



In addition, despite the Ad Litem's cosmetic modifications after the last hearing, the Petition still improperly seeks to recover damages for the entire Trust in direct violation of *In re XTO*. See *In re XTO*, 471 S.W.3d at 137-38 (allowing beneficiary "to proceed with her claims on her own behalf" but not "on behalf of the Trust"). Paragraph b of the Prayer seeks to "[c]harge the Trustees with any damages resulting from the Trustees' breaches of trust, including but not limited to any loss or depreciation in value *of the trust estate* as a result of the breach of trust, any profit made by the trustee through the breaches of trust, and any profit that would have accrued *to the trust estate* if there had been no breaches of trust." The Petition thus improperly seeks the exact same type of recovery that *In re XTO* expressly forecloses.

#### ***The Statutes Cited by the Ad Litem Are Unavailing***

Nothing in the statutes cited by the Ad Litem at the last hearing allows ad litem to bring affirmative claims against trustees when the absent beneficiaries do not have an incapacity, nor do any of the statutes allow individual beneficiaries to recover damages on behalf of the whole Trust. Section 114.001(a) states that a trustee "is accountable to *a beneficiary* for the trust property and for any profit made by the trustee . . . ." (emphasis added). The plain meaning of the singular phrase "*a beneficiary*" contemplates suits by *individual* beneficiaries, not by the entire trust or class-like groups of absent beneficiaries. This is consistent with Section 114.005, which provides that "[a] beneficiary may relieve a trustee from any duty, responsibility, restriction or liability *as to the beneficiary* that would otherwise be imposed on the trustee by this subtitle, including liability for past violations." This provision likewise contemplates liability relationships between the trustees and *individual* beneficiaries. It is also consistent with Section 115.011(b), which provides that the necessary parties to actions against a trustee include "*a beneficiary* of the trust on whose act or obligation the action is predicated."

Paragraph (c) of Section 114.001 must be interpreted in light of the clearly expressed mandate in Section 114.001(a) and elsewhere that recoveries may be sought on behalf of individual beneficiaries, not the entire trust or class-like groups of beneficiaries. Nothing in paragraph (c) states that an individual beneficiary has standing to recover damages for other beneficiaries or for the trust itself. The provision simply states that a trustee may be “chargeable” for damages to the trust estate; it does not state that individual beneficiaries may actually sue to recover damages for the entire Trust (let alone that an ad litem can sue on behalf of thousands of absent beneficiaries). Interpreting this provision to allow individual beneficiaries to recover damages to the entire trust estate (or to allow an ad litem to seek such relief on behalf of thousands of absent beneficiaries) would flatly contradict the holding in *In re XTO* and would “interfere with [the Trustees’] authority to control litigation on behalf of the Trust.” *See In re XTO*, 471 S.W.3d at 138.

The Trustees thus again specially except and plead to the jurisdiction. Texas appellate courts strongly disfavor representative actions on behalf of unitholders or shareholders and regularly grant relief when an individual holder is wrongfully permitted to bring fiduciary duty claims against trustees or directors in a representative capacity, with special exceptions being the preferred procedural vehicle for litigating these issues.<sup>3</sup> The Ad Litem similarly lacks authority to bring the representative claims asserted in this case.

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<sup>3</sup> *E.g.*, *In re XTO Energy Inc.*, 471 S.W.3d 126, 137 (Tex. App.—Dallas 2015, orig. proceeding) (granting mandamus where derivative claims by royalty trust unitholders were wrongfully allowed to proceed beyond special exceptions); *In re Astrotech Corp.*, No. 03-13-00624, 2014 WL 711018, at \*2 (Tex. App.—Austin Feb. 14, 2014, orig. proceeding) (granting mandamus where derivative suit wrongfully allowed to proceed); *In re Helix Energy Solutions Group, Inc.*, 440 S.W.3d 167, 176-78 (Tex. App.—Houston [14th Dist.] 2013, orig. proceeding) (granting mandamus where district court failed to dismiss shareholder derivative case; summary judgment thereafter granted); *In re Brick*, 351 S.W.3d 601, 604 (Tex. App.—Dallas 2011, orig. proceeding) (granting mandamus for failing to sustain special exceptions in Delaware shareholder derivative suit); *In re Denbury Res. Inc.*, No. 05-09-01206-CV, 2009 WL 4263850 at \*2 (Tex. App.—Dallas Dec. 1, 2009, orig. proceeding) (same); *In re Schmitz*, 285 S.W.3d 451

