

NO. 03-16-00764-CV

IN THE THIRD COURT OF APPEALS
AUSTIN, TEXAS

In re Trustees of the TEL Offshore Trust,
Relators

Original Proceeding From the Probate Court No. 1, Travis County, Texas
Cause No. C-1-PB-001245
Honorable Guy Herman, Presiding Judge

**RESPONSE IN OPPOSITION TO EMERGENCY MOTION FOR STAY OF
TRIAL COURT PROCEEDINGS PENDING OUTCOME OF MANDAMUS
PETITION**

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**ATTORNEYS FOR REAL PARTY
IN INTEREST GLENN M.
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LITEM**

Glenn M. Karisch, as Attorney Ad Litem (“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 (collectively, the “AAL Parties”) files this Response In Opposition to the Emergency Motion for Stay of Trial Court Proceedings Pending Outcome of Mandamus Petition (“Motion for Stay”).

I. Summary

“An attorney ad litem is entitled to reasonable compensation for his services in the amount set by the court” as may seem equitable and just. TEX. TRUST CODE §115.014(e). Ad Litem is entitled to his reasonable compensation awarded by the trial court, win or lose. There is no basis to stay payments that have already been authorized. And there is no reason to believe the Trust would be depleted by paying Ad Litem the compensation he is entitled to during the pendency of this mandamus.

At the Trustees’ request, Judge Herman appointed Ad Litem to represent the interests of the AAL Parties in June 2015¹. For over a year Ad Litem did just that without any objection from the Trustees. With the Court’s permission he hired an oil and gas expert and litigation counsel, filed a counterclaim and entered a tolling agreement. He also pursued discovery. And as a result, he discovered that the Trustees have

¹The trial court orally ruled on the issues subject to the petition for writ of mandamus on October 31, 2016 and entered the order that the Trustees complain of on November 7, 2016. At the Trustees’ request and with Ad Litem’s agreement, the court ordered payment of the Ad Litem’s fees ten days after the date of the order, to give the Trustees time to file a petition for writ of mandamus. The Trustees waited until the last possible moment to file their petition and their Motion to Stay, and thereby manufactured the emergency for which they seek a stay. In so doing they attempted to deprive Ad Litem of any meaningful opportunity to respond to the request for a stay. Ad Litem is filing this response quickly in the hopes of being heard before the Court rules on the stay request. Because Ad Litem has not received the Reporter’s Record, he is unable to cite to it. If the Court requests, Ad Litem will amend this response with record citations.

committed serious breaches of fiduciary duty, including, among other things, the Corporate Trustee paying itself in violation of the Trust Agreement. Only after Ad Litem asserted breach of fiduciary duty claims against the Trustees did the Trustees object that he did not 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 were not really in the suit.

Under the Texas Trust Code and the trial court's order, 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 Ad Litem to bring—and he is not bringing—a derivative suit or a class action. The trial court properly denied the Trustees' special exceptions based on those arguments.

Nonetheless, the Trustees now ask this Court to stay the Ad Litem's suit and even stay the Court-ordered compensation to which he is statutorily entitled while they pursue 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 to which he is entitled by statute; and
- A stay would prejudice the Ad Litem's ability to pursue the claims for the benefit of the AAL Parties.

This Court should deny the Motion for Stay.

II. Procedural History

On June 2, 2015 the Trustees filed their 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. They sought the appointment of an Attorney Ad Litem to represent the interests of unit holders who were served by publication and did not answer or appear, pursuant to Texas Trust Code 115.014 and Texas Rule of Civil Procedure 244. On June 18, 2015 the Court appointed Glenn M. Karisch as “the attorney ad litem to represent the interests of the Unit Holders of the TEL Offshore Trust Who Were Served by Publication, and Did Not Answer or Appear.” On October 18, 2015, Ad Litem filed an Original Answer on behalf of all the unit holders of the TEL Offshore Trust who were served by publication and did not answer or appear in this proceeding (as defined in this response, “the AAL Parties”). The Ad Litem stated: “On behalf of [the AAL Parties], I pray that the relief sought in the Petition be denied, that I be allowed a reasonable fee for services and reimbursement of my costs and expenses, that the Defendants recover costs, and for such other and further relief to which Defendants just may be entitled.” The Trustees did not object to Ad Litem seeking this relief.

