

NO. C-1-PB-14-001245

In Re: § **In the Probate Court No. 1**
§
§ **of**
§
TEL Offshore Trust § **Travis County, Texas**

AD LITEM'S RESPONSE TO TRUSTEES' MOTION FOR CONTINUANCE

Glenn M. Karisch, as Attorney Ad Litem for the beneficiaries of TEL Offshore Trust who were served by publication and did not answer or appear (“Ad Litem”) responds to Trustees of the TEL Offshore Trust’s Motion for Continuance (“Motion”) as follows:

I. Summary

Over two years after filing this action the Trustees of the TEL Offshore Trust¹ contend that they need more time to find evidence and experts to defend their actions in waiting until 2014 to take action to preserve the value of the beneficiaries’ investments. Though the Motion does not specify the length of the continuance sought, Trustees’ counsel said that they wanted the case to be postponed for a year.

Ad Litem does not oppose a reasonable continuance. Ad Litem’s counsel told the Trustees’ counsel that he would not oppose a continuance to dates in February that Ad Litem understands the Court has available. The Trustees, however, have not agreed to a continuance, and apparently will seek a much longer delay. Ad Litem opposes a continuance of any longer than four months.

¹ The Bank of New York Mellon Trust Company N.A., Gary C. Evans, Jeffrey S. Swanson and Thomas H. Owen, Jr. (collectively, “Trustees”).

II. Ad Litem's Breach of Fiduciary Duty Claims Should Come as No Surprise.

The Motion refers to the Ad Litem's recently-filed amended counterclaim and states that "the Trustees did not know (or have any reason to know) the extent or the gravity of these additional fiduciary claims prior to the filing of the Amended Counterclaim." Motion at p. 3. Ad Litem can't speak to what was in the Trustees' minds, but they certainly had reason to know of the potential for serious breach of fiduciary claims.

First, they acknowledge they knew that Ad Litem was investigating potential fiduciary duty claims. *See id.* In fact, Ad Litem and Trustees entered a tolling agreement, which they twice extended, to allow the Ad Litem to investigate those claims. *See Exhibit A.* That agreement specifically contemplated Ad Litem asserting any claim against the Trustees, including claims asserted derivatively on behalf of any of the unit holders. *See id.* at ¶¶ 1.7 and 2.1 Further, Ad Litem did not file his counterclaim for breach of fiduciary duty sooner because the Trustees asked him not to do because they wanted to try to settle the case before any amended counterclaim was filed. The beneficiaries should not be punished with further delay simply because the Ad Litem held off filing a claim at the Trustees' request.

Second, the Trustees know better than anyone what they did, and didn't do, in response to the catastrophic effect of Hurricane Ike on the Trust. Indeed, the corporate trustee's representative admitted that the Trustees were aware of the dire problems as early as 2009 and considered various options for responding, including calling a vote of the unit holders to dissolve the trust and seeking court modification of the trust to allow

the sale of all trust properties—the action they belatedly took. But they chose not to pursue any of these options, preferring to sell parts of the net profits interest and take out loans to make sure they kept getting paid trustee fees while the beneficiaries got nothing. Ad Litem needed discovery to learn these facts; the Trustees didn't.

The Motion also refers to a mediation scheduled for August 18, 2016 but fails to mention that mediation did not go forward because the Trustees cancelled it. Ad Litem too was hopeful that the case would settle at mediation. But he took steps to be ready to try the case, including hiring experts, if the case couldn't settle. If the Trustees placed all their eggs in the settlement basket and chose not to prepare the defense of the case that they knew was coming, they did so at their own peril.

As noted, Ad Litem does not oppose a short continuance. But the Court should not reward the Trustees for failing to take any action to defend their conduct which they knew was in question.

III. New Counsel Does Not Justify a Continuance.

The Motion further contends that the amended counterclaim creates a possible conflict regarding the continued representation of the Trustees by Andrews Kurth LLP (“AK”) because AK attorneys may potentially be fact witnesses. The Motion does not identify the attorneys who may be witnesses or describe their testimony. In particular, the Motion does not state whether AK's litigation counsel in this case will be witnesses. But even if some AK lawyers may testify, that does not justify a continuance.

First, that some AK lawyers may be witnesses would not preclude other AK lawyers from representing the Trustees. With the Trustees' informed consent other AK

lawyers who will not testify could serve as litigation and trial counsel. *See* TEX. DISC. R. PROF'L CONDUCT 3.08(c).²

Second, if the Trustees still think that they need to replace AK as their trial counsel, they have known that for a long time. The AK lawyers attended quarterly trustee meetings throughout the relevant periods. The Trustees and AK certainly knew that. In fact, as the Motion indicates, long before the Ad Litem amended his counterclaim, the Trustees' counsel told Ad Litem and his counsel that AK lawyers would not try the case. Motion at p. 5. The Trustees apparently decided to wait until the last moment to even begin thinking about retaining new trial counsel when they knew all along that they would need to do so. The Court should not reward their delay in retaining new counsel if that is what they think they need to do.

IV. Conclusion

The case has been pending for over two years and has been set for trial on November 7, 2016 since May. The Trustees have known that the Ad Litem was investigating and likely to bring fiduciary duty claims for almost a year. Further delay will simply further deplete funds in the trust and further delay any recovery by the beneficiaries of any portion of their investment. The Ad Litem is ready to try the case at the current setting. He does not oppose a reasonable continuance into the first part of next year. But he opposes anything more.

² *“Without the client’s informed consent, a lawyer may not act as an advocate in an adjudicatory proceeding in which another lawyer in the lawyer’s firm is prohibited by paragraphs (a) or (b) from serving as an advocate.”* (emphasis added). Thus, the Trustees could consent to AK lawyers who won’t testify representing them in the litigation.

Respectfully submitted,

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Attorney Ad Litem

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served or will be served in accordance with the Court's orders regarding service dated September 28, 2015 and January 21, 2016.

/s/ Daniel C. Bitting
Daniel C. Bitting

EXHIBIT A

NO. C-1-PB-14-001245

In Re:

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§
§
§

In the Probate Court No. 1

of

TEL Offshore Trust

Travis County, Texas

Tolling Agreement

For good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the Parties as defined below enter this Tolling Agreement effective as of December 28, 2015.

I. Definitions

1.1 “**Agreement**” means this Tolling Agreement together with all the promises and premises herein.

1.2 “**Beginning Date**” means December 28, 2015.

1.3 “**Expiration Date**” means the earlier of: (1) 12:01 a.m. of April 1, 2016; or (2) ten (days) after notice of termination sent and received in accordance with paragraph 2.6.

1.4 “**Karisch**” means Glenn M. Karisch, attorney ad litem for the interests of the unit holders of the Trust who were served by publication and did not answer or appear in the Probate Court Proceeding.

1.5 “**Parties**” mean Karisch, RNR and Trustees, as defined herein.

1.6 “**Probate Court Proceeding**” means *In Re TEL Offshore Trust*, Cause No. C-1-PB-14-001245 in the Probate Court No. 1 of Travis County, Texas.

1.7 **“Potential Claim”** means any claim, cause of action, demand or right, known or unknown, that could be asserted against Trustees by Karisch, RNR, or any unit holder of the Trust, including but not limited to any claim, cause of action, demand or right, known or unknown, that may be asserted in a representative capacity and/or derivatively on behalf of the Trust or any of its unit holders in the Probate Court Proceeding.

1.8 **“RNR”** means RNR Production Land and Cattle Company, Inc.

1.9 **“Timing Defense”** means any defense based in whole or in part on any failure to commence or a delay in commencing litigation or other legal proceedings within some specified period, before a specified date, or before the happening of a specified event. Without limiting the foregoing, **“Timing Defense”** includes any defenses based on: (i) any statute of limitations, and/or (ii) laches, waiver or estoppel due, in whole or in part, to any failure to commence or delay in commencing litigation or other legal proceedings. A Timing Defense does not include any defense, including any of the aforementioned defenses, that is not based on a failure to commence or delay in commencing litigation or other legal proceedings.

1.10 **“Tolling Period”** means the period from and including the Beginning Date until and including the Expiration Date.

1.11 The **“Trust”** means the TEL Offshore Trust.

1.12 **“Trustees”** means The Bank of New York Mellon Trust Company, N.A. (**“BONY”**), as Corporate Trustee, and Gary C. Evans, Jeffrey S. Swanson, and

Thomas H. Owen, Jr., as Individual Trustees, of the Trust.

II. Agreement to Suspend the Running of Timing Defenses

2.1 To allow time for settlement negotiations without prejudicing the rights of Karisch, RNR, or any unit holder of the Trust, including but not limited to any claim, cause of action, demand or right, known or unknown, that may be asserted in a representative capacity and/or derivatively on behalf of the Trust or any of its unit holders to pursue a Potential Claim if necessary, the Parties agree to toll and suspend certain defenses as provided herein.

