

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 Individual Trustees' Motion to Stay Pending Mandamus

Glenn M. Karisch as Attorney Ad Litem representing the interests of the unit holders of TEL Offshore Trust (the "Trust") who were served by publication and did not answer or appear in this proceeding (the "AAL Parties"), responds to Individual Trustees' Motion to Stay Pending Mandamus ("Motion to Stay") and shows as follows:

I. Summary

At the Trustees' request, in June 2015 the Court appointed Ad Litem to represent the interests of the AAL Parties. For over a year he did just that without any objection from the Trustees. With the Court's permission he hired an oil and gas expert and litigation counsel. He filed a counterclaim and entered a tolling agreement. He pursued discovery. And as a result of his efforts, he discovered that the Trustees have committed serious breaches of fiduciary duty, including, among other things, the Corporate Trustee paying itself in violation of the Trust Agreement. Only after he asserted claims for those breaches did the Trustees decide that he really didn't have authority to represent the AAL Parties after all and that, even though the Trustees went to great lengths to serve them by publication, the AAL Parties weren't really in the suit.

Under the Texas Trust Code and this Court's order, the Ad Litem clearly has authority—indeed a duty—to assert claims on behalf of the AAL Parties. That authority does not require that the AAL Parties be incapacitated. And it doesn't require the Ad Litem to bring—and he is not bringing—a derivative suit or a class action. This Court properly denied the Trustees' special exceptions based on those arguments.

Nonetheless, the Trustees now want the Court to stay the Ad Litem's suit and even stay the Court-ordered compensation to which he is statutorily entitled while they pursue these meritless arguments on mandamus. They are not entitled to a stay because:

- The Ad Litem is statutorily-authorized to bring his claims, which are not class action or derivative claims, and therefore the Trustees are not entitled to mandamus relief;
- There is no legal basis to stay the Ad Litem's compensation—either that which is already ordered or future compensation—to which he is entitled by statute;
- There is no reason to stay the entire proceeding even if the Trustees had a right to mandamus relief (which they don't); and
- A stay would prejudice the Ad Litem's ability to pursue the claims for the benefit of the AAL Parties.

The Court should deny the Motion to Stay.

II. The Trustees Are Not Entitled To A Stay Because They Are Not Entitled To Mandamus Relief

A. The Ad Litem Sues to Protect the Interests He Represents; He Does Not Sue Derivatively or on Behalf of a Class.

The Individual Trustees' ("Trustees") basis for a stay is their contention that they are entitled to mandamus relief because this Court erroneously allowed a shareholder class action and/or a derivative action to proceed. *See* Motion to Stay, p. 2. But this is a trust case, not a corporate shareholder case. The Trustees invoked the jurisdiction of this statutory probate court (which has jurisdiction over trusts but not corporations) to address issues of Texas trust law. The Trustees asked the Court for permission to serve the AAL Parties by publication and to appoint Ad Litem to represent them under Section 115.014(b) of the Texas Trust Code. They did this to get each of the AAL Parties before the Court so that each would be subject to the Court's judgment. The law about corporate shareholder derivative suits is irrelevant in this trust case.

The AAL Parties are persons interested in the Trust who by statute are permitted to bring an action to hold the Trustees liable. TEX. TRUST CODE §§111.004(7), 115.001 and 115.011(a). Thus, the AAL Parties may bring these claims directly in their capacity as beneficiaries of the Trust and do not need to act derivatively on behalf of the Trust or the Trustees. Ad Litem is entitled (and, indeed, is required) to bring these claims on their behalf. TEX. TRUST CODE §§111.004(10)(J), 115.014(b); *see also Cahill v. Lyda*, 826 S.W.2d 932, 933 (Tex. 1992) (explaining that an appointment under Rule 244 requires the ad litem to "exhaust all remedies available to his client"). This is what Ad Litem has done.

This case also is not a class action. As seen, all the AAL Parties were joined as parties at the Trustees' insistence. They are not "absent" parties. Ad Litem is asserting claims on behalf of the AAL Parties he represents. He is not asserting claims on behalf of a class of non-parties. A class action is used to represent persons who have *not* been joined as parties. See TEX. R. CIV. P 42(a). No class is needed because all beneficiaries are before the Court.

