

NO. C-1-PB-14-001245

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

**ATTORNEY AD LITEM’S MOTION TO REALIGN THE PARTIES OR
ALTERNATIVELY SET ORDER OF PROCEEDINGS AT TRIAL**

TO THE HONORABLE JUDGE OF THIS COURT:

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”) moves to realign the parties or alternatively set the order of proceedings at trial under Texas Rules of Civil Procedure 265, 266 and 269 as follows:

The Trustees¹ filed their Original Petition for Modification and Termination of Trust on July 10, 2014. On November 16, 2015, Ad Litem filed his First Amended Answer and Counterclaim for Order to Sell Royalty Interest and Accounting. On January 15, 2016, the Court entered a Severance Order. It severed matters related to the modification of the TEL Offshore Trust and sale of trust assets into a separate action, Cause No. C-1-PB-16-000096. In the new, severed cause, the Court entered a final judgment. This judgment modified the trust to permit the Trustees to direct the partnership to sell all of the overriding royalty interests as soon as reasonably possible.

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

And the Court ordered the Trustees to direct the partnership to make this sale. That judgment became final and non-appealable.

Under the Severance Order, the Ad Litem's counterclaim for accounting along with RNR Production Land and Cattle's ("RNR") counterclaim for accounting remained in this original cause, C-1-PB-14-001245. The parties conducted discovery in this cause, including the deposition of the corporate trustee. On August 17, 2016, Ad Litem filed Attorney Ad Litem's Second Amended Answer and First Amended Counterclaim. In addition to the claim for an accounting, Ad Litem added claims against the Trustees for breach of fiduciary duty, negligence, gross negligence, intentional conduct and bad faith, fee forfeiture and punitive damages. Ad Litem also asserted a claim for his compensation and expenses and an award of attorneys' fees.

On August 23, 2016 the Trustees filed a motion for continuance of the November 7, 2015 trial. They argued that "[w]ith the filing of the Amended Counterclaim, this is essentially a new case."

The Trustees are right about this being a new case in one respect. The Trustees have obtained (by agreement and lack of objection) the relief they originally sought: modification of the trust to allow the sale of all of the remaining overriding royalty interest that, in effect, is the trust's sole asset. That relief is the subject of a separate, non-appealable, final judgment. Consequently, Ad Litem now has the burden of proof on the

whole case with the exception of defensive issues.² Accordingly, Ad Litem is entitled to be re-aligned as Plaintiff and open and close the evidence and arguments at trial.

In the alternative, even if this Court does not realign the parties, under to Rule 265, it has authority to modify the order of the proceedings. Rule 265 specifically authorizes the Court “for good cause stated in the record” to direct that Ad Litem shall have the right to open and conclude both in argument and evidence. Allowing the Trustees—who are plaintiffs in name only—to begin defending claims before Ad Litem has even put on his case will create a confusing and disjointed trial narrative. The Trustees will be telling the Court or jury³ why Ad Litem’s claims are incorrect before Ad Litem has even explained what the claims are. A logical and coherent presentation of the evidence requires Ad Litem to first lay out the facts supporting his claims and then let the Trustees respond. Accordingly, good cause exists to allow Ad Litem to open and close the argument and evidence regardless of whether he is realigned as plaintiff.

WHEREFORE, Ad Litem respectfully requests that the Court realign the parties and designate Ad Litem as Plaintiff, or in the alternative, allow Ad Litem to open and close the argument and evidence, and for such other and further relief to which he may be justly entitled.

² See *Hawthorne v. Guenther*, 917 S.W.2d 924, 931 (Tex. App.—Beaumont 1996, writ denied) (finding trial court was correct in realigning the parties when the party realigned as plaintiff had the burden of proof on breach of fiduciary duty claim which amounted to “the whole case” with the exception of “defensive issues.”)

³ The Trustees have until September 30, 2016 to tell the Court whether they want a jury trial.

Respectfully submitted,

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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