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 CORPORATE TRUSTEE'S MOTION FOR SUMMARY JUDGMENT ON THE AFFIRMATIVE DEFENSE OF STATUTE OF LIMITATIONS DEFENSE

TO THE HONORABLE JUDGE HERMAN:

Glenn M. Karisch, as Attorney Ad Litem ("Ad Litem") for the unit holders of the TEL Offshore Trust ("Trust") that were served by publication and did not answer or appear ("AAL Parties"), files this response to Corporate Trustee of the TEL Offshore Trust's Motion for Traditional and No-Evidence Partial Summary Judgment on the Affirmative Defense of Statute of Limitations (the "Limitations MSJ") filed by Bank of New York, Mellon Trust Company, N.A. ("BNYM" or "Trustee") as follows:

I. SUMMARY

BNYM is not entitled to summary judgment on its affirmative defense of limitations because: (a) it has not carried its burden to prove when the causes of action accrued; (b) the evidence establishes fraudulent concealment and (c) under the continuing tort doctrine the claims were timely filed.

First, BNYM has not proven when the AAL Parties knew or in the exercise of reasonable diligence should have known of BNYM's wrongful acts and the resulting injury, as required to prove accrual under the discovery rule. BNYM relies solely on the

disclosures in its SEC filings, which it admits were the only disclosures it made to the Trust's beneficiaries. But the AAL Parties' claims rest on wrongful acts that were **not disclosed** in those filings. Among other things, BNYM failed to disclose that:

1. In April 2009 it received a report from the Trust's petroleum engineers stating that, as of March 31, 2009, the total future net revenues for the Trust properties were **$0**—below the $2 million minimum that could have triggered termination of the Trust.
2. In 2009 and thereafter it and the other trustees considered various options to respond to the financial crisis the Trust faced due to Hurricane Ike, including:
    - Calling a vote of the beneficiaries, as allowed under the trust agreement, to decide whether to sell all the trust properties and terminate the Trust;
    - Placing the Trust into receivership;
    - Selling all or part of the net profits interest;
    - Borrowing money to pay expenses; and
    - BNYM resigning as trustee.
3. Instead of taking action to preserve value for the beneficiaries, the Trustees placed their interests ahead of the beneficiaries' interests, taking actions that benefitted only the Trustees.
4. BNYM paid itself contrary to the compensation formula under the Trust Agreement.

Because BNYM's SEC filings did not disclose BNYM's wrongful conduct or resulting injuries they were insufficient to put the AAL Parties on notice of their claims.

Second, because BNYM owed the AAL Parties (and all other beneficiaries) the duty of full disclosure, BNYM repeated failure to disclose material facts affecting the beneficiaries' investments constitutes fraudulent concealment—an independent basis to toll the running of the statute of limitations.

Finally, the AAL Parties' claims are timely filed under the continuing tort doctrine. For all these reasons, the Court should deny BNYM's Limitations MSJ.

II. SUMMARY JUDGMENT EVIDENCE

Ad Litem relies on the pleadings in this cause and Cause No. C-1-PB-16-000096 and asks the Court to take judicial notice of those pleadings. Ad Litem further relies on the full content of the SEC filings of the TEL Offshore Trust and asks the Court to take judicial of those filings.[1] In addition, Ad Litem relies on the following exhibits that were filed with Attorney Ad Litem's Motion for Summary Judgment on Defendant's Statue of Limitations Defense ("Ad Litem's Limitations MSJ") on February 24, 2017. That summary judgment evidence is listed below and incorporated as if fully set forth herein:

Exhibit 1	Excerpts from the deposition of Mike Ulrich, as corporate representative of BNYM ("Ulrich Dep.");

[1] The Trust's SEC filings can be accessed here: https://www.sec.gov/cgi-bin/browse-edgar?company=TEL+Offshore+Trust&owner=exclude&action=getcompany. Texas Rule of Evidence 201 allows this court to take judicial notice of facts that are not subject to reasonable dispute because they can be accurately and readily determined from a source whose accuracy cannot reasonably be questioned. TEX. R. EVID. 201(b)(2). Specifically, courts have the power to take judicial notice of SEC filings for the purpose of determining what statements the documents contain—or don't contain—not to prove the truth of the documents' contents. *See United States ex rel. Lam v. Tenet Healthcare Corp.*, 481 F.Supp.2d 673, 680 (W.D. Tex. 2006) (applying nearly identical Federal Rule of Evidence 201(b)).

