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

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

**ATTORNEY AD LITEM'S OBJECTIONS TO AFFIDAVITS OF MICHAEL J. ULRICH**

Glenn M. Karisch ("Ad Litem"), appointed by this Court as attorney ad litem to represent the interests of the unit holders of the TEL Offshore Trust ("Trust") who were served by publication and did not answer or appear files these Objections to the Affidavit of Michael J. Ulrich ("Ulrich") dated February 21, 2017 (the "February Affidavit") and the Affidavit of Michael J. Ulrich dated March 10, 2017 (the "March Affidavit"):

## I. OBJECTIONS TO CONCLUSORY STATEMENT IN BOTH AFFIDAVITS

Ad Litem objects that the following statements in both the February and March Affidavits lack foundation, are conclusory and are vague:

> 8. I understand that Section 11.01 of the Trust Agreement permits unit holders to inspect the books and records of the Trust. This would include all reserve reports by DeGolyer & MacNaughton and the compensation to the Corporate Trustee.

Ulrich's statement of his "understanding" that the books and records of the Trust would include "all reserve reports" and "the compensation to the Corporate Trustee" lacks any foundation as to how he arrived at that understanding. Was he told that by his attorney? Is that is legal interpretation of the Trust Agreement? While acting on behalf of the Trustee did he ever make that determination or is it just speculation?

Further Ulrich does not identify what "books and records" would address the Corporate Trustee's compensation. He previously testified that he did not keep records of the time he or others worked on Trust matters. *See* Attorney Ad Litem's Motion for Summary Judgment that Corporate Trustee has Breached its Fiduciary Duty by Paying Itself Compensation in Violation of the Trust Agreement, at 3 and deposition excerpt cited therein.

Affidavits supporting a motion for summary judgment must set forth facts, not conclusions. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984) (holding that affidavits containing conclusory statements unsupported by facts are not competent summary judgment proof); *Larson v. Family Violence & Sexual Assault Prevention Ctr.*, 64 S.W.3d 506, 514 n. 6 (Tex. App.—Corpus Christi 2001, pet. denied). "A conclusory statement is one that does not provide the underlying facts to support the conclusion." *Haynes v. City of Beaumont*, 35 S.W.3d 166, 178 (Tex. App.—Texarkana 2000, no pet.). *Garner v. Long*, 106 S.W.3d 260, 267 (Tex. App.—Fort Worth 2003, no pet.). Absent any factual support, Ulrich's affidavit testimony is not proper summary judgment evidence.

Ad Litem therefore objects that Ulrich has not established that he has any personal knowledge or laid the appropriate foundation for this testimony. *See* TEX. R. EVID. 602. As such his statements amount to pure speculation and should be stricken from the summary judgment record.

In addition, Ad Litem objects that `Ulrich is not qualified to offer a legal opinion on the effect or interpretation of the Trust Agreement. *See* TEX. R. EVID. 702.

Further, the February Affidavit is submitted in support of BNYM's motion for summary judgment on limitations, and Ulrich is an interested witness. Under Tex. R. Civ. P. 166a(c) "[a] summary judgment may be based on uncontroverted testimonial evidence of an interested witness . . . if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted." The February Affidavit does not meet these criteria. As discussed above, it is not clear, positive and direct. Further, the lack of detail described above prevents the affidavit from being readily controverted. Therefore, the February Affidavit is not competent summary judgment proof.

## II. OBJECTIONS TO MARCH AFFIDAVIT

Ad Litem objects to paragraph 9 of the March Affidavit that states:

> 9. I understand that Section 9.01 of the Trust Agreement provides, in part, that the Trust shall terminate "(a)t such time as total future net revenues attributable to the Overriding Royalty Interest as determined by independent petroleum engineers as of the end of any year, are less than $2 million." The March 31, 2009 report by DeGolyer & MacNaughton was only a mid-year report, and it was followed by a yearend report for 2009 that concluded reserves were greater than $2 million.

