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

# RELATORS' REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY OF TRIAL COURT PROCEEDINGS PENDING OUTCOME OF MANDAMUS PETITION


**NORTON ROSE FULBRIGHT US LLP**

Paul Trahan (State Bar No. 24003075)
paul.trahan@nortonrosefulbright.com
Peter A. Stokes (State Bar No. 24028017)
peter.stokes@nortonrosefulbright.com
98 San Jacinto Boulevard, Suite 1100
Austin, Texas 78701-4255
Telephone: (512) 474-5201

Daniel M. McClure (State Bar No. 13427400)
dan.mcclure@nortonrosefulbright.com
Katherine Mackillop (State Bar No. 10288450)
katherine.mackillop@nortonrosefulbright.com
1301 McKinney, Suite 5100
Houston, TX 77010-3095
Telephone: (713) 651-5151

**THOMPSON & KNIGHT LLP**

Craig A. Haynes (State Bar No. 09284020)
craig.haynes@tklaw.com
Rachelle H. Glazer (State Bar No. 09785900)
rachelle.glazer@tklaw.com
1722 Routh Street, Suite 1500
Dallas, Texas 75201
Telephone: (214) 969-1700

James E. Cousar (State Bar No. 04898700)
james.cousar@tklaw.com
98 San Jacinto Blvd., Suite 1900
Austin, Texas 78701
Telephone: (512) 469-6100

***Counsel for Relators***

The Ad Litem's response again fails to cite a single case where ***any*** court has allowed an ad litem to bring affirmative damages claims against trustees in ***any*** context, let alone forced the creditors and unitholders of a publicly traded trust to fund a class or derivative action against the trustees on a monthly basis out of a rapidly diminishing trust account that will be exhausted by the litigation. Nothing in Tex. R. Civ. P. 244 or the generic ad litem appointment statutes suggests that they were intended to fund plaintiff-side damages lawsuits against trustees out of trust funds, change the fundamental "American rule" presumption that plaintiff-side suits must be paid for by actual plaintiffs and not through house money, or supersede the specific requirements for suing in a representative capacity (*e.g.*, TEX. R. CIV. P. 42).

The Ad Litem's response also does not dispute that once the $200,220 due on Thursday, November 17, is drained from the Trust account, there is no way for the Trust to recoup these funds, to the irreparable detriment of the Trust's creditors and unitholders. More than $170,000 of the $200,220 was spent on outside counsel and experts.[1] The Ad Litem's argument about compensation under the Trust Code does not apply to these outside expenses. Moreover, page 13 of the

[1] *See* App. Tabs 3 & 4. Again, no effort was made to determine whether counsel would be willing to take this case on a contingent fee basis, which is commonplace in class actions. If the Ad Litem is unable to find counsel to take that risk, why should the Trust (along with its creditors and unitholders) be forced to do so?

response asserts that the Ad Litem is entitled to keep the fees "whether or not he prevails on his claims." This is the textbook case where a stay should be granted.

***The Ad Litem cannot distinguish In Re XTO.*** The Ad Litem again is incapable of distinguishing the *In re XTO* mandamus opinion. *See In re XTO Energy Inc.*, 471 S.W.3d 126, 137-38 (Tex. App.—Dallas 2015, orig. proceeding) (granting mandamus). *In re XTO* specifically addressed whether claims against trustees of a publicly traded royalty trust may be asserted in a representative capacity on behalf of the entire trust or absent unitholders. The court's answer was straightforward: Beneficiaries may not sue on behalf of the whole trust or all of its unitholders, and an "interested person" may only sue in a representative capacity on behalf of other unitholders under narrow circumstances as described in comment d to Restatement (Third) of Trusts § 94, which do not apply here. *See id.*

The Ad Litem's response ***does not even attempt to argue that he falls within the requirements of comment d***.[2] He has no standing to assert claims on behalf of non-appearing unitholders who do not have a legal "incapacity" as required by comment d and has not argued that any "incapacities" exist.

[2] 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.