Exhibits 2a-2h	Excerpts from the United States Securities and Exchange Commission Form 10-K for the years 2008-2015;
Exhibit 3	Letter Report as of October 31, 2008 on Reserves and Revenues of Certain Properties owned by the TEL Offshore Trust Partnership;
Exhibit 4	Letter Report as of March 31, 2009 on Reserves and Revenues of Certain Properties owned by the TEL Offshore Trust Partnership.

Ad Litem also relies on the following exhibit attached hereto:

Exhibit 5	Email dated August 4, 2011 from Mike Ulrich to Bob Rudolph.

III. UNDISPUTED FACTS

Ad Litem fully incorporates the statement of Undisputed Facts in Ad Litem's Limitations MSJ as if fully set forth herein.

IV. ARGUMENT AND AUTHORITIES

A. BNYM's Traditional Motion for Summary Judgment Fails Because It Has Not Proven When the AAL Parties' Causes of Action Accrued Under the Discovery Rule—That is, When They Knew or Should Have Known Of BNYM's Wrongful Acts and the Resulting Injuries.

A defendant moving for summary judgment on the affirmative defense of limitations must conclusively prove when the cause of action accrued. *KPMG Peat Marwick v. Harrison County Housing Finance Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). And when the discovery rule applies, the defendant must prove as a matter of law when the plaintiff discovered, or in the exercise of reasonable diligence should have discovered the nature of his injury. *Id*; *see also Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515,

518 n. 2 (Tex. 1988) ("in a summary judgment setting, the burden rests upon the movant defendant not only to plead limitations, but also to negate the discovery rule.").

BNYM does not dispute that the discovery rule applies[2] but contends that the AAL Parties knew or should have known of their claims in 2009 because of information disclosed in the Trust's SEC filings. Limitations MSJ at pp. 7-9 ("Here, Plaintiffs knew or should have known of the facts giving rise to their claims by March 2009). But none of the SEC filings disclose the wrongful acts that are the basis of the Ad Litem's claims. Ad Litem bases his claims on material facts that were *not disclosed*.

1. BNYM's SEC disclosures do not disclose the basis of Ad Litem's claims.

BNYM mischaracterizes Ad Litem's claims to contend that its SEC filings put the AAL Parties on notice of their claims as early as 2009. Limitations MSJ at pp. 7-9. BNYM argues its SEC filings "fully disclosed the damage caused by Hurricane Ike" and that "future distributions are expected to be severely negatively impacted." Limitations MSJ at p. 4. But Ad Litem is not suing BNYM for causing Hurricane Ike or for not disclosing that the damage from the hurricane might adversely affect distributions. Rather, Ad Litem sues BNYM for failing to disclose information regarding options for the Trust that were material to the AAL Parties' interests:

[2] Ad Litem's Limitations MSJ establishes that the discovery rule applies to Ad Litem's claims for breach of fiduciary duty, negligence and gross negligence as a matter of law. *See* Ad Litem's Limitations MSJ at pp. 8-13. Ad Litem incorporates Ad Litem's Motion as if fully set forth herein.

