

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 REPLY TO TRUSTEE'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT DAMAGES**

Glenn M. Karisch, Attorney Ad Litem (“Ad Litem”) for the unit holders of the TEL Offshore Trust (“Trust”) who were served by publication and did not answer or appear (“AAL Parties”), replies to the Corporate Trustee of the TEL Offshore Trust’s Response to Ad Litem’s Motion for Summary Judgment on Measure of Damages (“Damages Response”) and Corporate Trustee of the TEL Offshore Trust’s Supplement to Response to Ad Litem’s Motion for Summary Judgment on the Measure of Damages (“Supplemental Response”), filed by Bank of New York Mellon Trust Company, N.A. as Corporate Trustee (“BNYM” or “Trustee”) as follows.

Attorney Ad Litem’s Motion for Summary Judgment on the Measure of Damages (“Damages MSJ”) is straightforward. It simply asks the Court to construe a statute, Texas Trust Code § 114.001(c), and declare what the remedy is under that statute if Ad Litem (or other Plaintiffs) shows that BNYM committed a breach of trust. It is the Court’s job, of course, to construe statutes. And this statutory construction is not difficult. Section 114.001(c) provides that a trustee who breaches the trust is chargeable with, among other things, the loss or depreciation in the value of the trust caused by the breach. It does not say that a breaching trustee is chargeable only with the loss or depreciation in the value of the portion of the trust estate *attributable to the interest of any beneficiaries that sue it*. In effect, BNYM wants the Court to read that limitation into the statute.

True, Ad Litem has not found a reported decision confirming that the statute means what it says. Equally true is that BNYM has not cited any authority that the damages under 114.001(c) are limited to only the interests of beneficiaries that actually sue a trustee. The lack of reported cases is likely due to the fact that the statutory language is clear and has not required construction on appeal. Ad Litem's position is that the Court should enforce the statute as written and not read into it limitations that the legislature could have added if it wanted to but didn't.

Rather than address the straightforward question of statutory construction, BNYM resorts to its oft-repeated tactic of mischaracterizing Ad Litem's claims and citing the *XTO Energy* case that did not even mention, much less construe, §114.001(c). For the umpteenth time, Ad Litem is not suing derivatively. He brings claims only on behalf of the AAL Parties whose interests he was appointed to represent. If Ad Litem's interpretation of 114.001(c) is correct and he proves a breach of trust, the Court may award damages equal to the total loss in value of the trust estate due to BNYM's breaches. That such an award might benefit beneficiaries in addition to the AAL Parties does not make Ad Litem's claims derivative claims.

The *XTO* opinion did not address a claim by an ad litem, who, by definition, is appointed to represent others' interests, and it also did not address § 114.001(c). *See In re XTO Energy Inc.*, 471 S.W.3d 126 (Tex. App.—Dallas 2015, orig. proceeding). Further, it recognized that a trust beneficiary can do exactly what Ad Litem is doing for the AAL parties: sue a trustee for breach of fiduciary duty. *See id* at 137-38. Ad Litem's position on the claims he is bringing and the damages he is seeking has been consistent, both in this Court and before the Texas Supreme Court. He sues on behalf of the AAL Parties. And he seeks the remedy authorized by §

114.001(c). *See* Response to Petition for Writ of Mandamus, Exhibit A to Damages Response, at p. 9.<sup>1</sup>

BNYM's untimely<sup>2</sup> Supplemental Response adds a new argument for why it should not be held accountable for its breaches of trust. It claims that Section 7.09 of the Trust Agreement preempts the statutorily-authorized damages under §114.001(c). It claims that Section 7.09 relieves the Trustees from any duties or liabilities except those imposed by Sections 10, 11 and 12 of the Texas Trust Act and notes that those sections of the Texas Trust Act became sections of the Trust Code other than §114.001(c). This newest argument fails for at least three reasons.

