



special exceptions in response to the amended Ad Litem's Original Petition filed on October 10 (which was restyled the "Attorney Ad Litem's Original Petition as Realigned Plaintiff," and which does not cure all of the foundational defects identified in the prior Special Exceptions).<sup>1</sup>

The Individual Trustees therefore request that — pending mandamus — the Court stay (1) the September Fee Order, (2) all future applications by the Ad Litem seeking the award of fees and costs, including the Ad Litem's October 2016 Fee Application filed October 14, 2016 ("October Fee Application") and any orders entered pursuant thereto; and (3) all proceedings and discovery in this case relating to the Ad Litem's affirmative claims against the Trustees (as opposed to the administration and wind-up of the Trust), other than the renewed special exceptions being heard simultaneously with this Motion to Stay on October 31, 2016.

## **II. ARGUMENT**

It is well settled that mandamus may be granted when a trial court erroneously allows shareholder class and derivative actions to proceed.<sup>2</sup> The October orders do just that. The Ad Litem is attempting to expend substantial Trust assets in pursuit of claims that are prohibited by Texas law and which conflict with the holding in *In re XTO Energy Inc.*, 471 S.W.3d 126, 137 (Tex. App.—Dallas 2015, orig. proceeding), which forbids representative claims on behalf of trusts or absent beneficiaries except in individualized circumstances not present here. The

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<sup>1</sup> If the renewed special exceptions are not granted, the Individual Trustees anticipate filing a mandamus petition within approximately one week after those special exceptions are denied. A hearing on the renewed special exceptions will be held on October 31, 2016.

<sup>2</sup> 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 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 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).

substantive rights of the Trustees to control litigation decisions on behalf of the Trust and to determine whether Trust assets should be spent in pursuit of the claims asserted by the Ad Litem would be injured unless a stay is granted, and the Trust assets would be significantly depleted if the fees are required to be paid from the segregated account that hold the proceeds of the sale of the Trust assets earlier in 2016.

It would be far more sensible, and would serve the interests of the unitholders, for the Court to stay enforcement of the Fee Order, any further Ad Litem fee applications and orders, and all further proceedings relating to the Ad Litem's affirmative claims (other than the pending special exceptions) so that the threshold issues regarding the Ad Litem's standing to bring these claims in the first place can be resolved at the outset. *See In re Siemens Corp.*, 153 S.W.3d 694, 699 (Tex. App.—Dallas 2005, orig. proceeding) (recognizing that one purpose of mandamus review is to “preserve important substantive and procedural rights from impairment or loss” and to “spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings”). The Texas Supreme Court has repeatedly recognized that staying discovery or other proceedings is appropriate when there are threshold issues that should be resolved first. *E.g.*, *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 181 (Tex. 1999) (“courts may limit discovery pending resolution of threshold issues”); *Commercial Travelers Life Ins. Co. v. Spears*, 484 S.W.2d 577, 579 (Tex. 1972) (trial court abused discretion in awarding broad discovery when pleadings and evidence did not support a class action).

Staying the Fee Order and all future proceedings is consistent with these principles. It would prevent the risk that the entire Trust account will be depleted (and substantial additional merits litigation expenses incurred) on claims that the Ad Litem is ultimately found to have

lacked standing to bring in the first place, or which are not properly recoverable as fees payable from the Trust account even if the Ad Litem is allowed to proceed on the merits.

By contrast, staying proceedings related to the Ad Litem's Original Petition pending resolution of threshold issues by the appellate courts would cause no prejudice to the Ad Litem, who would be free to proceed with his claims later if the appellate courts decide he has standing. This is a damages action that does not require expedited proceedings. The only arguable prejudice that would result is delay in continuing discovery, but there will be ample time to complete discovery if the mandamus is denied. After all, the Ad Litem's expert has already drafted a report in August 2016. And, the Trustees have already produced voluminous documents to the Ad Litem. Further, staying the September Fee Order and October fee application will cause no prejudice to the Ad litem, as it only delays payment for a limited time until the mandamus of that September Fee Order is decided, if the mandamus is denied.

Conversely, if the September Fee Award is not stayed, the segregated account of the Trust would be immediately depleted by \$118,203. And, if the October Fee Application is granted, the account would lose an additional \$87,717. Accordingly, the prejudice caused by a delay, if any, is outweighed by the substantial prejudice to the unitholders if the stay were denied. Individual Trustees do not, however, seek a stay of proceedings related to the routine administration and wind up of the Trust, such as the Corporate Trustee's Motion to Approve Payment of the Ordinary Business Expenses Owed to Third Parties, filed October 7, which would not be the subject of the mandamus in any event.

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

Given the nature of the Ad Litem's claims, the irreparable injury to the Trust's assets, and the absence of any emergency requiring an immediate merits adjudication of the Ad Litem's

claims, the Individual Trustees respectfully request that, pending mandamus, the Court stay (1) the September Fee Order, (2) all future applications by the Ad Litem seeking the award of fees and costs, including the October Fee Application; and (3) all proceedings and discovery in this case relating to the Ad Litem's affirmative claims against the Trustees (as opposed to the administration and wind-up of the Trust), other than the renewed special exceptions being heard simultaneously with this Motion.

Respectfully submitted,

NORTON ROSE FULBRIGHT US, L.L.P.

/S/ PETER A. STOKES

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**CERTIFICATE OF SERVICE**

I hereby certify that, on October 21, 2016, a true and correct copy of this motion was served on counsel of record for the Ad Litem and for the Corporate Trustee. I further certify that on October 24, 2016, a true and correct copy of the foregoing is being 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

**CERTIFICATE OF CONFERENCE**

I hereby certify that between October 13, 2016, and October 21, 2016, counsel for the Individual Trustees conferred with Ad Litem, counsel for Ad Litem, counsel for RNR Production Land and Cattle, and counsel for Corporate Trustee regarding the foregoing. The Corporate Trustee is not opposed, while Ad Litem and RNR Production Land and Cattle are opposed.

/s/ Peter A. Stokes  
Peter A. Stokes

 **NORTON ROSE FULBRIGHT**

October 21, 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 Individual Trustees of the TEL Offshore Trust's Motion to Stay Pending Mandamus. 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,



Paul Trahan

PT/jw  
Enclosure

Cc: Via Texas e-filing and email on Ad Litem, counsel for Ad Litem, Albert Speisman, counsel for RNR Production Land and Cattle, and counsel for Corporate Trustee Bank of New York Mellon Trust Company, N.A. and all other interested parties in this matter in accordance with the Court's Order Directing Method of Service dated January 21, 2016.

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

**ORDER GRANTING MOTION TO STAY PENDING MANDAMUS**

On this day came on to be considered the Motion to Stay Pending Mandamus filed by Gary C. Evans, Jeffrey S. Swanson, and Thomas H. Owen, as Individual Trustees of the TEL Offshore Trust. 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 that:

1. Compliance with the October 3, 2016 order approving the Ad Litem’s amended September 2016 fee application is stayed pending resolution of mandamus.
2. All future applications by the Ad Litem seeking the award of fees and costs, including the Ad Litem’s October 2016 Fee Application filed October 14, 2016, are stayed pending mandamus.
3. All proceedings and discovery in this case relating to the Ad Litem’s affirmative claims against the Trustees are also stayed pending mandamus. Proceedings related solely to the administration and wind-up of the Trust are not affected by this Order.

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JUDGE PRESIDING