> 54. The only disclosures that the Trustees made to the Beneficiaries were those in SEC filings. As noted, those disclosures did state that "there are not likely to be sufficient Net Proceeds from the Royalty Properties for the Trust to make a regularly scheduled quarterly distribution to Beneficiaries for the foreseeable future." But the disclosures in the SEC filings omitted numerous material facts and misrepresented other material facts. Neither in their SEC filings nor in any other communication did the Trustees tell the Beneficiaries that:
>
> - The March 2009 Report revealed total future net revenues of the Trust properties were $0, possibly triggering or authorizing termination of the Trust.
> - The situation was so bad by 2009 that the Trustees were considering resigning;
> - In 2009 the Trustees were considering selling all or some of the interests;
> - As of late 2009 the Trustees were considering borrowing money to pay themselves and other administrative expenses;
> - The Trustees considered calling a vote and let the Beneficiaries decide whether to sell all the Net Profits Interest, but the Trustees decided not to do so;
> - Notwithstanding the destruction of Hurricane Ike, the Trustees could have sold all of the Net Profits Interest for the benefit of the Beneficiaries rather than continuing the Trust for their own benefit.
> - The Corporate Trustee intentionally breached the trust by paying itself what it wanted rather than following the terms of the Trust Agreement.
> - That the conduct of the Trustees was so egregious that it probably constituted bad faith, gross negligence, reckless indifference or intentional breach of trust that would enable the Beneficiaries to recover damages for the Trustees' breaches.

Attorney Ad Litem's Second Amended Petition as Realigned Plaintiff at ¶ 54. This misconduct was not disclosed in any SEC filing, and thus the filings did not trigger accrual of the AAL Parties' claims.

Similarly, BNYM urges that the disclosure of trustee compensation in its SEC filings put the AAL Parties on notice of the claim that BNYM paid itself in violation of the Trust Agreement. Limitations MSJ at p. 5 (the "Trust's annual 10-K reports disclosed

the Corporate Trustee's compensation since 2009"). But the SEC filings never disclosed how BNYM was calculating its own fees or that such calculation was contrary to the formula under the Trust Agreement. Thus, any general disclosure of trustee compensation did not trigger accrual of claims based on BNYM paying itself contrary to the Trust Agreement.

2. The AAL Parties had no reason to know or suspect of BNYM's wrongdoing and no duty to inspect records or otherwise investigate BNYM's conduct.

As Trustee, BNYM owed the AAL Parties (and all other beneficiaries) a "fiduciary duty of full disclosure of all material facts known to" it that might affect their rights. *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984). Because BNYM owed this duty of full disclosure, the AAL Parties had no reason to investigate BNYM's conduct. Texas law recognizes that in a fiduciary context the beneficiary is relieved of any duty to investigate its fiduciary. *See S.V. v. R.V.*, 933 S.W.2d at 8 ("a person to whom a fiduciary duty is owed is relieved of the responsibility of diligent inquiry into the fiduciary's conduct, so long as that relationship exists") *citing Willis v. Maverick*, 760 S.W.2d 642, 645 ("Facts which might ordinarily require investigation likely may not excite suspicion where a fiduciary relationship is involved."); *Slay v. Burnett Trust*, 187 S.W.2d 377, 394 (Tex. 1945) (knowledge of facts did not cause trust beneficiaries or co-trustees to suspect wrongdoing by co-trustees); *Courseview, Inc. v. Phillips Petroleum Co.*, 312 S.W.2d 197, 205 ("limitations does not begin to run in favor of a trustee and against the cestui until the latter has notice of a repudiation of the trust, and there is no

duty to investigate at least until the cestui has knowledge of facts sufficient to incite inquiry").

