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THIRD COURT OF APPEALS
AUSTIN, TEXAS
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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

EMERGENCY MOTION FOR STAY OF TRIAL COURT PROCEEDINGS PENDING OUTCOME OF MANDAMUS PETITION

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Pursuant to Texas Rules of Appellate Procedure Rules 10 and 52.10, Gary C. Evans, Jeffrey S. Swanson, and Thomas H. Owen, Jr., as Individual Trustees of the TEL Offshore Trust ("TELOZ" or the "Trust"), and Bank of New York Mellon Trust Company, N.A., as Corporate Trustee of the Trust (collectively, the "Trustees" or "Relators"), request this Court to stay all trial court proceedings relating to the payment of Ad Litem fees and the prosecution of the Ad Litem's improper claims pending the outcome of the Trustees' Petition for Writ of Mandamus ("Petition"), which was filed simulataneously with this motion. The Trustees filed a similar motion to stay in the trial court, which was denied.

The Trustees request that the Court stay compliance with the September Fee Order (Tab 4 to Petition) and October Fee Order (Tab 3 to Petition), ***which the Court has ordered Trustees to pay by Thursday, November 17***, all future applications for the Ad Litem's fees, and all other proceedings and discovery relating to the Ad Litem's affirmative claims against the Trustees (excluding any fees or proceedings relating to the continued administration and wind-up of the Trust) during the pendency of the mandamus petition.

BACKGROUND

This case began as a probate proceeding initiated by the Trustees to modify and terminate TELOZ's operative trust agreement (the "Trust Agreement") to allow the sale of the Trust's remaining oil and gas assets, termination of the Trust,

and distribution of the remaining Trust assets to the unitholders. 1R: 1944-1989. Because 2,743 of the unitholders were served by publication and did not appear, the trial court appointed an attorney ad litem to represent them as required by Tex. R. Civ. P. 244. 1R: 1939-1943; 1R: 1938. The Ad Litem consented to the proposed modification of the Trust agreement and sale of the Trust assets. 1R: 1887-1898; 1R: 1831-1836; 1R: 1817-1830.

The Ad Litem thereafter took the unprecedented step of filing an affirmative damages counterclaim against the Trustees on behalf of the absent 2,743 unitholders, asserting that the Trustees breached their fiduciary duties because they were not clairvoyant enough to terminate the Trust in 2009 rather than 2014 and improperly accepted and approved compensation during the intervening years. 1R: 1706-1730. The Ad Litem purports to bring his claims on behalf of all 2,743 absent unitholders, with no evidence that any (let alone all) of these unitholders has consented to have these claims brought on their behalf or has any legal incapacity that would permit a representative action. R: 979-1004. The Ad Litem also seeks damages based on injuries to the whole Trust and all 6,500 unitholders. *See* 1R: 73-74; 1R: 862 ("The economic damages are the loss or depreciation in value of the trust estate as a result of the Trustees' breaches of trust").

The trial court's orders will cause imminent and irreparable harm to the Trust's creditors and unitholders unless a stay is granted. The trial court has

improperly forced TELOZ (and by extension its creditors and unitholders) to fund the Ad Litem's unprecedented and improper *de facto* securities class and derivative action out of TELOZ's rapidly dwindling trust account. On November 7, 2016, the trial court ordered the Trustees to pay $200,220.04 in attorneys' fees (including outside counsel fees for a law firm hired by the Ad Litem), expert fees and expenses to the Ad Litem by ***November 17, 2016 (this Thursday)*** after denying the Trustees' special exceptions and pleas to the jurisdiction.[1]

The Trust's sole asset is a segregated account containing less than $1,756,800, which the trial court has been using to fund the Ad Litem's fees and expenses (including outside counsel and experts).[2] The November 7 order would significantly and irreparably deplete the Trust's assets. With a trial date next June, 2017, the Ad Litem will almost assuredly gamble away the entire Trust account if this groundless suit proceeds to trial. The Ad Litem admitted that the Trust may not be able to recover these funds.[3]

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[1] 1R: 1-2; 1R: 1098. The trial court has awarded $386,350.98 to date, including the $200,220.04 in the two orders after the improper claims were filed on August 17, 2016 and $186,130.94 during the 14 months before the improper claims were filed. 1R: 1815-1816; 1R: 1813-1814; 1R: 1760-1762; 1R: 1731-1732. In other words, the Ad Litem's fees – which include approximately $86,000 in expert fees in addition to outside counsel fees – have accelerated dramatically since August 17, 2016 due to his pursuit of these unauthorized claims.

