

intended to do so. (Of course, Corporate Trustee contends that no violation of the Trust Agreement has occurred.) A legal conclusion is one that does not provide underlying facts to support the conclusion. *Cooper v. Circle Ten Council Boy Scouts of Am.*, 254 S.W.3d 689, 698 (Tex. App. – Dallas 2008, no pet.). But here, the Testimony contains *nothing but facts*.

The cases Ad Litem cite illustrate the distinction between inadmissible legal conclusions and admissible facts that support legal conclusions. In *Anderson v. Snider*, 808 S.W.2d 54 (Tex. 1991), the attorney in a legal malpractice case testified that “I acted properly ... and have not violated the [DTPA]. I did not breach my contract ... and have not been guilty of any negligence or malpractice.” The Court found that the affidavit was simply a sworn denial of the claims and was therefore wholly conclusory. *Id.* at 55. Similarly, in *Life Ins. Co. v. Gar-Dal, Inc.*, 570 S.W.2d 378, 381-82 (Tex. 1978), the issue was whether plaintiff had credited all offsets and payments to defendant’s note. Defendant’s affidavit simply averred that the defendant was not given credit, without supplying any supporting facts. The Court held that stating nothing more than “all offsets and credits have not been allowed,” is a conclusion. *Id.* at 382.

In contrast, paragraph 11 of the Ulrich Affidavit states no legal conclusions or conclusory self-serving statements on ultimate issues. Rather, the Testimony consists of facts that support the conclusion that Corporate Trustee did not breach its fiduciary duty regarding compensation.

B. Response to Objections to Paragraphs 13, 16, 17, and 20 of the Affidavit.

Ad Litem objects to the following paragraphs:

Paragraph 13: “Each year that I have served as Trust officer for Corporate Trustee, I have computed less compensation for Corporate Trustee than the Corporate Trustee Compensation Provision allows. Specifically, since at least 2007, I have capped my hours each year at a total of 650 hours per year, but I worked each year for the Trust more than 650 hours. The Trust Agreement does not require me to cap my hours, but my practice of doing so has resulted in less compensation to Corporate Trustee than the Corporate Trustee Compensation Provision allows.”

Paragraph 16: “I have, however, been careful to ensure that the number of hours I spent each year performing work for the Trust exceeded 650 hours that I billed for each year.”

Paragraph 17: “I know I have spent more than 650 hours each year performing work for the Trust because, in 2007, I tracked my time, and the hours I spent exceeded 650. Since 2007, my time spent performing work for the Trust has not decreased. I work about 1800 hours per year, and, since 2007, I average two full days a week performing work for the Trust, which means I spend, on average, about 16 hours a week performing work for the Trust.”

Paragraph 20: “To my knowledge, I have never made any false statements regarding Corporate Trustee’s compensation for work performed for the Trust. I do my best to perform my duties and to carefully take into account the requirements of the Trust Agreement and the interests of the Unit Holders. I have not engaged in any intentional misconduct, and, in fact, I make my best efforts to avoid doing so.”

Each of these paragraphs provides facts, and paragraph 17 provides additional supporting facts for paragraphs 13 and 16. Ulrich does not testify that he did not violate the Trust Agreement provisions concerning compensation. Rather, he has set out the factual detail of what he did and his mindset during his performance to rebut the claim that he intentionally breached some duty. This is exactly what he would say if he were on the stand in the courtroom.

Ad Litem complains that the Affidavit “lacks facts to show how he complied with the trust compensation provisions, computed his compensation, or knows that his work exceeded 650 hours for the Trust.” But that is exactly what is contained in the Affidavit. *See* paragraphs 9-20 of the Affidavit. Paragraphs 9-14, 16-17, and 20 detail how he complied with the Trust Agreement’s compensation provisions and computed his compensation, and paragraph 17 specifically addresses how he knows his work exceeded 650 hours for the Trust. In fact, it is hard to imagine what else Ulrich could say on these subjects.

C. Ulrich’s affidavit testimony is consistent with his deposition testimony.

Ad Litem incorrectly states that “at his deposition, Mr. Ulrich testified that he did not keep track of his time working for the Trust and only ‘pegged it at 650 hours.’” Rather, Ulrich testified at his deposition that he did not keep time records – not that he never kept track of his time. In fact, Ulrich testified in his deposition that, in about 2008 or 2009, “I evaluated how many hours were spent on TEL Offshore Trust, and I pegged it at 650 hours for the calculation of the trustee fee.” Ulrich Deposition., 175:2-5. The deposition testimony at pages 175:11-18, 175:23-176:3, and 177:15-21 provides the following:

Q. And then you said sometime around 2009, you just estimated that you’re ... the trustee, which for all practical purposes, is you in terms of computing hours, right?

A. Correct.

Q. That you were spending about – aa total of 650 per year on the TEL Trust?

A. Minimum.

...

Q. Did you keep billing records to actually know how much time you were spending?

A. No.

Q. All right. I said billing records. That’s a – because I’m a lawyer. Did you keep any records?

A. No.

...

Q. And for that entire period were you charging 400? Did you just assume the 500 extra hours a year or was there a period in which you actually calculated times that?

A. No, I – I was spending half my time on the trust, so I know the 560 was good – or the 650 hours a years was a good number, probably a low number.

In his Affidavit, Ulrich confirmed that he does not keep time records, but clarified that it was the year 2007 when he “tracked” his hours. Ulrich made clear in his deposition and confirmed in his Affidavit that he did more than was required by the compensation “formula” by capping his hours, resulting in less fees charged to the Trust. Ad Litem has no actual “evidentiary objections” to the Affidavit – he simply does not like the Testimony.

II. Conclusion

For these reasons, Corporate Trustee asks that the Court (1) deny Ad Litem's Objections to the Ulrich Affidavit and not strike the testimony from the summary judgment record and (2) award such other and further relief to which Corporate Trustee shows itself justly entitled.

Respectfully submitted,

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ATTORNEYS FOR THE BANK OF NEW YORK
MELLON TRUST COMPANY, N.A., as
CORPORATE TRUSTEE OF THE TEL
OFFSHORE TRUST

CERTIFICATE OF SERVICE

I hereby certify that, on December 8, 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 8, 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