Despite the Trustees' vociferous arguments about shareholder derivative suits and class actions, the court in *In re XTO Energy* did not base its holding on these issues. See 471 S.W.3d 126, 137-38 (Tex. App.—Dallas 2015, orig. proceeding). Instead, it decided the case based on the rights of trustees and beneficiaries in the Texas Trust Code. *Id* at 130-31, 137-38. The Trustees are wasting this Court's time with these arguments that the *XTO Energy* court did not consider and don't apply here.

B. Ad Litem's Claims On Behalf of the Beneficiaries He Represents Are Consistent With, Not Contrary to, the *XTO Energy* Holding.

Although the Trustees insist otherwise, this suit is precisely what the holding in *In re XTO Energy* allows: a trust beneficiary's claim for breach of fiduciary duty brought directly against the trustee on the beneficiaries' behalf:

The Texas Trust Code provides the mechanism by which a beneficiary may sue a trustee. Under the code, any interested person may bring an action to, among other things, construe a trust instrument and determine the liability of a trustee.

471 S.W.3d 126, 137-38, *citing* TEX. PROP. CODE. ANN. §§ 115.001 & 115.011 (West 2014). The Trust Code permits a trust beneficiary to bring claims to "determine the liability of a trustee," and this is precisely what the Ad Litem is doing here. See *id.* at 138

(denying mandamus relief to allow beneficiary to amend to assert claims against Trustee directly).

And the *XTO Energy* opinion recognized that a fiduciary like Ad Litem may bring claims on behalf of the persons he represents. The court cited Section 111.004(10)(J) of the Trust Code, which defines “person” to include “an individual ... acting as a personal representative or in any other fiduciary capacity.” 471. S.W.3d at 138. Each of the AAL Parties is an “interested person” who can sue the Trustees directly, and Ad Litem is an “interested person” who can sue the Trustees in his fiduciary capacity.

The Legislature has provided a clear and logical statutory scheme for trust cases:

1. An “interested person” may sue a trustee to hold the trustee liable. TEX. TRUST CODE §§115.001 and 115.011(a).
2. As beneficiaries of the Trust, each of the AAL Parties is an “interested person.” TEX. TRUST CODE §111.004(7).
3. The Court may appoint an attorney ad litem to represent any interest that the Court considers necessary. TEX. TRUST CODE §115.014(b).
4. As fiduciary for the AAL Parties, Ad Litem is an “interested person” who may sue the Trustees to hold them liable. TEX. TRUST CODE §111.004(7) and (10)(J).

The Court clearly had authority to appoint an attorney ad litem to represent the interests of the AAL Parties. And, in fact, the Court did so at the Trustees’ request:

There are significant number of [AAL Parties] who were served by publication and did not answer or appear in this suit within the prescribed time. As such, appointment of an attorney ad litem is required. There is no known conflict of interest that would preclude a single attorney ad litem from representing the interests of [AAL Parties]...

See Motion for Appointment of Attorney Ad Litem For the Unit Holders of the TEL Offshore Trust Who Were Served by Publication and Did Not Answer or Appear filed on June 2, 2015.

The beneficiaries that the Ad Litem represents are not “absent.” Rather, they are in the suit because they were served. And the Ad Litem’s job is to advance their interests. But now, having asked the Court to appoint an Ad Litem to represent these beneficiaries, the Trustees complain that the Ad Litem cannot bring claims on their behalf. *See* Motion to Stay, p. 2 (“*In re XTO Energy* forbids representative claims on behalf of trusts or absent beneficiaries...”). Nothing in the *XTO Energy* holding speaks to—much less forbids—the appointment of an ad litem to pursue claims to determine the liability of a trustee on behalf of beneficiaries.