The AAL Parties had no reason to think that the disclosures in BNYM's seemingly-complete SEC filings actually omitted material facts, such as:

1. In April 2009 BNYM received a report from the Trust's petroleum engineers stating that, as of March 31, 2009, the total future net revenues for the Trust properties were **$0**—below the $2 million minimum that could have triggered termination of the Trust.
2. In 2009 and thereafter it and the other trustees considered various options to respond to the financial crisis the Trust faced due to Hurricane Ike, including:
    - Calling a vote of the beneficiaries, as allowed under the trust agreement, to decide whether to sell all the trust properties and terminate the Trust;
    - Placing the Trust into receivership;
    - Selling all or part of the net profits interest;
    - Borrowing money to pay expenses; and
    - BNYM resigning as trustee.
3. Instead of taking action to preserve value for the beneficiaries, the Trustees placed their interests ahead of the beneficiaries' interests, taking actions that benefitted only the Trustees.
4. BNYM paid itself contrary to the compensation formula under the Trust Agreement.

The AAL Parties were entitled to rely on BNYM to comply with its fiduciary duty of full disclosure. They had no reason and no obligation to try to independently confirm that BNYM had disclosed all the material facts it should have disclosed, even if they had the ability to do so, which is doubtful. Moreover, BNYM would have rejected any attempt by an AAL Party to obtain information not in the SEC filings because, as Ulrich said, "we cannot favor one investor over others by providing information in response to private inquiries; so we must direct your attention to the various public disclosures…." Exhibit 5. [3]

Likewise, the AAL Parties had no reason to investigate whether BNYM was honoring its obligations under the Trust Agreement. BNYM was entitled to compensation, but it was not entitled to pay itself by any method and in any amount contrary to the specific formula in the Trust Agreement. Until discovery in this case, the AAL Parties had no reason to think that BNYM would so blatantly put its interest above the beneficiaries by failing to follow the compensation formula set forth in the Trust Agreement.

[3] Even if, as BNYM claims, the AAL Parties had the right to inspect trust records, there is no evidence that such an inspection would have revealed the non-disclosures. To the contrary, the sparse minutes of trustee meetings do not reveal any of the options BNYM admits it considered but chose not to pursue. Further, any right to inspect trust records does not impose an obligation on the AAL Parties to do so. Finally, the suggestion that all 2,743 of the AAL Parties should have examined the Trust's s records is absurd.

B. BNYM Cannot Seek No Evidence Summary Judgment Because It Bears the Burden to Prove, As a Matter of Law, When Plaintiffs' Discovered the Nature of Their Injury.

In seeking a no-evidence summary judgment on its affirmative defense of limitations, BNYM misplaces the burden of proof. When a defendant's request for summary judgment involves the discovery rule, the burden of proof remains with the defendant.

> A defendant moving for summary judgment on the affirmative defense of limitations had the burden to conclusively establish that defense. Thus, the defendant must (1) conclusively prove when the cause of action accrued, and (2) negate the discovery rule, if it applies and has been pleaded or otherwise raised, by proving as a matter of law that there is no genuine issue of material fact about when the plaintiff discovered, or in the exercise of reasonable diligence should have discovered the nature of its injury.

KPMG Peat Marwick, 988 S.W.2d at 748; *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 518 n. 2 (Tex. 1988) ("in a summary judgment setting, the burden rests upon the movant defendant not only to plead limitations, but also to negate the discovery rule.").[4] Because it has the burden of proof on this issue, BNYM cannot seek a no-evidence summary judgment.

C. Evidence of BNYM's Failure to Disclose Material Facts Establishes Fraudulent Concealment.

Fraudulent concealment is an equitable doctrine that, when properly invoked, estops a defendant from relying on limitations as an affirmative defense. *Borderlon v.*

[4] Incredibly, BNYM cites *Woods v. William M. Mercer, Inc.* to argue just the opposite—that Ad Litem has the burden to prove when each unit holder's claim accrued. Limitations MSJ at p. 11. However, the *Woods* opinion very clearly explained the burden to prove the requirements of the discovery rule "in a trial on the merits" is different from a summary judgment setting. *Woods*, 769 S.W.2d at 518 n. 2 ("This is because 'the presumption and burden of proof for an ordinary or conventional trial are immaterial to the burden that a movant for summary judgment must bear.'")