[2] Following the sale of the Trust's royalty assets, $1,756,624 was put into the segregated account. 1R: 1756. However, the account has been depleted by $111,974.58 pursuant to the trial court's August 10, 2016 order approving Ad Litem's July fee application. 1R: 1731-1732.

[3] 1R: 106-107 (testifying that "I don't know" if the Corporate Trustee could recover its $1 million loan to TELOZ and agreeing that if "there's nothing left and there's no recovery, the only dollars that I can see would be the dollars that the Court may order one party or the other to

To prevent irreparable harm to the Trust's creditors and beneficiaries (whose interests the trial court and Ad Litem are supposed to protect), the Court should stay the fee awards and all further proceedings relating to the Ad Litem's improper claims, so that the Trust account is not drained while the mandamus petition is pending. The mandamus petition establishes that the Ad Litem has no authority to bring claims on behalf of the 2,743 non-appearing beneficiaries, no authority to recover damages derivatively on behalf of the whole Trust, and no authority to exhaust the limited funds left in the Trust account to pay for this litigation.

The trial court's decisions on these issues conflict with Texas law and are an abuse of discretion. Courts routinely grant mandamus relief when a trial court improperly allows a public company shareholder representative action to proceed.[4]

The Dallas Court of Appeals recently granted mandamus relief in another public royalty trust case, holding that beneficiaries cannot bring representative

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pay in attorneys' fees and costs under 114.064," and further testifying that "I don't think the ad litem is chargeable" with fees and expenses paid to his outside counsel).

[4] *See In re Astrotech Corp.*, No. 03-13-00624, 2014 WL 711018, at *2 (Tex. App.—Austin Feb. 14, 2014, orig. proceeding) (granting mandamus where shareholder 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 (Tex. 2009) (granting mandamus in shareholder 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 in shareholder derivative case where district court allowed discovery in violation of Delaware law).

claims on behalf of the entire trust or all of its beneficiaries. *See In re XTO Energy Inc.*, 471 S.W.3d 126, 137 (Tex. App.—Dallas 2015, orig. proceeding). *In re XTO* made clear that suits in a representative capacity on behalf of multiple beneficiaries may proceed only in the narrow situations contemplated by comment d to Restatement (Third) of Trusts § 94, which do not apply here. *See id.* at 137-38.

The Ad Litem's claims are similarly improper and will irreparably plunder the Trust account if a stay is not granted. He purports to bring his claims on behalf of all 2,743 absent unitholders, with no evidence that any (let alone all) of these unitholders has consented to have these claims brought on their behalf or has any legal incapacity that would permit a representative action under *In re XTO*. *See* Section I of Petition. In further violation of *In re XTO*, the Ad Litem has specifically sought recovery of damages on behalf of the entire Trust and all 6,500 of the unitholders. *See* Section II of Petition. The Ad Litem has yet to cite a single case where any court allowed an ad litem to bring these types of claims, let alone to drain a trust account in pursuing them.

ARGUMENT

A. Irreparable Harm Will Result If No Stay Is Granted

The Trustees ask that the Court decide the threshold issues of whether the Ad Litem is entitled to bring these claims and get paid out of Trust assets ***before*** the Trust's assets are drained to pay Ad Litem's fees and expenses. If a stay is not

granted before November 17, more than $200,000 will be paid from the Trust account. If the case proceeds, the Trust account will be completely exhausted between now and June 2017 trial. The interest of the Trust, its creditors and beneficiaries would be irreparably harmed by requiring the Trust to continue expending Trust assets on the Ad Litem's claims before this Court has an opportunity to make a threshold determination of whether the Ad Litem has authority to bring these claims and to spend Trust funds in their pursuit.

The Ad Litem's outside counsel testified that, once his firm is paid, the payments will go into the firm's general account and will be used to pay firm liabilities or be disbursed to the firm's partners. 1R: 357-358. There is no assurance any of these funds could be restored to the Trust account once they are paid, and the Ad Litem has testified that interim attorneys' fees and expenses paid to him and his outside counsel and experts may not be returned to the Trust even if the Ad Litem loses the case at trial. *See supra* footnote 3 and 1R: 106-107.