The Trustees claim that the *XTO Energy* opinion stands for the proposition that only the fiduciary of an *incapacitated* beneficiary may bring a claim against trustees. *See* Trustees’ Special Exceptions and Plea to the Jurisdiction to Ad Litem’s “Original Petition as Realigned Plaintiff,” p. 4. Of course, this is not Texas law, and this was not the holding in that case. The court held that, since the plaintiff there was not acting in a fiduciary capacity, she could bring claims only on her own behalf. 471 S.W.3d at 138. Even the dicta in *XTO Energy* does not state that only a fiduciary of an incapacitated person may bring a claim against a trustees. After quoting Section 111.004(10)(J), which allows claims to be brought by “an individual ... acting as a personal representative or in *any other fiduciary capacity*,” the court mentions a fiduciary acting for an incapacitated

beneficiary as one example of a fiduciary that may bring a claim. Of course, this does not limit the situations in which a fiduciary may bring a claim on behalf of a trust beneficiary to those in which the beneficiary is incapacitated. To do so would make Section 115.014(b) of the Texas Trust Code, which authorizes the court to appoint attorneys ad litem, meaningless.

The *XTO Energy* opinion addressed something very different. It prohibited (except in certain circumstances) a beneficiary from bringing derivative claims *on behalf of* a trust against a third party that the trustee refused to pursue. 471 S.W.3d at 131 (“a beneficiary may not bring a cause of action on behalf of the trust merely because the trustee has declined to do so”). The prohibition addressed *In re XTO Energy* simply does not apply here. Ad Litem is not attempting to sue on a claim against third parties that the Trustees could have brought but didn’t. Rather, Ad Litem is suing the Trustees on behalf of the beneficiaries he represents.

C. The AAL Parties’ Claims Are Not Infringing Upon the Rights of the Trustees.

The Trustees further contend they are entitled to mandamus relief because allowing this case to proceed would “injure” their substantive rights to control litigation decisions on behalf of the Trust. **But again, this is not litigation on behalf of the Trust.** This is litigation by beneficiaries against the Trustees. The notion that the Trustees have the right to control litigation against themselves is preposterous. Once again, the Trustees misconstrue the Ad Litem’s claims in this case to falsely claim that *In re XTO Energy* prohibits them.

In *In re XTO Energy*, the plaintiff asserted the right to pursue litigation *against a third party on behalf of the trust* that the trustee had considered and declined to pursue. The court held that a court should not interfere with the exercise of a trustee's discretionary powers to pursue or not pursue claims except where the beneficiary "pleads and proves that the trustee's refusal to pursue litigation constitutes fraud, misconduct or a clear abuse of discretion." *Id.* at 132. Here, Ad Litem is not claiming the Trustees have failed to pursue litigation against third parties, nor is he claiming to pursue litigation on the Trustees' behalf. Rather, this is a claim on behalf of the AAL Parties directly against the Trustees, seeking to hold them liable. Such an action is expressly permitted by Texas Trust Code §§115.001 and 115.014(a). Thus, the *XTO Energy* holding does not bar Ad Litem's suit but in fact supports it.

D. The Trustee's Plea to the Jurisdiction on the Current Pleading Does Not Warrant Mandamus Relief.

The Trustees' claim that they are entitled to mandamus relief depends entirely on their mischaracterizations of the Ad Litem's claims and Texas law. As explained above, the Ad Litem is not pursuing a shareholder class action or derivative action. The AAL Parties are not "absent parties" because the Trustees joined them as parties. Texas law specifically permits the Ad Litem as fiduciary for the AAL Parties to bring claims against the Trustee seeking to hold them liable. The Trustees have cited no authority that allows mandamus relief against beneficiaries' claims to determine the liability of a trustee.¹

¹ In footnote 2, the Trustees cite to a series of cases that all pertain to pleading requirements for derivative shareholder suits or class actions. None of these cases involve attorneys ad litem appointed to represent trust beneficiaries, and none of them apply here.

To be entitled to mandamus relief, the Trustees must show not only that the trial court clearly abused its discretion but also that they have no adequate remedy by appeal. *In re Prudential*, 148 S.W.3d 124, 135-36 (Tex. 2004). Pleas to the jurisdiction are generally considered incidental rulings for which appeal is an adequate remedy. *See Bell Helicopter Textron, Inc. v. Walker*, 787 S.W.2d 954, 955 (Tex. 1990) (“Such incidental rulings include ... pleas to the jurisdiction, ... [even if] it might logically be argued that the petitioner for the writ was entitled, as a matter of law, to the action sought to be compelled.”); *see also, In re Christus Health*, No. 09-05-363 CV, 2005 WL 2450146 at *1 (Tex. App.—Beaumont Sept. 22, 2005, no pet.) (denying mandamus relief on a plea to the jurisdiction relating to plaintiff’s standing to represent a class) (mem. op.) (per curiam).