Peck, 661 S.W.2d 907, 908 (Tex. 1983); *Thames v. Dennison*, 821 S.W.2d 380, 384 (Tex. App.—Austin 1991, writ denied). Where a defendant is under a duty to make disclosure but fraudulently conceals the existence of a cause of action from the party to whom it belongs, the defendant is estopped from relying on the defense of limitations until the party learns of the right of action or should have learned thereof through the exercise of reasonable diligence. *Borderlon*, 661 S.W.2d at 908. "The gist of the fraudulent concealment is the defendant's active suppression of the truth or his failure to disclose when he is under a duty to disclose, concerning the facts necessary for the plaintiff to know that he has a cause of action that has accrued." *Leonard v. Eskew*, 731 S.W.2d 124, (Tex. App.—Austin 1987, writ ref'd n.r.e.).

To prove fraudulent concealment survives a no-evidence challenge, AAL must present evidence sufficient to create a fact issue that BNYM had (1) actual knowledge that a wrong occurred d, (2) a duty to disclose the wrong, and (3) a fixed purpose to conceal the wrong. *Seureau v. ExxonMobil Corp.*, 274 S.W.3d 206, 228 (Tex. App.—Houston [14th Dist.] 2008, no pet.). It is undisputed that BNYM owed the AAL Parties a fiduciary duty of full disclosure. *See* Ulrich Dep., 36:3-37:8; *Montgomery v. Kennedy*, 669 S.W.2d at 313. And Ad Litem has evidence of BNYM's knowledge of the wrong and failure to disclose it. *See* Undisputed Facts in Ad Litem's Limitations MSJ, which are fully incorporated herein.

Until learning about it in discovery in this case, the AAL Parties (through Ad Litem) had no reason to know of the existence of the March 31, 2009 Report. A report

that BNYM knew was important and should have been shared with the beneficiaries. Ulrich Dep., 151:7-21; 153:1-13. Similarly, the AAL Parties had no reason to know that BNYM considered but failed to pursue various options that would have protected the beneficiaries' interests in the aftermath of Hurricane Ike. *Id.* at 109:12-110:12. Finally, the AAL Parties had no reason to know BNYM was engaging in self-dealing by paying itself in violation of the Trust. *Id.* at 173:22-176:3. As beneficiaries of the TEL Trust, the AAL Parties were entitled to rely on BNYM to fulfill its fiduciary duties and disclose all information that was material to their investment. By telling only part of the story, the Trust's SEC filings were fraudulent and deceitful.

These actions demonstrate BNYM knowingly concealed facts that it knew were material, leaving the AAL Parties with no means to learn or reason to question whether BNYM was honoring its fiduciary duties. *See Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988) (finding "breach of the duty to disclose is tantamount to concealment"); *S.V. v. R.V.*, 933 S.W.2d 1, 8 (Tex. 1996) (observing "a person to whom a fiduciary duty is owed is either unable to inquire into the fiduciary's actions or unaware of the need to do so.") Given that BNYM had a duty of full disclosure of all material facts, a failure to disclose material information is tantamount to fraud. *See Montgomery*, 669 S.W.2d at 313-14 (discussing whether a trustee's failure to disclose an oil and gas lease was intrinsic or extrinsic fraud); *see also In re Whittington*, 530 B.R. 360, 399-400 (W.D. Tex. 2014) (finding fraudulent concealment deferred accrual where general partner took undisclosed profits from transactions in breach of his fiduciary duty).

The undisputed evidence establishes the required elements of fraudulent concealment. Thus, BNYM's no-evidence motion for summary judgment on limitations fails.