The affidavit does not demonstrate any foundation for Ulrich's opinion that the March 31, 2009 report was not a year-end report. Further, Ulrich is not qualified to offer opinions on the legal interpretation of Section 9.01 of the Trust Agreement, including what constitutes the determination of future net revenues as of the end of any year.

Ad Litem further objects to paragraph 10 in the March Affidavit which states:

> 10. I was deposed in the above-styled case on July 14, 2016. I had not seen or reviewed the March 31, 2009 DeGolyer and MacNaughton report prior to my deposition. As a result I did not immediately notice that this

> was not a year-end report but, upon reflection and realization that this was only a mid-year report, this report could not have triggered automatic termination of the Trust pursuant to the Trust Agreement. Whether the mid-year report was required to be disclosed to the Trust's unit holders is a question for my securities counsel, as I cannot provide an answer on this issue."

First, this new testimony completely contradicts his sworn deposition testimony in several ways. (The Ulrich deposition excerpts are Exhibit 1 to Attorney Ad Litem's Motion for Summary Judgment on Defendant's Statute of Limitations Defense and are fully incorporated herein.) In his deposition he testified that he saw the March 31, 2009 report sometime in April 2009:

> Q. (By Mr. Ratliff) This appears to a letter report as of March 31, 2009, on reserves in [sic] revenue and this letter bears a date of May 15, 2009, right?
>
> A. Yes, sir.
>
> Q. When was the first time you saw this report?
>
> A. Sometime in April of 2009.
>
> Q. Sometime in April of 2009?
>
> A. Yes, sir.

Ulrich Dep. 145:5-12. He now claims, though, that he had not seen or reviewed the report before his deposition.

Further, in his deposition he admitted that the findings in the March 31, 2009 report were important information that should have been disclosed to the beneficiaries and he does not know why it was not disclosed:

Q. And a report like this would be something enough information you would sure want to review it, wouldn't you?

A. Yes, sir.

Q. And if it had reported zero values for the trust assets, you would want to make sure there was immediately a disclosure to the unit holders and to other stake holders of that fact, wouldn't you?

THE WITNESS: Yes.

Q. Did you do that?

A. No.

Q. And why didn't you?

A. I don't – I don't know. I don't have an answer.

Ulrich Dep., 151:7-21.

Now, he claims that he does not know if it needed to be disclosed because he would have to ask his securities counsel.

Ulrich had the opportunity to change this deposition testimony by the errata sheet and did not do so. He gives no explanation for this 180 degree change in his testimony in his affidavit. Thus, this affidavit does nothing more than present a sham fact issue to avoid summary judgment and should not be considered. *See, e.g., Martinez v. Daughters of Charity Health Services*, No. 03-05-00264-CV, 2006 WL 3453356, at *5 (Tex. App.—Austin Nov. 30, 2006, no pet.) ("If a party's own affidavit contradicts her earlier testimony, the affidavit must explain the reason for the change. Without such an explanation, we assume that the sole purpose of the affidavit was to avoid summary judgment. Accordingly, we hold that Martinez's affidavit presents nothing more than a

"sham" fact issue."); *Goeth v. Craig, Terrill & Hale, L.L.P.*, No. 03-03-00125-CV, 2005 WL 850349, at *3 (Tex. App.—Austin Apr. 14, 2005, no pet.) ("A party 'cannot file an affidavit to contradict his own deposition testimony without any explanation for the change in the testimony, for the purpose of creating a fact issue to avoid summary judgment.' Such an affidavit presents no more than a "sham" fact issue."); *Eslon Thermoplastics v. Dynamic Sys., Inc.*, 49 S.W.3d 891, 901 (Tex. App.—Austin 2001, no pet.) (same).

Ad Litem further objects to the statement that "upon reflection and realization that this was only a mid-year report, this report could not have triggered an automatic termination of the Trust pursuant to the Trust Agreement." This is a legal conclusion which Ulrich is not qualified to make. *See* TEX. R. EVID. 702.

Because the statements described above do not provide competent summary judgment evidence, the Court should strike them and not consider them.

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 the 17th day of March 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