The fact that the Ad Litem's amending pleadings cosmetically deleted the word "derivatively"[3] does not change the substance of his claim. The plaintiff in *In re XTO* did not use the word "derivatively" either, yet the court had no difficulty seeing the lawsuit for what it was. *See In re XTO*, 471 S.W.3d at 130 (noting that plaintiff brought her claims "on behalf of, and for the benefit of" the trust). The Ad Litem openly admitted in his August 17, 2016 FAC that he was suing "***derivatively*** on behalf of the TEL Offshore Trust and all of its beneficiaries." 1R: 1706 (emphasis added).

While the Ad Litem quickly deleted the word "derivatively" after Relators raised the *In re XTO* opinion in their special exceptions, his current petition still alleges damages based on injury to the whole Trust.[4] His initial disclosures assert

[3] The initial iteration of the Ad Litem's claim (the August 17, 2016 FAC) openly admitted that the Ad Litem was suing "derivatively" on behalf of the Trust and all unitholders. After Relators specially excepted based on the *In re XTO* decision foreclosing such claims, the Ad Litem amended his petition three times in a cosmetic attempt to purge any vestiges of this admission.

[4] The First Amended Petition, however, continues to allege damages to the entire Trust. *See, e.g.*, 1R: 981 ("By failing to take appropriate action within a reasonable time of this damage, the Trustees benefited themselves personally ***but caused the trust estate millions of dollars in damage***"); 1R: 998-1001 (Am. Pet. para. 64, 65, 68, 71, 72, 73, 74, 79, 82) ("The Trustees' actions and inactions constitute gross negligence that proximately and directly ***caused damage and injury to the Trust and its Beneficiaries***"); 1R: 1003 (Am. Pet. at Prayer). *See also* Am. Pet. ¶¶ 8 ("Other beneficiaries of the Trust are before the Court and are parties to this proceeding."); ¶ 53 (alleging that "the conduct of the Trustees was so egregious that it probably constituted bad faith, gross negligence, reckless indifference or intentional breach of trust ***that would enable the Beneficiaries to recover damages for the Trustees' breaches***.") (emphasis added); ¶ 65 ("The Trustees also owe **the Beneficiaries** the duty of loyalty….By their actions and inactions described above, the Trustees have breached their duty of loyalty. These breaches of the Trustees' duty have ***damaged the Trust estate***….") (emphasis added); ¶ 79 ("The Trustees' actions and inactions constitute gross negligence that proximately and directly caused damage and injury ***to the Trust and its Beneficiaries***.") (emphasis added); ¶ 89 ("…[I]f all of Ad

that he is calculating his damages based on a Trust-wide injury. 1R: 862 ("The economic damages are the loss or depreciation in value of the trust estate as a result of the Trustees' breach of trust"). The Ad Litem also readily admitted in testimony that he is seeking to recover $20 million in alleged damages to the whole Trust (for not selling the Trust mineral interests in 2010), not just damages for unitholders served by publication that he calls the "AAL Parties." 1R: 73-75.

Thus, this is, for all practical purposes, a derivative suit brought to recover damages to the entire Trust. *In re XTO* plainly bars this claim. ***Allowing an improper derivative suit to proceed is a classic ground for mandamus***.[5]

The fact that the Ad Litem was appointed as required by Tex. R. Civ. P. 244, which only authorizes ad litems to "defend" suits on behalf of persons served by publication, does not mean that he suddenly has *carte blanche* authority to launch

---

Litem's compensation and expenses are not awarded against Trustees personally, ***the Court can determine whether Ad Litem's actions have benefitted all Beneficiaries of the Trust. Under the common fund doctrine, Ad Litem's fees and expenses and those of his litigation counsel and experts should be borne by all who benefitted by his actions*** and not solely by the AAL Parties.") (emphasis added).

[5] *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 improperly allowed discovery before derivative standing requirements were met).

class and derivative claims out of Trust assets. The "interested person" statute recognizes that one may be an "interested person" for one purpose but not others. *See* TEX. PROP. CODE § 111.004(7) ("Whether 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). The Ad Litem is plainly not an "interested person" for the purposes at issue in *In re XTO* and the Restatement.