D. Ad Litem's Claims Are Timely Filed Under the Continuing Tort Doctrine.

Under the continuing tort doctrine, BNYM's continuing breaches of its fiduciary duties did not accrue until the wrongful conduct ended—specifically when BNYM finally caused the sale of the remaining net profits interests in 2016. Thus, Ad Litem's counterclaims filed on November 16, 2015 are timely filed.[5]

The continuing tort doctrine applies when torts involve wrongful conduct inflicted over a period of time that is repeated until desisted, and each day creates a separate cause of action. *See Moyer v. Moyer*, No. 03-03-00751-CV, 2005 WL 2043823 *6 (Tex. App.—Austin Aug. 25, 2005, no pet.) (finding intentional infliction of emotional distress is a continuing tort). "Under this rule, a 'continuing tort' does not accrue until the tortious act ceases." *Id.*[6] Thus, Ad Litem's claims for breach of fiduciary duty, negligence and gross negligence are all timely filed.

[5] Ad Litem's original counterclaim asserted claims for an accounting and an order to sell the royalty interests. Ad Litem's additional claims for breach of fiduciary duty, negligence, gross negligence, reckless indifference, intentional conduct, bad faith and fee forfeiture arise from the transactions and occurrences and thus relate back to Ad Litem's original filing. *See* Civ. Prac. & Rem Code §16.068 ("a subsequent amendment or supplement to [a timely-filed pleading] that changes the facts or grounds of liability or defense is not subject to a plea of limitation unless the amendment or supplement is wholly based on a new, distinct, or different transaction or occurrence."). BNYM's argument that Ad Litem did not sue until August 2016 ignores the relation-back statute.

[6] The Texas Supreme Court has not directly addressed the continuing tort doctrine. But it has acknowledged that some courts of appeals have used the doctrine to delay the start of limitations until the last tortious act occurs. *See Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 816 n.8 (Tex. 2005). The Austin Court of Appeals, however, has applied the doctrine. *See Twyman v. Twyman*, 790 S.W.2d 819, 820-21 (Tex. App.—Austin 1990), *rev'd on other grounds*, 855 S.W.2d 619 (Tex. 1993); *Moyer*, 2005 WL 2043823 at *6 (explaining that its undisturbed analysis in *Twyman* governs its analysis of the doctrine).

As for BNYM's breach of trust for paying itself in violation of the Trust Agreement, that conduct continued from at least 2007 and will continue until the Trust is terminated, which has not yet occurred. Each instance that BNYM paid itself in violation of the Trust Agreement was a breach of fiduciary duty, each one a separate cause of action that continues to the present. Thus, these claims are not barred by limitations.

BNYM's failures to disclose that it and the other trustees were considering calling a vote to decide whether to sell all the trust properties and terminate the trust, placing the trust in receivership, selling all or part of the net profits interest and BNYM resigning as corporate trustee, also continued over time. BNYM first considered these options in 2009 and continued to put it interests above the beneficiaries until the sale of Trustees finally decided to file this suit for modification of the Trust on July 10, 2014.

The continuing tort doctrine applies to situations like this when wrongful conduct is repeated over a period of time causing a continuing injury. *See, e.g., In re Jones*, 445 B.R. 677, 718-719 n.124 (N.D. Tex. 2011) (finding continuing tort doctrine applied to breach of fiduciary duty and misappropriation of partnership funds brought in adversary proceeding); *Upjohn Co. v. Freeman*, 885 S.W.2d 538, 542 (Tex. App.—Dallas 1994, writ denied) (holding continued use of injury-producing medication could be continuing tort); *Adler v. Beverly Hills Hosp.*, 594 S.W.2d 153, 155 (Tex. Civ. App.—Dallas 1980, no writ) (concluding false imprisonment is continuing tort for purposes of tolling statute of limitations); *W.W. Laubach Trust v. The Georgetown Corp.*, 80 S.W.3d 149, 159-60 (Tex. App.—Austin 2002, pet. denied) (finding continuing tort doctrine applies to

trespass claim); *Twyman v. Twyman*, 790 S.W.2d 819, 821 (Tex. App.—Austin 1990) *rev'd on other grounds*, 855 S.W.2d 619 (Tex. 1993) (holding negligent infliction of emotional distress is continuing tort); *Newton v. Newton*, 895 S.W.2d 503, 506 (Tex. App.—Fort Worth 1995, no pet.) (finding intentional infliction of emotional distress is continuing tort). Thus, BNYM's breach of its fiduciary duties and negligent conduct were continuing torts and the claims for these torts did not accrue until sale of the remaining net profits interest.

