

NO. C-1-PB-14-001245

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

ATTORNEY AD LITEM’S MOTION FOR CONTINUANCE OF HEARING ON TRUSTEE’S MOTION FOR SUMMARY JUDGMENT ON STANDING

Pursuant to Tex. R. Civ. P. 166a (g) Glenn M. Karisch, Attorney Ad Litem (“Ad Litem”) for the unit holders of the TEL Offshore Trust who were served by publication and did not answer or appear (“AAL Parties”), moves to continue the March 20, 2017 hearing on Corporate Trustee of the TEL Offshore Trust’s Motion for Tradition and No-Evidence Partial Summary Judgment on the Issue of Standing (“Standing MSJ”) as follows.

In the Standing MSJ, the Corporate Trustee, Bank of New York Mellon Trust Company (“Trustee” or “BNYM”) seeks summary judgment against Ad Litem’s claims on the grounds that Ad Litem cannot show when any of the AAL Parties acquired units and therefore cannot show that they were owed fiduciary duties when Ad Litem contends that BNYM breached its fiduciary duties. All of the AAL Parties owned units as of July 2, 2014 and thus were owed fiduciary duties at that time and before. BNYM’s breaches of fiduciary duty were a continuing tort beginning in 2009¹ and continuing until it ultimately sold the last portion of the net profits interest in 2016. Thus, any one of the AAL Parties whose interests the Ad Litem represents has standing to sue for those breaches of fiduciary duty. And one of the remedies for those breaches is to restore to the Trust estate the loss in value the breaches caused. See Attorney Ad Litem’s Motion for Summary Judgment on Measure of Damages.

¹ The Court has already found that the Trustee breached its fiduciary duty by paying itself compensation contrary to the Trust Agreement. Based on BNYM’s interrogatory answers, this breach began in 2007.

Nonetheless, Ad Litem has attempted to discover information about when the AAL Parties acquired their units and the period over which they held them. His counsel reviewed tens of thousands of pages of documents BNYM produced but did not find any document showing when the AAL Parties purchased units in the Trust. *See* Affidavit of Daniel Bitting (“Bitting Aff.”), attached as Exhibit A. Having failed to find this information in the documents, Ad Litem asked BNYM in an interrogatory to identify the unit holders since January 1, 2008, including the dates and amounts of their purchases. *See id.* BNYM refused to provide this information, requiring Ad Litem to file a motion to compel. *See* Attorney Ad Litem’s Motion to Compel Corporate Trustee to Provide Information about Unit Holders, both of which are fully incorporated herein.

Evidence of when the AAL Parties acquired and held their units is clearly material to BNYM’s standing argument. Ad Litem has used diligence to obtain this evidence but has been unable to obtain it. *See* Bitting Aff. Accordingly, pursuant to Tex. R. Civ. P. 166a (g) the Court should either deny the Standing MSJ or continue the hearing on the Standing MSJ until a reasonable time after BNYM answers Ad Litem’s interrogatory and provides the information requested concerning the identity of the AAL Parties.

WHEREFORE, PREMISES CONSIDERED, Ad Litem requests that the Court deny the Standing MSJ or alternatively continue the March 20, 2017 hearing on the Standing MSJ and grant Ad Litem such other and further relief, both at law and in equity, to which he may be justly entitled.

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 on counsel of record on March 13, 2017 and 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

AFFIDAVIT OF DANIEL C. BITTING

Affiant, Daniel C. Bitting, duly sworn on oath, deposes and states as follows:

1. "I am over 18 years old and have never been convicted of a felony or crime of moral turpitude. I have personal knowledge of the facts stated herein and they are true and correct.

2. I am lead counsel for Glenn M. Karisch, as Attorney Ad Litem ("Ad Litem") for the unit holders of the TEL Offshore Trust ("Trust") who were served by publication but did not answer or appear ("AAL Parties"). According to information provided by the Corporate Trustee of the Trust, Bank of New York Mellon Trust Company ("Trustee" or BNYM"), the AAL Parties consist of some 2,743 persons or entities who owned units in the Trust as of July 2, 2014.

3. I make this affidavit in support of Attorney Ad Litem's Motion for Continuance of Hearing on Trustee's Motion for Summary Judgment on Standing and in support of Attorney Ad Litem's Response to Trustee's Motion for Summary Judgment on Standing. The motion for continuance seeks a continuance of the hearing on Corporate Trustee of the TEL Offshore Trust's Motion for Tradition and No-Evidence Partial Summary Judgment on the Issue of Standing ("Standing MSJ"). In the Standing MSJ, BNYM seeks summary judgment against Ad Litem's claims on the grounds that Ad Litem cannot show when any of the AAL Parties acquired units and therefore cannot show that they were owed fiduciary duties during the times when Ad Litem contends that BNYM breached its fiduciary duties.

4. On behalf of the Ad Litem, I and my firm have diligently attempted to discover information showing when the AAL Parties acquired their units and the period over which they held the units. I, my partner Cindy Saiter, and others with my firm, have reviewed tens of thousands of pages of documents produced by BNYM in this case. We have not discovered any information that shows when the AAL Parties acquired their units or how many units they acquired. Consequently, to obtain this information we sent interrogatories to BNYM. A true and correct copy of BNYM's response to the Ad Litem's second set of interrogatories is attached to Attorney Ad Litem's Motion to Compel Corporate Trustee to Provide Information About Unit Holders. Interrogatory number 4 asked BNYM to identify the unit holders since January 1, 2008, including the date and amounts of their purchase and the date of any disposition of their units. If BNYM provided this information, we could crosscheck it against a list of at least some of the AAL Parties to determine when they acquired their units. (The identity of some of the AAL Parties—which BNYM refers to as the "Objecting Beneficial Owners—is unknown because, according to BNYM, these owners refused to allow their brokers or financial institutions to reveal their identities.) However, BNYM refused to provide this information. Despite using diligence to review the documents BNYM produced and to obtain additional information through interrogatories, Ad Litem has been unable to obtain and present facts essential to justify his opposition to the Standing MSJ.

FURTHER AFFIANT SAYETH NOT.

By: 
Daniel C. Bitting

SUBSCRIBED AND SWORN TO before me on this the 13th day of March, 2017, to certify which witness my hand and official seal.

Michelle Price

Notary Public in and for the State of Texas

Michelle Price

Printed or typed name

My Commission Expires:

