Texas Rules of Civil Procedure require by identifying the experts they relied upon and the topics of that advice.<sup>26</sup> In addition, the Trustees have produced responsive documents regarding the experts whose advice is not privileged. And the Corporate Trustee answered Ad Litem’s questions about this subject matter during its deposition.

**D. Alternatively, the Court should defer ruling on Ad Litem’s motion to compel the production of privileged information until the Trustees decide whether to plead the defense of reliance on advice of counsel.**

To force the Trustees to decide now whether to plead the defense of reliance on the advice of counsel is premature. Under the Court’s scheduling order, the deadline for parties to amend pleadings responding to claims for affirmative relief is not until March 13, 2017. The Trustees will comply with this deadline for amending their answers set by the Court. Nothing in

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<sup>23</sup> Ad Litem’s motion to compel at 2 (emphasis added).

<sup>24</sup> TEX. R. CIV. P. 197.1 (emphasis added). *See also* TEX. R. CIV. P. 194 cmt. 2 (“Rule 194.2(c) and (d) permit a party further inquiry into another's legal theories and factual claims than is often provided in notice pleadings. So-called ‘contention interrogatories’ are used for the same purpose. Such interrogatories are not properly used to require a party to marshal evidence or brief legal issues.”)

<sup>25</sup> TEX. R. CIV. P. 192 cmt. 5 (“Rule 192.3(j) makes a party's legal and factual contentions discoverable but does not require more than a basic statement of those contentions and does not require a marshaling of evidence.”)

<sup>26</sup> Corporate Trustee’s Response to Ad Litem’s Interrogatory No. 3 (emphasis added), Exhibit B to Ad Litem’s motion to compel; Individual Trustees’ Response to Ad Litem’s Interrogatory No. 3, Exhibit C to Ad Litem’s motion to compel.

the Texas Rules of Civil Procedure requires the Trustees to decide whether to plead a particular defense—and further to explain the specific basis for a defense—at this stage. Further, this matter is set for mediation on December 13, 2016, and a ruling on privilege issues is not necessary before that mediation.

### **III. Conclusion**

For these reasons, the Trustees ask that the Court enter an order (1) denying Ad Litem's motion to compel; or (2) alternatively deferring its ruling on Ad Litem's motion to compel until the Trustees decide whether to plead the defense of reliance on advice of counsel.

Respectfully submitted,

/s/ Craig A. Haynes

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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 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/ Rachele H. Glazer*

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Rachele H. Glazer

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December 7, 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 Response to Attorney Ad Litem's Motion to  
Compel Information on Reliance on Experts Defense.

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