V. CONCLUSION

BNYM is not entitled to either a traditional or no-evidence summary judgment on its affirmative defense of limitations because: (a) it has not carried its burden to prove when the causes of action accrued; (b) the evidence establishes fraudulent concealment and (c) under the continuing tort doctrine the claims were timely filed. Accordingly the Court should deny its motions.

WHEREFORE, PREMISES CONSIDERED Ad Litem respectfully requests that the Court deny BNYM's Limitations MSJ, grant Ad Litem's Limitations MSJ and grant him such other and further relief both at law and in equity, to which he may be entitled.

Respectfully submitted,

SCOTT DOUGLASS & McCONNICO LLP
303 Colorado Street, Suite 2400
Austin, Texas 78701
(512) 495-6300 Telephone
(512) 495-6399 Facsimile

By: */s/ Daniel C. Bitting*
Daniel C. Bitting
State Bar No. 02362480
dbitting@scottdoug.com
Cynthia L. Saiter
State Bar No. 00797367
csaiter@scottdoug.com

Attorneys for Attorney Ad Litem

THE KARISCH LAW FIRM, PLLC

By: */s/ Glenn M. Karisch*
Glenn M. Karisch
State Bar No. 11098950
301 Congress Avenue, Suite 1910
Austin, TX 78701
(512) 328-6346 (telephone)
(512) 597-4062 (fax)
karisch@texasprobate.com

Attorney Ad Litem

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on counsel of records 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.

By: */s/ Daniel C. Bitting*
Daniel C. Bitting

EXHIBIT 5

From: michael.ulrich@bnymellon.com
Sent: Thursday, August 04, 2011 2:06 PM
To: boborudolph@aol.com
Cc: sarah.newell@bnymellon.com
Subject: Fw: TELOZ Shareholder questions and concerns

Bob,we have received your email dated July 25,2011 with various inquiries about TEL Offshore Trust. We do appreciate your interest in the trust.However,given Regulation FD and that the Trust's units are publicly traded,we cannot favor one investor over others by providing information in response to private inquiries; so we must direct your attention to the various public disclosures made by the Trust in connection with your inquiries about the Trust.Sincerely,Mike Ulrich

----- Forwarded by Michael J. Ulrich/TX/DOMESTIC/BNY on 08/04/2011 08:54 AM -----

From: "Kim Wood" <kimwood72@aol.com>

To: <Sarah.Newell@BNYMellon.com>

Cc: <Michael.Ulrich@bnymellon.com>, <gevans@greenhunterenergy.com>

Date: 07/25/2011 01:51 PM

Subject: TELOZ Shareholder questions and concerns

Please forward to Mike Ulrich,

Mike, as per my phone message I am sending a list of questions and comments I feel pertinent to the devaluing to the TEL Offshore Trust stock.

My first concern has to do with the price of dismantling and plugging of the Eugene Island platform damaged by Hurricane Ike.

I understand after reading that the TEL portion of cost should have been 25% and the amount being charged to TEL is $15,000,000. That would indicate Chevron paid $45,000,000 Total $60,000,000

I have studied (mostly on the Internet) and found overwhelming amount of information that indicates the cost of dismantling and plugging of a well in shallow water should be between 1 to 3 million. I would like to know how the insurance policy reads. Why does the amount TEL is receiving seem more in line with the insurance payments rather than the number the trustees have reported?

