

**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 FOR SUMMARY JUDGMENT ON  
MEASURE OF DAMAGES**

TO THE HONORABLE JUDGE HERMAN:

Glenn M. Karisch, as Attorney Ad Litem (“Ad Litem”) representing the interests of the unit holders of the TEL Offshore Trust who were served by publication and did not answer or appear (“AAL Parties”), moves for summary judgment on the measure of damages under Texas Trust Code § 114.001(c) as follows.

On behalf of the AAL Parties, Ad Litem sues the Corporate Trustee, Bank of New York Mellon Trust Company, N.A. (“BNYM”), for breach of fiduciary duty, among other things. Among other potential remedies, Ad Litem seeks the remedy authorized by Texas Trust Code § 114.001(c). It provides:

- (c) A trustee who commits a breach of trust is chargeable with any damages resulting from such breach of trust, including but not limited to:
- (1) any loss or depreciation in value of the trust estate as a result of the breach of trust;
  - (2) any profit made by the trustee through the breach of trust; or
  - (3) any profit that would have accrued to the trust estate if there had been no breach.

Ad Litem contends that the statute means what it says and that upon a finding of breach of trust, the Court may charge BNYM with the full loss in the value of the trust estate caused by the breach. BNYM has argued that, notwithstanding the statute's plain language, each beneficiary—and in Ad Litem's case, each of the 2,743 AAL Parties he represents—must independently prove damages and can only recover the damages attributable to his or her beneficial interest in the trust for time they held the interest. Due to the number of beneficiaries with small interests (some of whom are AAL Parties) it is practically impossible for each of them to independently prove the damages associated with their interests, even though those damages are real. BNYM seeks to take advantage of this circumstance to escape even an inquiry into its conduct. In effect, BNYM contends that a trustee can breach its fiduciary duties and damage the trust estate with impunity, because it will only be responsible for the damages attributable to the interests of those beneficiaries that sue it. BNYM's position is contrary to the principle under Texas law that a fiduciary cannot escape responsibility for its breaches of fiduciary duty simply by contending that a beneficiary has not shown that it suffered damages. *Cf. Burrow v. Arce*, 997 S.W.2d 229, 239 (Tex. 1999).

Further, BNYM's position ignores the plain language of the statute. But Texas courts have applied this plain language, recognizing that Section 114.001(c) provides that “a trustee who breaches trusts is chargeable with any damages resulting from that breach, including, but not limited to, any loss or depreciation in the value of the trust estate” even if the trustee did not personally benefit from the breach. *Crowder v. Meyer*, No. 01-98-00105-CV, 1999 WL 82442, \* 3 (Tex. App.—Houston [1st Dist.] Feb. 11, 1999, no pet.).

In addition, the Texas Pattern Jury Charge for trust cases recognizes that the damages available under §114.001 are to compensate the trust estate for damages caused by breach of trust:

QUESTION \_\_\_\_

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate the trust estate for the damages, if any, resulting from the *conduct inquired about in Question \_\_\_\_ [PJC 235.9-235.112 (breach of duty)]?*

Consider the following elements of damages, if any, and none other.

1. *Any loss or depreciation in value of the trust.*
2. *Any profit made by the trustee.*
3. *Any profit that would have accrued to the trust estate.*
4. *[Other applicable elements].*

Consider each element separately. Do not add any amount for interest on damages, if any.

1. *[Element 1]*

Answer: \_\_\_\_\_

2. *[Element 2]*

Answer: \_\_\_\_\_

PJC 235.14, Texas Pattern Jury Charges Family & Probate (2016) (emphasis in original).

The proper interpretation of the statute is a question of law. Thus, a summary judgment is an appropriate way for the Court to declare the proper interpretation of §114.001(c). Accordingly, Ad Litem asks the Court to rule that if BNYM is found to have committed a breach of trust, it is chargeable with any damages resulting from such breach of trust, including but not limited to: (1) any loss or depreciation in value of the

trust estate as a result of the breach of trust; (2) any profit made by the trustee through the breach of trust; and (3) any profit that would have accrued to the trust estate if there had been no breach. The Court should further rule that such damages are payable to the trust estate for the benefit of all beneficiaries,<sup>1</sup> not just those that sued, and the damages are not limited to the interests of the AAL Parties or any other beneficiaries that actually sued.

WHEREFORE, PREMISES CONSIDERED, Glenn M. Karisch, as Attorney Ad Litem representing the interests of the unit holders of the TEL Offshore Trust who were served by publication and did not answer or appear, requests that the Court grant summary judgment requested herein and grant such other and further relief, both at law and in equity, to which he may justly be entitled.

Respectfully submitted,

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By: /s/ Daniel C. Bitting

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**Attorneys for Attorney Ad Litem**

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<sup>1</sup> This motion does not ask the Court to determine the allocation of any damages among the beneficiaries, should any damages be awarded.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been served on counsel of records on February 24, 2017 and will be served in accordance with the Court's orders regarding service dated September 28, 2015 and January 21, 2016.

By: /s/ Daniel C. Bitting  
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