

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

IN RE: § IN THE PROBATE COURT
§
§ OF
§
TEL OFFSHORE TRUST § TRAVIS COUNTY, TEXAS

**CORPORATE TRUSTEE OF THE TEL OFFSHORE TRUST'S ORIGINAL ANSWER
TO ATTORNEY AD LITEM'S FIRST AMENDED COUNTERCLAIM**

The Bank of New York Mellon Trust Company, N.A., as Corporate Trustee ("the Corporate Trustee") of the TEL Offshore Trust ("Trust") files this its Original Answer to the Attorney Ad Litem's ("Counter-plaintiff's") First Amended Counterclaim, and would respectfully show the Court the following:

I. GENERAL DENIAL

1. As provided for and allowed under the Texas Rules of Civil Procedure 92, the Corporate Trustee denies generally each and every, all and singular, of the allegations in the First Amended Counterclaim filed by the Counter-Plaintiff and demands strict proof thereof by a preponderance of the credible evidence, as required by the Constitution and the laws of the State of Texas.

II. DEFENSES

2. The Counter-Plaintiff's claims are barred, in whole or in part, because the Counter-Plaintiff lacks capacity to bring this suit.

3. The Counter-Plaintiff's claims are barred, in whole or in part, because the Counter-Plaintiff lacks capacity to recover on this suit.

4. The Counter-Plaintiff's claims are barred, in whole or in part, because the Counter-Plaintiff lacks standing to bring this suit. A beneficiary of a trust may not bring a derivative claim on behalf of the trust against a trustee.

5. The Corporate Trustee generally pleads the defense of lack of standing and lack of capacity against the claims of the Counter-Plaintiff, as well as any unit holders he purports to represent.

6. The Counter-Plaintiff's claims are barred, in whole or in part, by the statutes of limitations. The discovery rule does not apply to Counter-Plaintiff's claims.

7. The Counter-Plaintiff's claims are barred, in whole or in part, by the doctrine of laches.

8. The Counter-Plaintiff's claims are barred by the Corporate Trustee's lien priority.

9. The Counter-Plaintiff's claims are barred, in whole or in part, by the doctrines of estoppel, including without limitation quasi-estoppel, equitable estoppel, judicial estoppel, and promissory estoppel.

10. The Counter-Plaintiff's claims are barred, in whole or in part, by ratification.

11. The Counter-Plaintiff's claims are barred, in whole or in part, by waiver.

12. The Counter-Plaintiff's claims are barred, in whole or in part, by unclean hands.

The Counter-Plaintiff is putting his litigation counsel's, and his expert's interests, ahead of the interests of unit holders by seeking unreasonable, unnecessary, and excessive compensation for bringing time-barred and legally unsupportable claims against the Corporate Trustee.

13. The Counter-Plaintiff's claims are barred, in whole or in part, by indemnity.

14. The Counter-Plaintiff's claims are barred, in whole or in part, by the doctrines of payment, offset, credit, and/or recoupment.

15. The Corporate Trustee pleads the defense of actual, apparent, and/or implied consent.

16. The Counter-Plaintiff's claims are barred because Cross-Plaintiff is attempting to recover for actions which all unit holders had full knowledge. Simply put, the Counter-Plaintiff is seeking to recover for claims which the unit holders would not be able to bring if they were making such claims individually.

17. The Counter-Plaintiff's claims are barred by acquiescence.

18. The allegations in the First Amended Counterclaim fail to state a claim upon which relief can be granted.

19. The Corporate Trustee pleads the defense of the vice principal rule.

20. Counter-Plaintiff's claim for an accounting fails because Counter-Plaintiff can obtain adequate relief through the use of standard discovery and because Counter-Plaintiff's underlying grounds for obtaining an accounting fail.

21. The Corporate Trustee pleads that a negligence action is not permitted against Counter-Plaintiff pursuant to the Trust Agreement of the Trust.

22. The Corporate Trustee specifically denies responsibility for punitive or exemplary damages. If this Court finds that such damages are recoverable, such exemplary damages are limited by Texas Civil Practice and Remedies Code section 41.008, and in addition, Counter-Plaintiff cannot recover any punitive damages that are constitutionally excessive. The Corporate Trustee invokes all limitations, requirements, and protections provided in Texas Civil Practice and Remedies Code chapter 41, including without limitation, the requirement that Counter-Plaintiff prove by clear-and-convincing evidence the right to recover and the elements of exemplary damages. The Corporate Trustee contends that the correct burden of proof under constitutional principles is "beyond a reasonable doubt," but at a minimum, the standard is clear-and-convincing evidence, as required by chapter 41.

23. Awarding punitive damages would violate the Corporate Trustee's constitutional rights, including their rights to equal protection and due process under Article I, Sections 3, 13, and 19 of the Texas Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. Awarding punitive damages would also be an unconstitutional taking under Article I, Section 17 of the Texas Constitution. In addition, awarding punitive damages would violate the prohibitions against excessive fines and cruel or unusual punishment under Article I, Section 13 of the Texas Constitution and the Eighth Amendment to the United States Constitution.

Among other things, awarding punitive damages would be a constitutional violation, because:

- a. Texas law regarding punitive damages is unconstitutionally vague and does not provide sufficient notice of the conduct that could be punished and the severity of the punishment;
- b. The unconstitutional vagueness of Texas law results in arbitrary and discriminatory awards;
- c. Texas law does not provide adequate substantive and procedural safeguards to prevent arbitrary, excessive, and unconstitutional awards;
- d. Texas law does not provide adequate and meaningful guidance to fact finders when they award punitive damages, leaving such awards to arbitrary determinations by the fact finders;
- e. Texas law does not require that liability for and the amount of punitive damages be proven beyond a reasonable doubt;
- f. Punitive damages are a windfall to plaintiffs, making such damages an unconstitutional taking; and
- g. Punitive damages are not available for lawful conduct inside of Texas, for conduct outside of Texas, for conduct that has already been punished, for the conduct of another party, or for harm to others besides the plaintiff.

24. The Corporate Trustee pleads that the Counter-Plaintiff has exceeded the scope of his authority.

25. 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:

- a. Pursuant to Section 2.02 of the Trust, one of the purposes of the Trust is to "pay or provide for the payment of any liabilities incurred in carrying out the purposes of the Trust, and thereafter to distribute the remaining amounts received by the Trust pro rata to the owners of the Units."
- b. Pursuant to Section 3.03, the unit holders "take and hold the Unit subject to all the terms and provisions of this Trust Agreement."
- c. Pursuant to Section 6.01, the Trustees are "authorized" to ... take such actions as in their judgment are necessary, desirable or advisable to achieve the purpose of the Trust."
- d. Pursuant to Section 6.06, the Trust Agreement provides that the Trustees "shall use all money received by the Trust for the payment of all liabilities of the Trust, including but not limited to all expenses, taxes, and liabilities incurred of all kinds, compensation to the Trustees for their services..."
- e. Pursuant to Section 6.08, in the event of borrowing money to cover Trust's costs, "the Trustees shall suspend further Trust distributions ... until the indebtedness created by such borrowing has been paid in full."
- f. Pursuant to Section 6.11, "[t]he Trustees are authorized to maintain and defend, and to settle, in the Trust's name any claim or controversy by or against the Trust without the joinder or consent of any Certificate Holder or owner of a Unit."
- g. Pursuant to Section 6.13 of the Trust Agreement, "[t]he powers granted the Trustees under this Trust Agreement may be exercised upon such terms as the Trustees deem advisable and may affect the Trust properties for any length of time regardless of the duration of the Trust."
- h. Pursuant to Section 6.14 of the Trust Agreement, "[t]he Trustees shall be under no obligation to ... dispose of any wasting assets." The Trust Agreement specifically relieved the Trustees of any duty to dispose of any Trust assets at any particular time.
- i. Pursuant to Section 7.01 of the Trust Agreement, "[t]he Trustees are empowered to act in their discretion and shall not be personally or individually liable for any act or omission except in the case of gross negligence, bad faith or fraud."
- j. Pursuant to Section 7.03 of the Trust Agreement, "[t]he Trustees shall be indemnified by, and receive reimbursement from, the Trust Estate against ... any and all liability, expense (including counsel fees and expenses incurred in preparing for and defending claims or suits), ... or loss incurred by them individually or as Trustees in the

administration of the Trust [except for] gross negligence, bad faith or fraud....” Moreover, this Section provides the 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.”

- k. Pursuant to Sections 7.04 and 7.05 of the Trust Agreement, the Corporate Trustee and the Individual Trustees are entitled to compensation for their services, as set forth in the Trust Agreement.
- l. 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
- m. Pursuant to Section 9.01, the Trust Agreement's termination provisions were not triggered.

The Corporate Trustee would show this Court that the claims asserted by the Counter-Plaintiff are all barred by the language quoted above.

26. The Corporate Trustee relies upon Texas Property Code, Section 112. 054, which sets forth the limited circumstances in which modification or termination of a trust should be sought. The Trustees' decision to seek judicial termination of the Trust in 2014 was an extraordinary measure.

27. The Corporate Trustee pleads the defense of mitigation of damages.

28. The Corporate Trustee pleads that it is likely to succeed on the merits of this case and has a probable right to the relief it seeks. Pursuant to Section 7.03 of the Trust Agreement, the Corporate Trustee has a lien on the Trust Estate's assets, which it seeks to enforce. The Corporate Trustee pleads that it is entitled to reimbursement of its expenses, including attorney's fees, from the Trust Estate; that third-parties who have been retained by the Trustees are also

entitled to reimbursement of their expenses from the Trust Estate; and that Counter-Plaintiff is not entitled to the Trust Estate's remaining funds.

29. The Counter-Plaintiff is bringing a meritless claim that relates directly to the issue of who is properly entitled to reimbursement of expenses. If the Counter-Plaintiff is allowed to diminish the Trust Estate, the Trustees will suffer probable injury as the harm will be imminent and the injury will be irreparable, with no adequate legal remedy available to the Trustees. Furthermore, the Counter-Plaintiff's actions are impairing the Corporate Trustee's lien rights without due process. Due to the competing claims to the Trust Estate's remaining claims, the Court should not consider the Counter-Plaintiff's fee and/or expense applications until the merits of this lawsuit have been decided.

30. The Counter-Plaintiff should not be allowed to waste and deplete the remaining Trust assets and violate the due process rights of the Corporate Trustee and the Trust itself.

31. The Corporate Trustee files this Original Answer in good faith and with just cause. The Corporate Trustee respectfully reserves the right to file an Amended Answer in this case in the manner authorized by the Texas Rules of Civil Procedure.

III. PRAYER

WHEREFORE, Counter-Defendant the Bank of New York Mellon Trust Company, N.A., as Corporate Trustee, prays that the Counter-Plaintiff Attorney Ad Litem take nothing; that the Corporate Trustee be awarded its reasonable attorneys' fees, costs, and expenses, and pre- and post-judgment interest thereon; that the Corporate Trustee be discharged with its costs; and that the Corporate Trustee recover general relief.

Respectfully submitted,

/s/ Craig A. Haynes

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CORPORATE TRUSTEE OF THE TEL
OFFSHORE TRUST

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WITHDRAWING ATTORNEYS FOR THE
BANK OF NEW YORK MELLON TRUST
COMPANY, N.A., AS CORPORATE TRUSTEE

CERTIFICATE OF SERVICE

I hereby certify that, on September 23, 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 September 23, 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

THOMPSON & KNIGHT LLP

ATTORNEYS AND COUNSELORS

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September 30, 2016

Via E-File

Tanya Scanlon, Court Coordinator
Probate Court, Travis County
P. O. Box 1748
Austin, TX 78767

Re: No. C-1-PB-14-001245; *In Re: Tel Offshore Trust*; in the Probate Court of
Travis county, Texas

Dear Ms. Scanlon:

Enclosed is the verification of Michael Ulrich which should be included with the
Corporate Trustee of the Tel Offshore Trust's Original Answer to Attorney Ad Litem's
First Amended Counterclaim filed on September 23, 2016.

Thank you for your time and consideration.

Very truly yours,

/s/ Rachelle H. Glazer

Rachelle H. Glazer

c: All counsel of record

Verification

STATE OF TEXAS

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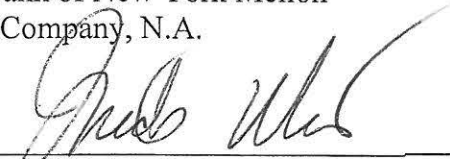
COUNTY OF TRAVIS

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Before me, the undersigned authority, appeared The Bank of New York Mellon Trust Company, N.A., as Corporate Trustee, acting through their authorized agent, Michael Ulrich, and after being first duly sworn according to law upon their oath, deposed and stated that the factual statements contained in paragraphs 2, 3, 4, and 5 of this instrument are true and correct to The Bank of New York Mellon Trust Company, N.A.'s knowledge.

The Bank of New York Mellon
Trust Company, N.A.



By: Michael Ulrich
Representative of The Bank of New
York Mellon Trust Company, N.A.

SUBSCRIBED AND SWORN to before me on this the 28 day of September, 2016.



Notary Public, State of

My Commission Expires:

02-16-18