Also on August 18, 2015 Ad Litem filed Attorney Ad Litem’s Motion to Retain and Compensate Consulting Expert. This motion asked the Court to authorize Ad Litem to retain Michael L. Wiggins, Ph.D., P.E., a petroleum engineer, to assist Ad Litem in understanding the technical oil and gas information that formed the justification for the

Trustees' request to modify and terminate the trust. Ad Litem stated "that he needs a better understanding of this information in order to properly represent [the AAL Parties]." The Trustees agreed with this motion, and on September 28, 2015 the Court authorized Ad Litem to retain Wiggins.

On November 16, 2015 Ad Litem filed Attorney Ad Litem's First Amended Answer and Counterclaim for Order to Sell Royalty Interests and for Accounting. On behalf of the AAL Parties, he filed a counterclaim for an order to sell the royalty interests and a counterclaim for an accounting.² He asked the Court to: (1) order the royalty interests to be sold; (2) order the Trustees to provide a detailed accounting of general administrative expenses from 2008 to the present; (3) award Ad Litem a reasonable fee for services and reimbursement of his costs and expenses, to be charged against the Trustees individually; and (4) award the AAL Parties such other and further relief to which they may be entitled. The Trustees did not challenge the Ad Litem's standing to seek this relief.

Effective December 28, 2015, the Ad Litem, the Trustees and RNR Production Land and Cattle Company, Inc. entered a tolling agreement. They agreed:

2.1 To allow time for settlement negotiations without prejudicing the rights of Karisch, RNR, or any unit holder of the Trust, including but not limited to any claim, cause of action, demand or right, known or unknown, that may be asserted in a representative capacity and/or derivatively on behalf of the Trust or any of its unit holders to pursue a Potential Claim if necessary, the Parties agree to toll and suspend certain defenses as provided herein.

² Contrary to the Trustees' claim—*see* Motion to Stay at 2—Ad Litem did not agree to the relief the Trustees sought. Rather, he filed his own counterclaim seeking the sale of the royalty properties and the placement of the proceeds in a segregated account. The trial court granted this relief.

A copy of the tolling agreement was admitted into evidence as Ad Litem's Exhibit 7 at the October 3, 2016 hearing.

On March 18, 2016 Ad Litem served a request for disclosure, interrogatories and requests for production on the Trustees. The Trustees responded on April 19, 2016. Copies of their responses are attached. While the Trustees levied various objections, they did not object to the Ad Litem's standing to pursue this discovery on behalf of the AAL Parties.

On May 26, 2016 Ad Litem filed a Motion to Retain Counsel, asking the Court to authorize him to retain Scott Douglass & McConnico. The motion referred to his counterclaim for an accounting and stated "discovery is ongoing and it is likely that other claims related to the trust will be filed." The Trustees agreed to this motion, and by order dated June 9, 2016, the Court authorized Ad Litem to retain Scott Douglass & McConnico.

On July 14, 2016 the Ad Litem's litigation counsel took the deposition of Michael Ulrich, corporate representative of the corporate trustee, The Bank of New York Mellon Trust Company, N.A. Excerpts of that deposition were admitted into evidence as Exhibit 5 at the October 3, 2016 hearing. The Trustees did not object to the Ad Litem's counsel taking this deposition on behalf of Ad Litem and the AAL Parties. On August 17, 2016—after the Trustees cancelled a mediation scheduled for the next day—Ad Litem filed his Second Amended Answer and First Amended Counterclaim. This counterclaim detailed facts showing that the Trustees have committed serious breaches of fiduciary

duty, causing millions of dollars in damages to the AAL Parties and the other beneficiaries of the trust.

On September 1, 2016 Ad Litem filed his Attorney Ad Litem's September 2016 Fee Application. In opposition to that fee application and later in special exceptions, the Trustees contended for the first time that Ad Litem lacked standing to pursue claims on behalf of the AAL Parties, because such claims were improper derivative, representative or class action claims.

