

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 RESPONSE TO TRUSTEE'S MOTION FOR SUMMARY JUDGMENT ON STANDING**

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”), responds to Corporate Trustee of the TEL Offshore Trust’s Motion for Traditional and No-Evidence Partial Summary Judgment on the Issue of Standing (“Standing MSJ”), filed by the Bank of New York Mellon Trust Company, N.A. (“Trustee” or “BNYM”) as follows.

**I. Summary**

The Court appointed Ad Litem at BNYM’s request to represent the interests of the AAL Parties. The Standing MSJ is simply BNYM’s latest attempt to prevent Ad Litem from doing what he was appointed to do.<sup>1</sup> It now claims that Ad Litem lacks standing because he cannot show when each of the AAL Parties acquired units and were therefore owed fiduciary duties. BNYM is wrong. It clearly owed fiduciary duties to the AAL Parties, who, by definition, owned units as of July 2, 2014, shortly before BNYM filed this suit. Ad Litem is entitled to sue for the breach of those duties and, if successful, obtain the remedy allowed under Texas Trust Code § 114.001(c)—recovery for the Trust estate of the loss in value caused by the breaches.

Alternatively, the Court should deny the Standing MSJ—or at the very least continue the hearing—because BNYM has refused to provide the information to allow Ad Litem to identify the periods during which when the AAL Parties held units.

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<sup>1</sup> The Court has rejected BNYM’s previous arguments that Ad Litem lacks standing to bring affirmative claims for breach of fiduciary duty on behalf of the AAL Parties.

**II. Ad Litem Has Standing to Seek the Remedy Under Texas Trust Code § 114.001(c).**

The AAL Parties owned units in the Trust as of July 2, 2014, and BNYM owed them fiduciary duties. On their behalf, Ad Litem sues for the BNYM's continuing breaches of fiduciary duties that began in 2009<sup>2</sup> Ad Litem seeks the remedy expressly authorized by Texas Trust Code § 114.001(c)—namely, a return to the Trust estate of the loss in value caused by the breaches of fiduciary duty and a return of any profit made through the breaches. *See* Attorney Ad Litem's Motion for Summary Judgment on Measure of Damages, which is fully incorporated herein. Under § 114.001(c), BNYM is chargeable with these damages (among others) for all periods, regardless of who owned the units at the time of the breaches. The periods in which the AAL Parties owned their units might possibly be relevant to the allocation of any damages among them, but that issue is not before the Court. That issue will become ripe only if and when Ad Litem prevails on his claims and there is an award of damages. The issue of who is entitled to the damages and in what amounts is not relevant to the Ad Litem's standing to bring the claims in first instance. The Court should deny the Standing MSJ.

**III. BNYM is Not Entitled to Summary Judgment Based on the Ad Litem's Inability to Provide Information that BNYM Refuses to Provide.**

Even assuming that the Ad Litem must show, at this stage, when the AAL Parties acquired their units, BNYM is not entitled to summary judgment because it alone has that information yet has refused to provide it. Ad Litem served an interrogatory on BNYM asking for the identity of the unit holders since January 1, 2008 including the date they purchased their units, the number of units acquired and the dates any of them sold or disposed of their units. BNYM refused to provide this information. *See* Attorney Ad Litem's Motion for Continuance of Summary Judgment Hearing and Exhibit A thereto and Attorney Ad Litem's Motion to Compel

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<sup>2</sup> 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.

Corporate Trustee to Provide Information about Unit Holders, all of which are fully incorporated herein. Exhibit A to the motion for continuance is also attached hereto. Tex. R. Civ. P. 166(a)(g) provides that a court may deny a motion for summary judgment if the responding party cannot present facts essential to justify his opposition. Here, Ad Litem has been unable to obtain the evidence that the Trustee claims is necessary to establish his standing, due to BNYM's failure to provide it. Thus, the Court should deny the Standing MSJ. In the alternative, the Court should continue the hearing on the Standing MSJ until BNYM provides the requested information and Ad Litem is able to identify the dates on which the AAL Parties acquired their units and the period in which they held those units.

WHEREFORE, PREMISES CONSIDERED, Ad Litem prays that the Court deny the Standing MSJ. Alternatively, Ad Litem prays that the Court continue the hearing on the Standing MSJ as requested herein and as requested in Ad Litem's motion for continuance.. And Ad Litem requests 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

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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 13<sup>th</sup> 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:

