

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

IN RE: § IN THE PROBATE COURT
§
§ OF
§
TEL OFFSHORE TRUST § TRAVIS COUNTY, TEXAS

**CORPORATE TRUSTEE OF THE TEL OFFSHORE TRUST'S SPECIAL
EXCEPTIONS TO ATTORNEY AD LITEM'S FIRST AMENDED COUNTERCLAIM**

The Bank of New York Mellon Trust Company, N.A., as Corporate Trustee ("the Corporate Trustee") of the TEL Offshore Trust (the "Trust") files this its Special Exceptions to the Attorney Ad Litem's ("Counter-plaintiff's") First Amended Counterclaim, and shows the Court as follows:

I. Special Exceptions

1. Under Texas Rule of Civil Procedure 91, the Corporate Trustee specially excepts to Counter-plaintiff's First Amended Counterclaim and asks that the Court dismiss Counter-plaintiff's derivative claims with prejudice because any re-pleading of them would be futile to cure the following substantive defects. In the alternative, the Corporate Trustee asks that the Court require Counter-plaintiff to replead to (1) eliminate his derivative claims; and (2) assert only individual claims on behalf of the persons he has authority to represent in this action.

2. Counter-plaintiff lacks standing to bring claims on behalf of the Trust because only the Trustees have that authority. The Trust Agreement for the Trust (the "Trust Agreement") vests the Corporate Trustee and Gary C. Evans, Jeffrey S. Swanson, and Thomas H. Owen, Jr., as Individual Trustees (collectively, the "Trustees") with the exclusive authority to maintain, defend, and settle lawsuits by or against the Trust. Trust Agreement § 6.11; *see also* TEX. PROP. CODE ANN. § 113.019 (West 2014) (providing that a trustee of a trust is generally authorized to compromise, contest, arbitrate, or settle claims affecting the trust property).

Counter-plaintiff purports to assert this action “derivatively on behalf of the [Trust]....”

Counter-plaintiff’s First Amended Counterclaim at 1. But Counter-plaintiff is not and has never been a Trustee of the Trust. Counter-plaintiff therefore lacks standing, fails to state and cannot state a claim, and amendment will not cure this defect.

3. Counter-plaintiff lacks standing to bring derivative lawsuits on behalf of the Trust against the Trustees. Under Texas law, a beneficiary of a trust—which Counter-plaintiff purports to represent—cannot bring a derivative claim on behalf of the trust against the trustee. *In re XTO Energy Inc.*, 471 S.W.3d 126, 138 (Tex. App.—Dallas 2015, no pet.). In *XTO*, a unitholder of a publicly-traded trust attempted to bring a derivative lawsuit on behalf of the trust against the trustee, among other defendants. *Id.* at 130. The trustee filed special exceptions alleging, among other arguments, that a beneficiary has no authority to bring such a derivative action. *Id.* The district court denied the trustee’s special exceptions. *Id.* But the Dallas Court of Appeals reversed, holding that the Texas Trust Code allows a trust beneficiary to bring suit against a trustee only on the beneficiary’s own behalf,¹ not on a derivative basis. *Id.* at 138. Moreover, allowing a beneficiary to file a claim on behalf of the trust would “impermissibly usurp[] the role of the trustee to control the Trust’s involvement in litigation.” *Id.* Counter-plaintiff therefore lacks standing, fails to state and cannot state a claim, and amendment will not cure this defect.

4. Counter-plaintiff has exceeded the scope of his authority. Counter-plaintiff admits that he has been appointed as attorney ad litem only “for the unit holders of [the Trust] who were served by publication and did not answer or appear in this proceeding....” Counter-plaintiff’s First Amended Counterclaim at 1. Yet Counter-plaintiff purports to file his

¹ A beneficiary may bring suit on behalf of another beneficiary only in the limited circumstance when he is a personal fiduciary for that person, such as the situation where someone is appointed to act on behalf of an incapacitated person. *See id.*

counterclaim “derivatively on behalf of [the Trust] and *all of its beneficiaries....*” Counter-plaintiff’s First Amended Counterclaim at 1 (emphasis added). Counter-plaintiff has no authority to represent beneficiaries other than those beneficiaries who were served by publication and did not answer or appear in this proceeding. Counter-plaintiff therefore fails to state and cannot state a claim on behalf of all beneficiaries of the Trust.

II. Prayer

Counter-Defendant The Bank of New York Mellon Trust Company, N.A., as Corporate Trustee, prays that the Court grant its Special Exceptions and dismiss Counter-plaintiff Attorney Ad Litem’s derivative Counterclaim with prejudice and order that Counter-plaintiff take nothing on his derivative Counterclaim; or, alternatively, require Counter-plaintiff to replead to (1) eliminate his derivative claims; and (2) assert only individual claims on behalf of the persons he has authority to represent in this action.

Respectfully submitted,

/s/ Craig A. Haynes

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WITHDRAWING ATTORNEYS FOR THE
BANK OF NEW YORK MELLON TRUST
COMPANY, N.A., AS CORPORATE TRUSTEE

CERTIFICATE OF SERVICE

I hereby certify that, on September 23, 2016, a true and correct copy of the foregoing has been served via Texas e-filing and email on Ad Litem, counsel for Ad Litem, Albert Speisman, counsel for RNR Production Land and Cattle, and counsel for Individual Trustees Gary C. Evans, Jeffrey S. Swanson, and Thomas H. Owen, Jr.. I hereby certify that, on September 23, 2016, all other interested parties in this matter will be served in accordance with the Court's Order Directing Method of Service dated January 21, 2016.

/s/ Rachele H. Glazer
Rachele H. Glazer