First, as an exculpation clause, Section 7.09 is subject to Texas Trust Code §114.007. Section 114.007 provides that an exculpation clause such as Section 7.09 is unenforceable to relieve a trustee of liability for a breach of trust committed in bad faith, intentionally or with reckless indifference or for any profit derived by the trustee from a breach of trust. This Court has already found that BNYM intentionally breached its trust by paying itself compensation contrary to the Trust Agreement. If Ad Litem can prove other breaches of trust that were intentional, in bad faith or with reckless indifference, 7.09 will not exculpate BNYM.

Second, §114.001(c) provides a measure of damages, not a duty, restriction or liability. Section 7.09 does not purport to eliminate measures of damages for breaches of trust; it only addresses what may or may not constitute a breach of trust and whether or not a trustee can be held liable.

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<sup>1</sup> The mandamus response states: "Ad Litem's live petition (like earlier ones) asserts claims only on behalf of the AAL Parties. See SR263-65 (Trustees' breaches of fiduciary have "damaged the trust estate and caused damages to the AAL Parties"); and SR267-68 (Trustees' actions constitute negligence and gross negligence that "proximately and directly caused damage and injury to the Trust Estate and to the AAL Parties.>"). The real question is what damages Trustee must pay if Ad Litem proves a breach of trust by Trustee. Ad Litem seeks the remedy under Texas Trust Code § 114.001(c)... Ad Litem believes that under this statute a trustee who commits a breach of trust must pay for the loss to the trust estate regardless of how many beneficiaries sue for those damages."

<sup>2</sup> The Supplemental Response was filed five days before the summary judgment hearing. It is thus not timely under Rule 166a, and the Court need not consider it.

Third, Section 7.09 relieves the Trustees “from duties, restrictions and liabilities otherwise imposed upon the Trustees by the Texas Trust Act” (except for duties imposed by Sections 10, 11 and 12 of that Act.) But even if §114.001(c) imposed a duty or liability (and it doesn’t), it was not in the Texas Trust Act. It became effective in 1984 when the Texas Trust Code was enacted. Section 114.001 has no counterpart in the Texas Trust Act. Section 7.09 does not state that it releases duties, restrictions and liabilities in the Texas Trust Act *as it may be amended*. As an exculpation clause, Section 7.09 must be strictly construed and will only release BNYM of liability to the extent that it clearly provides for such a release. *See Neuhaus v. Richards*, 846 S.W.2d 70, 74-75 (Tex. App.—Corpus Christi 1992), writ granted w.r.m., 871 S.W.2d 182 (Tex. 1994); *see also Price v. Johnston*, 638 S.W.2d 1, 4 (Tex. App.—Corpus Christi 1982, no writ) (“When a derogation of the [Texas Trust] Act hangs in the balance, a trust instrument should be strictly construed in favor of the beneficiaries.”) Section 7.09 does not clearly release BNYM of liabilities *based on future amendments* of the Trust Act (or the Trust Code) that were not in the Act when the Trust Agreement was executed. Therefore, it does not apply to §114.001(c), even if it imposed a duty or liability, which it doesn’t.

Finally, the motion is not premature. The legal question of how to construe §114.001(c) is not going to change between now and trial. The parties’ experts need to prepare damage models based on the theory that the Court will submit. If the Court disagrees with Ad Litem’s interpretation his expert will need to revise his damage calculations. And even if this Court or the Texas Supreme Court decides that the Ad Litem lacks standing to bring the claims, the Court will still have to determine the measure of damages for the other plaintiffs’ claims.

This Court has already heard and rejected BNYM’s claim that the Ad Litem is improperly bringing derivative claims. That is not the issue. The issue is what is the remedy

under §114.001(c) if Ad Litem can prove that BNYM breached its trust.<sup>3</sup> BNYM offers no reason why the Court should not enforce § 114.001(c) as written. Accordingly, the Court should grant Ad Litem's Damages MSJ.

Respectfully submitted,

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**Attorney Ad Litem**

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<sup>3</sup> Ad Litem has already proven that BNYM breached its fiduciary duty as a matter of law in the way it compensated itself.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been served on counsel of record on March 17, 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  
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