***The approval of previous fee applications says nothing about the current ones.*** The fact that prior applications were approved without objection under different circumstances breathes no life into the Ad Litem's response. The Ad Litem did not plead the affirmative damages claims until he filed the FAC on August 17, 2016. Relators promptly challenged the FAC and objected to every fee application submitted since that date. Relators have acted swiftly and reasonably in raising their objections. The fact that a fee application is approved during an earlier time period, when no improper affirmative claims were pled, says nothing about whether ***future*** applications under different circumstances are proper.[6]

[6] Relators had no objection to the payment of reasonable fees for determining the original issues of whether the Trust Agreement should be modified or the assets sold, issues that have already been decided in this litigation. As acknowledged in the response, the parties also entered several tolling agreements to facilitate settlement discussions. No affirmative damages claims had been pled as of that point. The fact that parties engage in settlement discussions can hardly be construed as a waiver of future defenses or other arguments that may be asserted if, as here, settlement discussions prove unfruitful. Once the improper claims were pled in August 2016,

The Ad Litem's assertion that his counsel may not be able to take the risk of not getting paid for the mandamus response does not override Relators' compelling interest in a stay. First, there is never an assurance that fees currently being incurred will be approved for payment, as the Ad Litem must seek court approval every time he submits an invoice. The risk of nonpayment always exists.

Second, the risk of not getting paid for the mandamus response will only materialize if in fact the Ad Litem is held to lack authority to bring his claims in the first instance (or is held to lack authority to compel payment from the Trust account), or if the trial court denies his next fee application. There is nothing unjust about not forcing the Trust to pay for claims the Ad Litem has no right to bring. If the Ad Litem's affirmative claims had any potential merit, he could have easily obtained counsel to handle the suit on a contingent fee basis.

Third, attorneys are not entitled to recover fees incurred to pursue or defend their fees. *See Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2168 (2015) ("In our legal system, no attorneys, regardless of whether they practice in bankruptcy, are entitled to receive fees for fee-defense litigation absent express statutory authorization."); *Tow v. Speer*, No. H-II-3700, 2015 U.S. Dist. LEXIS 108553 at *27 (S.D. Tex. Aug. 17, 2015) (holding that charge for "attending a hearing 'to approve fees in Bankruptcy Court'" was not recoverable).

---

Relators acted immediately and opposed every subsequent fee application, which represent the majority of Ad Litem fees sought so far in this litigation.

Fourth, the Ad Litem cannot reasonably be surprised that his right to obtain fees out of Trust assets could be challenged given the holding of *In re XTO* and the absence of any case allowing ad litems to bring these types of claims, and given the provisions in the Trust Agreement foreclosing the claims he is asserting.

Lastly, to the extent there is any prejudice, the creditor encumbrances and liens on the Trust funds (including the Corporate Trustee's unpaid $1 million loan and the Trustees' lien as established in the Trust Agreement), as well as the unitholders' interest in ensuring that the Trust funds are not drained in support of meritless and unauthorized claims, take precedence over the Ad Litem's fee claim. Again, if the Ad Litem cannot find counsel willing to take the same contingency risk that class action lawyers regularly take, it cannot possibly be reasonable, necessary, equitable or just to force the creditors and unitholders to take that risk.

***The Ad Litem's claim regarding the corporate trustee's compensation is meritless.*** The Corporate Trustee has not been paying itself in violation of the Trust Agreement. The Agreement provides that the Trustee may charge an hourly charge at the Trustee's standard rate for officer time in excess of 150 hours annually. The Trust Officer for the Corporate Trustee, Michael Ulrich, has done exactly that. He has charged his standard rate per hour since 2009 and has computed ***less*** compensation than the Trust Agreement allows by capping his hours each year at a total of 650 hours when he has worked far in excess of those hours.

Further, in the fourth quarter of 2013 and the years 2015 and 2016 , the Corporate Trustee did not receive ***any*** compensation for work performed for the Trust. The Attorney Ad Litem has no support for this allegation, much less is there any support for an allegation that the Corporate Trustee's compensation was charged in bad faith or was fraudulent or grossly negligent, which is what is required to be shown for Trustee liability under the Trust Agreement.