The exhaustion of the Trust account will irreparably prejudice the Trust's creditors and unitholders. Consistent with the normal practice that creditors get paid before equity holders, the Trust Agreement requires the Trustees to pay liabilities to creditors first.[5] This includes more than $1 million that an affiliate of

[5] *See* 1R: 1962 (purpose of Trust is to "pay or provide for the payment of any liabilities incurred in carrying out the purposes of the Trust, and thereafter to distribute the remaining amounts received by the Trust pro rata to the owners of the Units"); 1R: 1971 (providing that the Trustees

the Corporate Trustee loaned to the Trust so that the Trust could pay its expenses.[6] The Trust Agreement also provides that the Trustees "shall be indemnified by, and receive reimbursement from, the Trust Estate against and from any and all liability" and "shall have a lien upon the Trust Estate to secure them for such indemnification. . . ."). 1R: 1976. The trial court's orders have subverted this lien and have manufactured an improper liquidation preference in favor of the Ad Litem at the irreparable expense of the Trust's creditors and beneficiaries.

This 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 In re CSX Corp.*, 124 S.W.3d 149, 153 (Tex. 2003) (orig. proceeding) (per curiam) (appellate court is unable to cure an order inflicting burdensome costs); *Braden v. Downey*, 811 S.W.2d 922, 929 (Tex. 1991) (orig. proceeding) (opining that when parties must pay discovery sanctions prior to the final judgment, mandamus relief is warranted); *TransAm. Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991) (orig. proceeding) (deciding the relator had no adequate remedy by appeal because discovery sanctions were to be paid before the final judgment, thereby

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"shall use the money received by the Trust for the payment of all liabilities of the Trust . . ."); 1R: 1972 (providing that when the Trust borrows money to pay its costs, "the Trustees shall suspend further Trust distributions . . . until the indebtedness created by such borrowing has been paid in full"); 1R: 1976 (providing that Trustees "shall be indemnified by, and receive reimbursement from, the Trust Estate against and from any and all liability" and "shall have a lien upon the Trust Estate to secure them for such indemnification. . . ."); 1R: 1980 (providing that upon termination of the Trust, the Trustees shall sell the Trust assets and "shall pay, satisfy and discharge all of the existing liabilities including fees of the Trustees . . . .").

[6] *See* 1R: 534-535 (testimony regarding unpaid $1 million debt to Corporate Trustee).

entitling the relator to mandamus relief). If a stay is not granted, the very harms that the mandamus petition seeks to prevent – *i.e.*, the invasion of the Trustees' authority to make litigation decisions regarding the Trust assets and the potential wasting of the Trust account on a groundless lawsuit – will come to pass.

B. Texas Law Confirms the Relators' Position

Relators have strong prospects of success on the underlying mandamus petition. Courts routinely grant mandamus relief when a trial court improperly allows a public company shareholder representative action to proceed – a trend that *In re XTO* extended to the public royalty trust context.[7]

By contrast, the Ad Litem ***did not cite a single case*** during the trial court proceedings in which a court: (i) allowed an ad litem to bring affirmative damages claims against trustees on behalf of beneficiaries (let alone in a class-like capacity on behalf of thousands of non-appearing beneficiaries); (ii) forced a trust to pay for such a suit as it proceeds; or (iii) otherwise forced a company or its shareholders (or, for that matter, any putative class in any context) to pay hourly bills in real time for a class or derivative action involuntarily brought on their behalf.

Under the American Rule, plaintiffs must ordinarily pay for their own counsel and experts. Attorney's fees are not recoverable for a fiduciary duty

[7] *See In re XTO*, 471 S.W.3d at 137-38 (granting mandamus where beneficiary improperly attempted to bring claims against trustees on behalf of entire trust); *see supra* footnote 4.

claim.[8] Plaintiff's attorneys in a traditional class or derivative case may not recover fees until ***after*** they win a judgment or obtain a settlement– not ***before***.

Not only has the trial court improperly ordered the Trust to pay for the Ad Litem's attorneys' fees, but the trial court is also erroneously forcing the Trust to fund the Ad Litem's experts. The September Fee Order included a $46,375.00 award to Michael L. Wiggins, who is serving as a petroleum engineering expert witness,[9] and the trial court recently approved the Ad Litem's engagement of an additional expert (Bruce Wallace) who will likewise begin charging the Trust. 1R: 5. Texas law does not permit the Ad Litem to recover his expert's fees.[10]

The trial court abused its discretion both in denying Relators' special exceptions and pleas to the jurisdiction and in forcing the Trust to fund this

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[8] *See Western Reserve Life Assur. Co. of Ohio v. Graben*, 233 S.W.3d 360, 377-378 (Tex. App.—Fort Worth, 2007); *Hooks v. Hooks*, No. 02-03-00263-CV, 2004 WL 1635838, at *2 (Tex. App.—Fort Worth July 22, 2004, no pet.) (mem. op.) (citing *Musquiz v. Marroquin*, 124 S.W.3d 906, 913 (Tex. App.—Corpus Christi 2004, pet. denied)).