The actual claims asserted here—to determine the liability of the Trustees on behalf of the beneficiaries the Ad Litem was appointed to represent—do not warrant mandamus relief or a stay of these proceedings.² Accordingly, the Trustees’ request to say this proceeding should be denied.

III. The Trustees Are Not Entitled To Stay the Ad Litem’s Compensation

As seen, the Trustees’ sole basis for a stay is their reliance on inapplicable class action and derivative action cases. The Trustees cite absolutely no authority for staying the Ad Litem’s compensation that has already been ordered by the Court and any future applications. There is no authority for this incredible request. And it is contrary to the

² In the very case cited by Trustees in support of their request for a stay, *In re Alford Chevrolet-Geo*, 997 S.W.2d 173 (Tex. 1999), the Texas Supreme Court rejected the argument that a party is entitled to abate all merits discovery pending a class certification.

Texas Trust Code §115.014(e), which entitles Ad Litem to reasonable compensation. The Trustees fail to recognize that the Ad Litem is entitled to compensation whether or not he prevails on his claims. His compensation is not contingent on any particular outcome. If that were the case, few would agree to serve as Ad Litem.

Unbelievably, while seeking to deny the Ad Litem his statutorily-entitled compensation, the Trustees are simultaneously asking the Court to allow them to use the segregated funds to pay their own expenses, contrary to the Court's final judgment in Cause No. C-1-PB-16-000096. In the alternative, if the Court is inclined to stay the Ad Litem's compensation it should also stay any payments from either remaining trust funds or the segregated funds to the Trustees or their creditors. In the further alternative, even if payment of the Ad Litem's compensation is stayed, there is no reason to stay the filing and hearing of future fee applications.

IV. There Is No Need For A Stay; Alternatively, Any Stay Should Be Limited To A Stay Of Discovery.

Even if the Trustees had some right to mandamus relief, they have not proven that a stay is necessary. They claim that staying the fee order and proceedings would prevent depletion of the segregated funds. *See* Motion to Stay at 3. Yet, the Trustees themselves are attempting to deplete the account and want the right to continue to do so. *See* Attorney Ad Litem's Response To Corporate Trustees' Motion To Approve Payments Of Ordinary Business Expenses Owed To Third Parties at Section III.

Based on the cases they cite and their reference to litigation expenses, the Trustees' main argument appears to be that a stay would prevent additional discovery

costs. But they don't identify any pending discovery that would increase costs unless it is stayed pending resolution of a mandamus petition. There is no reason to stay proceedings in the case. But, in the alternative, the most the Court should stay is discovery, not other proceedings such as fee applications and requests to hire experts and other non-discovery related motions.

V. The Stay of Trial Proceedings and the Stay of the Ad Litem's Compensation Would Severely Prejudice the AAL Parties.

The Trustees claim, without any explanation, that a stay would not prejudice the Ad Litem. *See* Motion to Stay at 3-4. But depriving the Ad Litem of the compensation to which he is statutorily entitled is certainly prejudicial. Among other things, a stay of the Ad Litem's compensation would severely prejudice his ability to respond to the mandamus. The Trustees would put the Ad Litem and his counsel in a position of choosing to either work for free to respond to the mandamus with no assurance of when or if they would get paid or to stop work and hope the Court of Appeals sees through the Trustees' arguments without a response.

The requested stay is also prejudicial because it prevents further preparation for trial and may threaten the June 12, 2017 trial setting. The case has been pending for over two years and has already been continued once, at the Trustees' request. A mandamus proceeding of the type the Trustees are threatening could easily take months to resolve. If the parties cannot move forward to prepare the case for trial during this time the Trustees may use that as a basis to seek yet another delay, further delaying any recovery for the beneficiaries.

WHEREFORE, PREMISES CONSIDERED, Ad Litem respectfully requests that the Court deny the Trustees of the TEL Offshore Trust's Motion to Stay Pending Mandamus and grant him such other and further relief to which he may be justly 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 record on the 28th day of October 2016 and will be served in accordance with the Court's orders regarding service dated September 28, 2015 and January 21, 2016.

/s/Cynthia L. Saiter

Cynthia L. Saiter