The fact that it was the Eugene Island platform/well that was damaged is a little convenient if someone was trying to defunct this trust. The comments to follow are just rank speculation

but I read articles that came out in 2008 about the storm. They read a little more like press releases that suggested the Tel platform "got hit right between the eyes". When looking at a map

of hurricane's trajectory, Eugene Island was in the path of influence but not in path of peak winds.

I have looked but not found any other wells in that immediate are that were so devastated. I know of no other well of such importance still not in commission.

Why would Chevron take so much time to clean up and start re-drilling this well? This is a well that is one of the most important wells in the Tel inventory? You gave me an "I don't know" answer

as to why they haven't drilled the last time we spoke. These Magnum Hunter directors are way too savvy to get away with an "I don't know" answer. Your experience with oil royalty trusts and

lawsuits of fraud are prone to make that kind of flimsy answer. We all know this Eugene Island 339 is a very unique and important well sight.

I would like to know and understand the matrix used to determine market value of gas and oil as the prices received for at least the last 6 months. This shouldn't seem out of line. I read about

a suit where the purchaser was denied the ability to charge the supplier for the higher storage and transportation costs when the market already makes such an adjustment (such as the difference

between Brent crude from the North Atlantic and light sweet crude from the Gulf).

I would like to know how many shares Magnum Hunter, Canvasback and any other subsidiary of these two entities own of TEL stock?

Have they bought any stock since they chose to delist from the NASDAQ?

Have Gary Evans, Jeff Swanson, Thomas Owens or Mike Ulrich acquired more TEL stock since the NASDAQ delisting?

I would like to request the names of the shareholders that own the approximately 2 million shares, not to include shares owned by the parties mentioned above.

I am trying to get a group of shareholders together to pay for an audit and some forensic accounting. I am sure that if I am wrong about all of my suspicions then none

of my requests or questions will be out line.

I would like to take a quick paragraph to let you know where I am coming from. I am 50 years old. From the time I was 25 years old until I was 40 I had made a great living selling and investing in real estate.

I got very sick 10 years ago and over time had to dispose of everything I had. I was able to survive without public assistance or any handouts by being willing to do anything to earn my keep. My best friend

is Kim Wood and she has never hesitated to help me in any way she could. I had run across TEL as I was trying to learn a bit more about the market. TEL as an investment had it all. Consistent earnings, a

knowledgeable set of Trustees, and a well in the 330 block of Eugene Island that was truly considered a natural phenomenon that should have been built back at any time. I thought I had done all of the research.

I spoke positively about this stock to many of my friends.

Kim was the only friend to believe enough in me go out and buy about $80,000 of her own money into the stock.

The problem was that I had never researched how often these trusts come up on the short end of the stick on these deals. She has lost a great deal on this investment. Had this been my money I would have

written this off as to how stupid I was. I cannot quit on this one until I make it right. I have all of the time in the world to do this.

My real request is that the Trustees get with Chevron and determine there is some money due back to the trust. The trust relists on NASDAQ. Chevron steps up their effort to finish 339. One reasonably positive

SEC reporting is filed with the SEC and the stock goes to where the market takes it. Everyone will have done the right thing and most will have made some good change along the line. I can look Kim in the eye

again and crawl back in the hole I came from. Is that so much to ask?

Bob Rudolph

704 996 7995

TELOZ

-----Original Message-----
From: Sarah.Newell@BNYMellon.com
To: boborudolph@aol.com
Cc: michael.ulrich@bnymellon.com
Sent: Wed, Apr 6, 2011 4:00 pm
Subject: TEL Offshore Docs

Mike Ulrich asked that I forward you the attached documents. Please contact Mike (512-236-6599) should you have any questions.

Sarah Newell

Kimberly R. Wood, VP
First Choice Title Services, Inc.
PO Box 32722
Charlotte, NC 28232
Ph: 704.370.6023
Fax: 704.370.6024
Email: kwood@firstchoicetitlesvcs.com