[9] 1R: 1098; 1R: 1628-1630.

[10] *See Messier v. Messier*, 458 S.W.3d 155, 168 (Tex. App.—Houston [14th Dist.] 2015, no pet.) ("Generally speaking, the fee of an expert witness constitutes an incidental expense in preparation for trial and is not recoverable as costs."); *Bundren v. Holly Oaks Townhomes Ass'n*, 347 S.W.3d 421, 440 (Tex. App.—Dallas 2011, pet. denied) ("Because there is no statute or rule pertaining to the subject matter of this suit that authorizes the recovery of expert witness fees and expenses as costs, the trial court did not err by refusing to award appellees the requested fees and expenses."); *Stanley Stores, Inc. v. Chavana*, 909 S.W.2d 554, 563 (Tex. App.–Corpus Christi 1995, writ denied) (holding the trial court erred in making an equitable award of expert witness fees absent statutory authorization); *Griffin v. Carson*, No. 01–08–00340–CV, 2009 WL 1493467, at *7 (Tex. App.-Houston [1st Dist.] May 28, 2009, pet. denied) (mem. op.) ("It is well-settled that, 'regardless of any good cause shown, costs of experts are merely incidental expenses in preparation for trial and not recoverable.'").

improper suit. The gravity and extent of the error is compounded by the absence of merit in the underlying suit. As set forth more fully in the mandamus petition:

- As held in *In re XTO*, suits on behalf of non-appearing beneficiaries may only be asserted when there is a "personal fiduciary" relationship, such as "when the beneficiary being represented is under an incapacity." *See In re XTO*, 471 S.W.3d at 137-38 (citing comment d to the Restatement (Third) of Trusts § 94). There is no assertion any of the 2,743 absent beneficiaries have any legal incapacity. Comment d to the Restatement specifically requires an incapacity and lists a series of highly personalized situations (*e.g.*, guardianships and conservatorships) where representative claims on behalf of absent beneficiaries can be asserted. *In re XTO* and comment d simply do not countenance class-like claims.
- The specific rules governing class actions – which the Ad Litem cannot satisfy – control over the generalized grants of authority to ad litems in Tex. R. Civ. P. 244 and the ad litem statutes (none of which contemplates classwide relief). *See* Section II of Petition.
- The *In re XTO* opinion specifically precludes claims on behalf of the entire Trust or all of its beneficiaries regardless of whether such

claims are overtly labeled as "derivative" or "class" claims. *See In re XTO*, 471 S.W.3d at 137-38.

- Just because an ad litem may be an "interested person" for the more conventional purpose of representing absent beneficiaries in a trust modification proceeding does not mean the ad litem has plenary authority to launch a class action on their behalf. Tex. Prop. Code § 111.004(7) states that "[w]hether a person, excluding a trustee or named beneficiary, is an interested person ***may vary from time to time*** and must be determined ***according to the particular purposes*** of and matter involved in any proceeding" (emphasis added). As *In re XTO* and comment d to Section 94 of the Restatement make clear, the Ad Litem does not have authority to bring class-like claims.
- The underlying suit is premised on duties that do not exist under the Trust Agreement, which: (i) expressly limits the Trustees' duties to those specifically set forth in the agreement; (ii) does not impose any duty to seek a judicial modification of the agreement's terms, a termination of the Trust or the sale of the Trust assets; (iii) expressly disclaims any obligation to "dispose of any wasting assets"; (iv) expressly permits the Trustees to pay expenses and liabilities (including Trustee compensation) and to borrow from the Corporate

> Trustee to pay such expenses; (v) bars all claims for liability unless the Trustees acted with gross negligence, bad faith or fraud; and (vi) bars liability for Trustee decisions made in good faith based on outside opinions.[11]

The Ad Litem thus has no basis for his claims and no standing to assert claims against the Trustees on behalf of the 2,743 absent unitholders, let alone on behalf of all 6,500 TELOZ unitholders. He should not be permitted to force the 58% of unitholders whom he was not appointed to represent in any capacity to fund this suit out of the Trust account.