The Ad Litem has now filed *four* iterations of its claims. After the Trustees specially excepted to the Ad Litem's First Amended Counterclaim, the Ad Litem filed *two further amendments* (the Second Amended Counterclaim and the current Petition) and has still not cured the defects. Dismissal is thus appropriate, as amendment is plainly futile.<sup>4</sup>

## **II.** **ARGUMENT**

### **A. Special Exception and Plea to the Jurisdiction #1: The Ad Litem Cannot Sue the Trustees on Behalf of Thousands of Absent Beneficiaries**

As with the last two petitions, the Trustees specially except to, and plead to the jurisdiction with respect to, the Petition as a whole (and, without limitation, the introduction, paragraph 1 and all claims for relief) because Texas law does not permit the Ad Litem to sue the Trustees in a representative capacity on behalf of the absent beneficiaries.

#### **1. The Ad Litem Does Not and Cannot Plead a Legal “Incapacity”**

As held in *In re XTO*, while “a person may bring suit on behalf of other beneficiaries,” this “is only the case when the person is acting as a fiduciary, *such as when the beneficiary being represented is under an incapacity.*” See *In re XTO*, 471 S.W.3d at 137 (citing Restatement (Third) of Trusts § 94)).

There is no assertion that the beneficiaries have an “incapacity” that would permit a representative action. The relevant comment relied on in *In re XTO* states as follows:

*d. Others acting on behalf of beneficiaries.* If a beneficiary is *under an incapacity*, suit may be brought against a trustee *on behalf of that beneficiary* by a *personal* fiduciary (conservator, natural or legally appointed guardian, or the like, or an agent so empowered under a durable power of attorney).

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(Tex. 2009) (granting mandamus in derivative case where dismissal on pleadings improperly denied); *In re Crown Castle Int'l Corp.*, 247 S.W.3d 349, 355 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding) (granting mandamus where district court allowed discovery in violation of Delaware law).

<sup>4</sup> See *Perry v. S.N.*, 973 S.W.2d 301, 303 (Tex. 1998) (trial court may grant final dismissal when party repeatedly fails to correct deficiencies); *In re XTO*, 471 S.W.3d at 137 (dismissal appropriate when further amendment is futile).

Restatement (Third) of Trusts § 94, cmt. d. The *In re XTO* opinion likewise emphasized that a beneficiary may only sue “on her own behalf or on behalf of beneficiaries for whom she is acting as a **personal fiduciary**.” *In re XTO*, 471 S.W.3d at 138 (emphasis added).

The Ad Litem has not alleged that each or any of the thousands of unitholders he purports to represent are under any legal “incapacity.” Under Texas law, an “incapacitated person” is: “(1) a person who is mentally, physically, or legally incompetent; (2) a person who is judicially declared incompetent; (3) an incompetent or an incompetent person; (4) a person of unsound mind; or (5) a habitual drunkard.” TEX. ESTATES CODE § 1001.003 (stating that this definition applies “[i]n this code or any other law”). Simply being absent or being served by publication does not equate to a legal “incapacity” under Section 1001.003’s plain language.

The categories of “personal fiduciaries” listed in comment d confirm that class-style claims are not permitted. The words “conservator,” “natural” guardian, and “agents empowered under a durable power of attorney” connote **personal** situations where a beneficiary’s decision-making authority is delegated on a **highly individualized** basis. Conservatorships, natural guardians and durable powers of attorney simply do not involve mass-representation situations. To confer mass-representation capabilities on “legally appointed guardians” would be inconsistent with the personalized fiduciary relationships contemplated in the other categories listed (and indeed, both the comment and the *In re XTO* opinion describe these categories as “**personal** fiduciaries”). See *Churchill Forge, Inc. v. Brown*, 61 S.W.3d 368, 372 (Tex. 2001) (construing categories by examining nature of other categories in a series).

The phrase “legally appointed guardian” likewise makes clear that an ad litem cannot sidestep the prohibition on representative actions against trustees by claiming to directly represent each absent unitholder. As stated in the comment, a “legally appointed guardian” may

only sue trustees on behalf of a beneficiary when that beneficiary is “under an incapacity.” A “guardian” thus cannot advance claims against a trustee absent a legal incapacity.

Construing the ad litem statute to permit class-like representative claims against trustees on behalf of thousands of absent unitholders would also improperly usurp the Trustees’ judgment about whether claims impacting all or a substantial part of the Trust should be pursued. *See In re XTO*, 471 S.W.3d at 137-38 (recognizing that trustees have the right to control such litigation).

## **2. The Specific Provisions Regarding Representative Actions Control Over the Generalized Ad Litem Statutes**

Even assuming *arguendo* that class claims could potentially be appropriate in the trust context,<sup>5</sup> the ad litem statutes do not contemplate or permit class-style claims by an ad litem and contain only generalized provisions that must give way to the specific requirements for class claims – which the Ad Litem is plainly incapable of satisfying. The “service by publication” rule (Texas Rule of Civil Procedure 244) only authorizes an ad litem “to *defend* the suit,” not to pursue affirmative class-style claims. TEX. R. CIV. P. 244. The ad litem provisions under Section 53.104 of the Texas Estates Code (which allows ad litem to “represent the interests of any person”) and Section 115.014 of the Property Code (which allows appointment of ad litem “to represent any interest that the court considers necessary”) are similarly generic and say nothing about allowing an ad litem to bring suit seeking affirmative relief in absentia for thousands of public unitholders.

By contrast, Texas law (including Texas Rule of Civil Procedure 42) imposes numerous specific requirements for class actions on behalf of large numbers of absent parties, including requirements of adequate representation, commonality, typicality and predominance. This rule applies in probate court. *See* TEX. ESTATES CODE § 53.107 (providing that certain civil

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<sup>5</sup> As set forth above, a class or representative action is not permissible under the circumstances alleged in this case.

procedure rules – but not Rule 42 – are inapplicable in probate court). Texas appeals courts zealously police the requirements for class certification and require trial courts to “perform a ‘rigorous analysis’ before ruling on class certification to determine whether all prerequisites to certification have been met.” *Sw. Ref. Co. v. Bernal*, 22 S.W.3d 425, 435 (Tex. 2000).

The specific requirements for class actions, as well as the overall scheme of court-imposed requirements for such cases, would be frustrated if the ad litem statutes were construed as a backdoor vehicle for class action claims. It is a settled rule of construction that the specific controls over the general. *See Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 901 (Tex. 2000) (describing “traditional statutory construction principle that the more specific statute controls over the more general”). To the extent class actions on behalf of thousands of absent unitholders are permissible at all,<sup>6</sup> the specific requirements for class actions should control over the general provisions regarding ad litem. Moreover, when considering an individual rule or provision, a court “must consider its role in the broader statutory scheme.” *20801, Inc. v. Parker*, 249 S.W.3d 392, 396 (Tex. 2008). Allowing the Ad Litem to bring these unprecedented claims in a representative capacity would frustrate the well-established scheme for class actions set forth in the Texas Rules of Civil Procedure and under Texas law.

Assuming *arguendo* that a class-like claim could be permissible in this context, the Ad Litem pleads no facts showing that any of the requirements for bringing a class action are capable of being satisfied. Most fundamentally, a class action may only be filed by “[o]ne or more members of a class. . . .” TEX. R. CIV. P. 42. Rule 42 requires an actual *class*

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<sup>6</sup> The Trustees do not believe such actions are permissible. *See In re XTO Energy Inc.*, 471 S.W.3d 126, 137 (Tex. App.—Dallas 2015, orig. proceeding) (“[W]e have found no Texas case authority allowing a trust beneficiary to sue a trustee derivatively on behalf of the trust.”). The Restatement (Third) of Trusts does not permit class-style claims against trustees. But even if representative actions like this were permissible, they would be subject to Rule 42, which the Ad Litem has not met and cannot meet.