2.2 Trustees agree that the running of any Timing Defense applicable to any Potential Claim shall be suspended and tolled during the Tolling Period. The effect of this suspension shall be to back date the filing date of any suit on a Potential Claim for the purposes of any Timing Defense by the number of days of the Tolling Period. For example, assume that no Party terminates the Tolling Agreement before the April 1, 2016 Expiration Date and further assume that Karisch files suit against Trustees on a Potential Claim on May 1, 2016. For the purposes of any Timing Defense, the deemed filing date of that suit would be January 27, 2016, because the filing date will be back dated by the 93 day Tolling Period. Assume, however, that a Party gives notice of termination of this Agreement, as provided for below, and the Agreement terminates on March 1, 2016. Also assume that Karisch files suit on a Potential Claim on July 1, 2016. The deemed filing date of that suit under this second scenario would be April 29, 2016—that being the July 1 date minus the 62-day Tolling Period.

2.3 This Agreement shall not prevent the application of any statute of limitation or other similar time-related equitable, contractual or statutory defense that may have existed prior to December 28, 2015; nor shall this Agreement have the effect of reviving any claim or cause of action that was barred by any such defense prior to December 28, 2015, or prejudice the rights of any Party to urge any such defenses. This Agreement is intended solely to prevent the running of any applicable Timing Defense during the Tolling Period with respect to any Potential Claim.

2.4 By entering this Agreement, the Parties do not admit liability or responsibility to anyone, and each Party acknowledges that nothing herein shall operate so as to affect, modify, limit, impair, create or expand any rights, remedies, defenses or liabilities that the Parties may have as of December 28, 2015.

2.5 This Agreement does not constitute an admission by any Party or unit holder of the Trust that any Timing Defense has or has not run or that any Timing Defense is or is not applicable to any Potential Claim.

2.6 Any Party may terminate this Agreement by giving the other Parties at least ten (10) days advance written notice of termination in the manner provided in paragraph 3.6.

III. General Provisions

3.1 This Agreement is a Rule 11 agreement binding on each Party even though it may be signed by a Party's attorney of record in the Probate Court Proceeding rather than the Party itself. Any Party may file it in the Probate Court Proceeding, but it is a binding contract and enforceable whether or not it is filed and no matter when it is filed.

3.2. The Parties represent and warrant that the persons signing below are legally and mentally competent to sign this Agreement, are duly authorized and empowered to bind any entity or person for which they have signed below, and possess all requisite consents, approvals and/or authorizations to execute and deliver this instrument in all capacities stated herein.

3.3. This Agreement contains the entire Agreement between the Parties with respect to the subject matter herein, and no statement, promise or inducement made by any Party to this agreement, or any agent of such Parties, that is not set forth in this Agreement shall be valid or binding.

3.4. This Agreement may not be modified except in writing signed by the Parties.

3.5. This Agreement is binding upon and inures to the benefit of the Parties hereto and the unit holders of the Trust, and their respective agents, employees, heirs, devisees, legatees, successors and assigns.

3.6. Notice may be given by fax, hand delivery or certified mail, postage pre-paid, and is deemed received on the date faxed, hand delivered or on the third day after deposit of sent by certified mail. Notice must be sent as follows:

Karisch: Glenn M. Karisch, The Karisch Law Firm, PLLC, 301 Congress Avenue, Suite 1910, Austin, Texas 78701; fax (512) 597-4062.

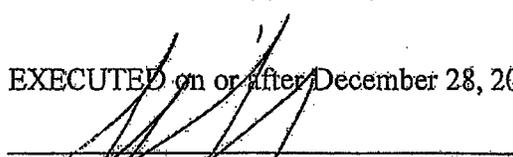
RNR: Shannon H. Ratliff, Ratliff Law Firm, PLLC, 600 Congress Avenue, Suite 3100, Austin, Texas 78701; fax (512) 493-9625.

Trustees: Georgia L. Lucier, Andrews Kurth LLP, 600 Travis, Suite 4200, Houston, Texas 77002; fax (713) 238-7349.

The Parties may change the addresses for written notice by providing written notice of the new address to the other Parties.

3.7. This Agreement may be executed in any number of counterparts with the same effect as if all signatory parties had signed the same document. All counterparts will be construed together and will constitute one and the same instrument which shall be binding upon the Parties, notwithstanding that each Party may not have executed the same counterpart. A copy of the executed Agreement, whether a PDF, TIFF, or other true and accurate copy, is fully enforceable.

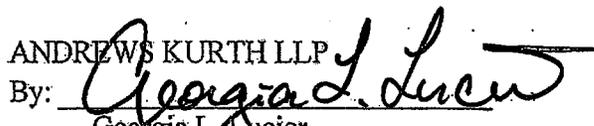
EXECUTED on or after December 28, 2015, but effective as of December 28, 2015.



Glenn Kafisch
State Bar No. 11098950

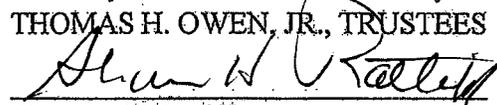
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As attorneys for and on behalf of
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