Pursuant to Texas Rules of Appellate Procedure 10 and 52.10(a), counsel for Relators certifies that Relators are notifying Ad Litem and counsel for Ad Litem of

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[11] *See* 1R: 1964 (Trust Agreement); Tab 7 at ¶ 3.04 (providing that "[t]he ***sole interest*** of each owner of a Unit shall be his pro rata portion of the Beneficial Interest and ***the obligations of the Trustees expressly created under this Trust Agreement*** with respect to the Beneficial Interest") (emphasis added); *id.* at ¶ 6.14 ("The Trustees shall be under ***no obligation to . . . dispose of any wasting assets***") (emphasis added); 1R: 1980; Tab 7 at ¶ 10.01 ("No person shall have the right or power to terminate, revoke, alter, amend or change this Trust Agreement or any provisions hereof except as expressly provided in Article IX or in this Article X."); *id.* 1R: 1971; Tab 7 at ¶ 6.08 (in the event "the cash on hand is not sufficient to pay liabilities of the Trust then due . . ., the Trustees are authorized, but not required, ***to borrow from the Corporate Trustee in its capacity as a bank*** . . . such amounts as are required after use of any available Trust funds to pay such liabilities . . . .") (emphasis added); 1R: 1975; Tab 7 at ¶ 7.01 ("The Trustees are empowered to act in their discretion and ***shall not be personally or individually liable*** for any act or omission ***except in the case of gross negligence, bad faith or fraud*** . . . .") (emphasis added); 1R: 1976; Tab 7 at ¶ 7.06 (providing that when the Trustees make decisions in reliance on experts such as "counsel, accountants, geologists, engineers and other parties deemed by the Trustees to be qualified as experts . . ., the opinion or written advice of any such parties on any matter submitted to them by the Trustees ***shall be full and complete authorization and protection in respect of any action taken*** or suffered by them hereunder in good faith and in accordance with the opinion or advice of any such party").

this request for immediate temporary relief by expedited means, and certifies that Relators have complied with Rule 52.10(a).

CONCLUSION

Accordingly, pending the resolution of the petition for writ of mandamus, Relators respectfully urge the Court to temporarily stay compliance with the September Fee Order and October Fee Order, all future applications for the Ad Litem's fees, and all other proceedings and discovery relating to the Ad Litem's affirmative claims against the Trustees (excluding any fees or proceedings relating to the continued administration and wind-up of the Trust) during the pendency of the mandamus petition or for such other period as the Court may direct so as to prevent irreparable injury. The requested stay does not include a stay of proceedings as to other counter-plaintiffs, RNR Production Land and Cattle, and Albert and Joyce E. Speisman, nor does it include any fees or proceedings relating to the continued administration and wind-up of the Trust.

Relators request the Court to act on this Motion to Stay on an emergency basis prior to November 17, 2016, because a trial court order requires the payment of $200,220 by Trustees to the Ad Litem from a segregated Trust account on November 17. Relators further pray for all additional relief to which they are justly entitled.

Respectfully submitted,

/s/ *Peter A. Stokes*

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Counsel for Corporate Trustee

CERTIFICATE OF CONFERENCE

I certify that I contacted counsel for Real Parties/plaintiffs and confirmed that they are opposed to this motion. Pursuant to Texas Rules of Appellate Procedure 10 and 52.10, I further certify that Relators are notifying Ad Litem and counsel for Ad Litem of this request for immediate temporary relief by expedited means, and certifies that Relators have complied with Rule 52.10(a).

/s/Peter A. Stokes
PETER A. STOKES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true, full and correct copy of the above and foregoing *Emergency Motion for Stay of Trial Court Proceedings Pending Outcome of Mandamus Petition* was served on the following counsel of record, in the manner indicated, and in accordance with the Probate Court's Order Directing Method of Service dated January 21, 2016, on the 15th day of November 2016.

/s/Peter A. Stokes
PETER A. STOKES

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VERIFICATION

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFORE ME, the undersigned notary public, on this day personally appeared Peter A. Stokes, who being by me duly sworn, on his oath deposed and said that he is one of the attorneys for the Individual Trustees in the above cause; that he has read the above motion; and that, based on his personal knowledge, the statements regarding the proceedings contained in the motion are true and correct.

SIGNED on November 15, 2016.

Peter A. Stokes

SUBSCRIBED AND SWORN TO BEFORE ME on the 15th day of November 2016, to certify which witness my hand and official seal.

Notary Public, State of Texas

JULIANN R. WRIGHT
NOTARY ID #[illegible]
My Commission Expires
July 05, 2017