As explained further in this opposition, the Trustees have mischaracterized Ad Litem's claims because he is simply pursuing the claims he was authorized to pursue on behalf of the AAL Parties. But even if the Trustees had a valid challenge to the Ad Litem's standing, they have waived it and/or are estopped or quasi-estopped to assert it by waiting over a year after the Ad Litem's appointment to challenge his standing. As seen, Ad Litem filed an answer seeking relief on behalf of the AAL Parties and a counterclaim on their behalf for an accounting. He asked the Court to retain a petroleum engineering expert and litigation counsel. He and the Trustees entered a tolling agreement that expressly acknowledged the likelihood of his pursuing claims in a representative capacity. At no point did the Trustees object to his standing to do this. In fact, they agreed to his retaining counsel and an oil and gas expert. Only after Ad Litem discovered evidence of clear and serious breaches of fiduciary duty and sought to assert those claims on behalf of the AAL Parties, did the Trustees—represented by new counsel—contend that he was not authorized to represent the AAL Parties. That

argument is invalid but even if it wasn't, they have waived or should be estopped or quasi-estopped to assert it at this late stage.

III. The Trustees Are Not Entitled To An Emergency 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 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* Emergency Motion for Stay, pp. 8-12. 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 trial 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’ dogged 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’ reliance on *XTO Energy* is misplaced.

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, the Ad Litem’s 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 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). Nothing in the statute—which trumps any Restatement provisions—limits an appointment to representing an incapacitated person.
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 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 Ad Litem cannot bring claims on their behalf. *See* Motion for Stay, p. 10 (“The *In re XTO* opinion specifically precludes claims on behalf of the entire Trust or all of its beneficiaries...”). Nothing in the *XTO Energy* holding speaks to—much less precludes—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* Motion for Stay, p. 10. 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. But this example 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.

IV. An Emergency Stay is Not Warranted or Necessary.

As seen, the Trustees’ sole basis for an emergency 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 Texas Trust Code §115.014(e), which entitles Ad Litem to reasonable

compensation. The Trustees fail to recognize that 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 attorney ad litem.

The Trustees' inexplicably claim that an emergency stay is necessary so that any relief granted by the Court in the form of a writ of mandamus will not be rendered meaningless. *See* Motion For Stay, p. 7. Even if this Court were to determine that Ad Litem does not have authority to bring his claims against the Trustees, Ad Litem is still entitled to reasonable compensation for his services. Both the scope of Ad Litem's services and the amount of compensation have been approved by the trial court. The Trustees have no basis to deny Ad Litem's reasonable compensation authorized by statute. And payment of Ad Litem's approved compensation of \$200,220.04 would not deplete the entire segregated account balance of \$1,756,800. The account has sufficient resources to allow the Ad Litem his approved compensation during the pendency of this mandamus.

Moreover depriving Ad Litem of the compensation to which he is statutorily entitled would severely prejudice his ability to respond to the mandamus. The Trustees would put 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 this could 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 Emergency Motion For Stay of Trial Court Proceedings Pending Outcome of Mandamus Petition and grant him such other and further relief to which he may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Response in Opposition of Emergency Motion for Stay of Trial Court Proceedings Pending Outcome of Mandamus Petition was served via the method indicated below on the following counsel on this 15th day of November, 2016.

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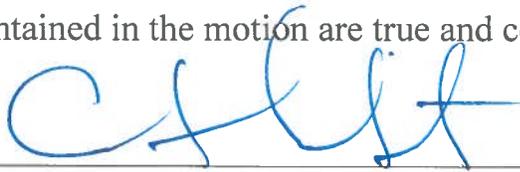
/s/ Daniel C. Bitting

Daniel C. Bitting

VERIFICATION

STATE OF TEXAS §
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COUNTY OF TRAVIS §

BEFORE ME, the undersigned notary public, on this day personally appeared Cynthia L. Saiter, who being by me duly sworn, on her oath deposed and said that she is one of the attorneys for the Ad Litem in the above cause; that she has read the above response; and that, based on her personal knowledge, the statements regarding the proceedings contained in the motion are true and correct.



Cynthia L. Saiter

SWORN TO AND SUBSCRIBED BEFORE me by Cynthia L. Saiter, on this the 15th day of November 2016, to certify which witness my hand and seal of office.



Notary Public in and for the State of Texas