The record simply does not support the trial court's decision to award the Ad Litem fees at issue, which total more than $200,000 in the past two months alone, and are likely to exhaust the $1.7 million of remaining Trust assets through trial. Rule 244 only authorizes an ad litem "to defend ths suit on behalf of the defendant" and only allows "a reasonable fee for his services, to be taxed as costs" (and costs are always assessed at the conclusion of the suit). There is nothing reasonable, equitable, just or necessary about awarding fees for claims that the Ad Litem has no legal authority to bring and for which no effort has been made to find payment arrangements for his counsel (such as a contingent fee) rather than plundering the Trust account. Even if his allegations are accepted at face value, the Ad Litem fails to explain how his theory that the Trust assets should have been sold earlier is even remotely viable given the provisions in the Trust Agreement.

## CONCLUSION

The Court should thus grant the stay of the September and October Fee Orders, stay trial court proceedings relating to Ad Litem's affirmative claims against the Trustees, and award all other relief to which Relators are justly entitled.

Respectfully submitted,

/s/ *Peter A. Stokes*
**NORTON ROSE FULBRIGHT US LLP**
Paul Trahan (State Bar No. 24003075)
paul.trahan@nortonrosefulbright.com
Peter A. Stokes (State Bar No. 24028017)
peter.stokes@nortonrosefulbright.com
98 San Jacinto Boulevard, Suite 1100
Austin, Texas 78701-4255
Telephone: (512) 474-5201

Daniel M. McClure (State Bar No. 13427400)
dan.mcclure@nortonrosefulbright.com
Katherine Mackillop (State Bar No. 10288450)
katherine.mackillop@nortonrosefulbright.com
1301 McKinney, Suite 5100
Houston, TX 77010-3095
Telephone: (713) 651-5151

***Counsel for Individual Trustees***

/s/ Craig A. Haynes
**THOMPSON & KNIGHT LLP**
Craig A. Haynes (Texas Bar No. 09284020)
craig.haynes@tklaw.com
Rachelle H. Glazer (Texas Bar No. 09785900)
rachelle.glazer@tklaw.com
1722 Routh Street, Suite 1500
Dallas, Texas 75201
Telephone: (214) 969-1700

James E. Cousar (Texas Bar No. 04898700)
James.Cousar@tklaw.com
98 San Jacinto Blvd., Suite 1900
Austin, Texas 78701
Telephone: (512) 469-6100

***Counsel for Corporate Trustee***

**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 16th day of November 2016.

*/s/Peter A. Stokes*
PETER A. STOKES

Hon. Guy Herman, Presiding Judge
Probate Court No. 1
Travis County Courthouse
1000 Guadalupe, Room 217
Austin, Texas 78701
**Respondent**
***Via Email***

Glenn M. Karisch
THE KARISCH LAW FIRM, PLLC
301 Congress Ave # 1910
Austin, Texas 78701
**Counsel for Real Parties in Interest/Plaintiffs**
***Via Email***

Daniel C. Bitting
SCOTT DOUGLASS & MCCONNICO LLP
303 Colorado Street, Suite 2400
Austin, Texas 78701
**Counsel for Real Parties in Interest/Plaintiffs**
***Via Email***

Shannon Ratliff
Lisa Paulson
RATLIFF LAW FIRM PLLC
600 Congress Avenue, Suite 3100
Austin, Texas 78701
**Counsel for Defendant RNR production**
**Land and Cattle**
***Via Email***

R. James George, Jr. (State Bar No. 07810000)
114 West 7th Street, Suite 1100
Austin, Texas 78701
Telephone: (512) 495-1400
**Counsel for Defendants Albert Speisman and Joyce E. Speisman**
***Via Email***

## 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 filing; and that, based on his personal knowledge, the statements regarding the proceedings contained in the filing are true and correct. SIGNED on November 16, 2016.

Peter A. Stokes

SUBSCRIBED AND SWORN TO BEFORE ME on the 16th day of November 2016, to certify which witness my hand and official seal.

Notary Public, State of Texas

JULIANN R. WRIGHT
NOTARY ID #00011616-3
My Commission Expires
July 05, 2017