*representative* and does not permit lawyers to file class actions without client oversight. See *Forsyth v. Lake LBJ Inv. Corp.*, 903 S.W.2d 146, 150-51 (Tex. App.—Austin 1995, writ dismissed w.o.j.) (describing adequacy factors such as “the personal integrity of the plaintiffs,” their “familiarity with the litigation” and their “belief in the legitimacy of the grievance”). The class is entitled “to more than competent counsel. It must also be assured that it will have an adequate representative, *one who will check the otherwise unfettered discretion of counsel in prosecuting the suit* and who will provide his personal knowledge of the facts underlying the complaint . . . . Plaintiff’s evident willingness to rely on counsel’s ability to protect the interests of the class is inconsistent with the participation required of an adequate class representative.” *Id.* at 152 (quoting *Weisman v. Darneille*, 78 F.R.D. 669, 671 (S.D.N.Y. 1978)) (emphasis added). Thus, even assuming *arguendo* that a class could be brought, the Ad Litem’s claims must be dismissed or repleaded because the Petition does not identify a class representative.

Nor can the Ad Litem plausibly satisfy the other requirements for certifying a class. With no actual client, the Ad Litem cannot show that his claims are typical of other beneficiaries or are devoid of unique defenses. The Ad Litem also faces an irreconcilable conflict with unitholders who do not want the Trust assets wasted on this lawsuit, which is a pressing concern given the Ad Litem’s demand that he be paid from Trust assets. Class claims are improper when, as here, there is a clear prospect for conflicts between class members. See *Supportkids, Inc. v. Morris*, 167 S.W.3d 422, 426 (Tex. App.—Houston [14<sup>th</sup> Dist.], pet. dismissed w.o.j.) (finding conflict where plaintiff sought to void contracts on classwide basis when “[t]he chance remains, however, that customers of Supportkids do not want their contracts to be declared void . . . .” ).

Any class claim would also face insuperable predominance and ascertainability problems. For example, the Ad Litem purports to sue on behalf of all current beneficiaries regardless of



whether they bought their units before or after the alleged wrongdoing. Beneficiaries who bought after the alleged wrongdoing would have no claim. *See Brigham Exploration Co. v. Boytim*, No. 03-015-00248-CV, 2016 WL 3390287, at \*5-6 (Tex. App.—Austin June 15, 2016, no pet. h.) (certification of class improper where class definition “lumps together” persons with potential claims and persons with no standing).

The Court should thus sustain the Trustees’ special exceptions and plea to the jurisdictions. Improper class claims may be struck or dismissed on the pleadings when, as here, they plainly fail to establish a basis for bringing the suit as a class. *See Boyer v. Diversified Consultants, Inc.*, 306 F.R.D. 536, 540 (E.D. Mich. Apr. 20, 2015) (granting motion to strike class allegations from pleading); *Kraetsch v. United Service Automobile Assoc.*, No. 4:14-CV-264-CEJ, 2015 WL 1457015, at \*5 (E.D. Mo. Mar. 30, 2015) (striking class claims at pleading stage where common issues failed to predominate). Even assuming *arguendo* that a class claim could be brought against a trustee (which, as stated above, is impermissible), the Court should sustain Defendants’ special exceptions and dismiss the claims or require repleading.

Accordingly, Texas law does not permit an ad litem to pursue class-like claims against trustees. Because this is a legal defect that cannot be cured, the Court should dismiss the claims in their entirety or require repleading to eliminate all impermissible claims.

**B. Special Exception and Plea to the Jurisdiction #2: The Ad Litem Cannot Sue Derivatively on Behalf of the Whole Trust**

The Trustees also specially except to, and plead to the jurisdiction with respect to, the Petition as a whole (and, without limitation, the introduction, paragraph 1, paragraph (b) of the Prayer and all claims for relief) because Texas law does not permit beneficiaries to recover damages for injuries to the whole Trust. *See In re XTO*, 471 S.W.3d at 137-38 (allowing beneficiary “to proceed with her claims on her own behalf” but not “on behalf of the Trust”). As

stated above, paragraph (b) of the Prayer explicitly seeks to recover damages for the entire trust estate. *In re XTO* specifically forbids a beneficiary from suing to recover damages payable to the entire Trust. *See id.* (disallowing claims “for the benefit of” the Trust).

As set forth on pages 2-3 above, the statutes cited by the Ad Litem do not contradict *In re XTO* or otherwise permit beneficiaries to seek damages on behalf of the whole Trust. The Trust Code instead gives *trustees* the exclusive power to “compromise, arbitrate, or settle claims of or against the trust estate or the trustee.” TEX. PROP. CODE ANN. § 113.019; *see also H.E.Y. Trust v. Popcorn Express Co.*, 35 S.W.3d 55, 60 n.5 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (discussing trustee’s statutory authority to assert claims on behalf of the trust). And indeed, the Trust Agreement for TEL Offshore vests the Corporate Trustee and Individual Trustees with the exclusive authority to maintain, defend, and settle lawsuits by or against the Trust. Trust Agreement § 6.11.

Texas law thus does not allow individual beneficiaries to sue in a representative capacity on behalf of the entire trust against a trustee. This is a legal defect that cannot be cured by amendment, so the Court need not allow an amended petition. *See Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 635 (Tex. 2007) (holding that courts need not allow an opportunity to amend if defect is incurable); *In re XTO*, 471 S.W.3d at 137 (same). The Trustees thus pray that the Court dismiss the Petition or require the Ad Litem to replead and disavow his claim for recovery on behalf of the entire Trust estate.

### **III.** **CONCLUSION**

For the reasons set forth above, the Court should sustain the Trustees’ special exceptions and plea to the jurisdiction, dismiss the Petition in its entirety or, alternatively, require the Ad Litem to replead to eliminate all impermissible claims.

Respectfully submitted,

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**CERTIFICATE OF CONFERENCE**

I hereby certify that, on the morning of October 25, 2016, I contacted Dan Bitting, counsel for the Ad Litem, and asked him whether he consents to or opposes special exceptions and a plea to the jurisdiction. Mr. Bitting stated he was opposed.

/s/ Peter A. Stokes  
Peter A. Stokes

**CERTIFICATE OF SERVICE**

I hereby certify that, on October 25, 2016, a true and correct copy of the foregoing has been served on all interested parties in this matter in accordance with the Court's Order Directing Method of Service dated January 21, 2016.

/s/ Peter A. Stokes  
Peter A. Stokes



October 25, 2016

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Re: No: C-1-PB-14-001245; In re: Tel Offshore Trust; in the Probate County No. 1 of Travis County Texas

Dear Clerk:

Attached for e-filing for the Court please find the proposed Order granting the Trustees' Special Exceptions and Plea to the Jurisdiction. I am also paying the \$2.00 fee for the signature for the Order. Thank you for your assistance with this filing.

Please let us know if you have any questions.

Very truly yours,

*/s/ Peter Stokes*

Peter Stokes

PS/jw  
Enclosure

Cc: Via Texas e-filing on Ad Litem, counsel for Ad Litem, Albert Speisman, counsel for RNR Production Land and Cattle, and all other interested parties in this matter in accordance with the Court's Order Directing Method of Service dated January 21, 2016.

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

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

**ORDER GRANTING SPECIAL EXCEPTIONS AND PLEA TO THE JURISDICTION**

On this day came on to be considered the Special Exceptions and Plea to the Jurisdiction filed by The Bank of New York Mellon Trust Company, N.A., as Corporate Trustee of the TEL Offshore Trust (the "Trust"), and Gary C. Evans, Jeffrey S. Swanson, and Thomas H. Owen, Jr., as Individual Trustees of the Trust (collectively, the "Trustees") in response to the Ad Litem's Original Petition as Realigned Plaintiff filed on or about October 10, 2016. The Court, having reviewed same, as well as the filings relevant thereto and the argument of counsel, is of the opinion such motion should be GRANTED.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that:

The Trustees' Special Exception and Plea to the Jurisdiction No. 1 is sustained for the reasons stated therein. The Ad Litem cannot assert claims against the Individual Trustees on behalf of the absent beneficiaries.

The Trustees' Special Exception and Plea to the Jurisdiction No. 2 is sustained for the reasons stated therein. The Ad Litem cannot seek or recover damages or other relief on behalf of the whole Trust.

The Ad Litem may file an amended petition within 7 days that complies with Texas law and the rulings set forth above. If the Ad Litem fails to correct the deficiencies, the claims will be dismissed.

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JUDGE PRESIDING