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Dana DeBeauvoir
Travis County Clerk
C-1-PB-14-001245
Sophia Delacroix

NO. C-1-PB-14-001245

IN RE:	§	IN THE PROBATE COURT
	§	
	§	NO. 1 OF
	§	
TEL OFFSHORE TRUST	§	TRAVIS COUNTY, TEXAS

INDIVIDUAL TRUSTEES' OBJECTION TO AD LITEM'S FEE APPLICATION

Gary C. Evans, Jeffrey S. Swanson, and Thomas H. Owen, Jr., as Individual Trustees (collectively, "Trustees") of the TEL Offshore Trust ("Trust"), submit this opposition to the Attorney Ad Litem's September 2016 Fee Application, filed on September 2, 2016, by Glenn M. Karisch ("Ad Litem"), appointed by this Court as attorney ad litem to defend the interests of the unit holders of the Trust, who were served by publication and did not answer or appear in this proceeding (collectively referred to as the "Absent Beneficiaries").[1]

I. INTRODUCTION

On August 17, 2016, the Ad Litem drastically altered the complexion of this proceeding by filing a First Amended Counterclaim (the "FAC") asserting fiduciary duty claims against the Trustees and the Corporate Trustee, Bank of New York Mellon. The FAC seeks at least $20 million in damages based on the Trustees' alleged lack of clairvoyance in not seeking a judicial termination of the Trust sooner than they did, despite the Trustees' admitted reliance on industry experts. The FAC is, for all practical purposes, a securities class action. It purports to seek affirmative relief on behalf of approximately 3,000 absent unitholders, who hold units that trade like public company stock. There is no substantive difference between the claims in the FAC and the types of fiduciary duty claims that are brought by shareholders against directors of public corporations. Texas appellate courts have strongly disfavored shareholder class and derivative

[1] The Trustees also join the Objection filed on behalf of Bank of New York Mellon Trust Company, N.A. (the "Corporate Trustee").

actions and have frequently granted mandamus relief where courts wrongfully allow such cases to proceed.[2] The Trustees intend to file a dispositive motion challenging the Ad Litem's authority to bring these claims after their new counsel have substituted in.

The Court should deny the current fee application and disallow use of Trust assets to fund these meritless claims. Fees may only be awarded if they are reasonable, necessary, equitable and just.[3] The Ad Litem can meet none of these requirements because: (i) the ad litem rule and statutes do not authorize a de facto class or derivative claim; (ii) allowing such fees will create a serious conflict between absent unitholders who support using their funds in this manner and those who do not; (iii) it would be manifestly unreasonable and inequitable to force the unitholders to bear the unprecedented burden of involuntarily funding a class or derivative action out of the Trust's assets on an ongoing basis before there is any determination that the claims have merit and until the Ad Litem is a prevailing party on those claims; (iv) there is no other basis to recover fees in a fiduciary duty suit against a trustee; and (v) the Ad Litem has not segregated properly payable fees (to the extent there are any) from unpayable ones.

In the Trustees' judgment, the interests of the Trust and its beneficiaries will be severely prejudiced if the Ad Litem is permitted to gamble the Trust's assets on litigating the claims in the

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[2] *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).

[3] Tex. Prop. Code § 114.064(a). Whether an attorney's fees and costs are reasonable and necessary is a separate and distinct inquiry from whether awarding those fees and costs is equitable and just. *In re Ray Ellison Grandchildren Trust*, 261 S.W.3d 111, 127 (Tex. App.—San Antonio 2008, pet. denied) ("[W]e are not dealing with whether a party 'incurred' fees; instead, our issue is whether the award of fees ... pursuant to the Texas Trust Code ... was 'equitable and just.'"). Whether it is equitable and just to award attorney's fees depends on the concept of fairness, in light of all the surrounding circumstances. *Ridge Oil Co., Inc. v. Guinn Invs., Inc.*, 148 S.W.3d 143, 162 (Tex. 2004).

FAC, which are subject to numerous insuperable factual and legal hurdles under the Trust Agreement's plain language (including a robust exculpation provision). The Ad Litem has now applied for a $118,203 September 2016 award, which follows a $114,925 July 2016 application . These amounts will no doubt increase exponentially if the case proceeds to pretrial and trial phases, thus quickly depleting the remaining $1,756,800 Trust assets. Indeed, only one deposition has occurred to date.[4] Because the pursuit of a unitholder class or derivative action far exceeds what is properly payable under the ad litem provisions and the Court's ad litem order, and because the incurring of these fees is not in the interests of the Trust, the Court should deny the request and bar future requests to fund litigation of the FAC out of Trust assets.

II.
ARGUMENT

A. The Ad Litem Rule and Statutes Do Not Permit Recovery of Attorney's Fees for a De Facto Class or Derivative Action on Behalf of 3,000 Absent Unitholders

The ad litem provisions do not confer authority to pursue de facto class or derivative claims, let alone to collect fees from the Trust in pursuit of such claims. Tex. R. Civ. P. 244 only authorizes an ad litem for a party served by publication "to ***defend*** the suit" on behalf of defendants where service has been made by publication. TEX. R. CIV. P. 244 (emphasis added). Bringing a plaintiff-side class or derivative action is far outside the limited grant of authority to "defend" a proceeding. The ad litem provisions under Section 53.104 of the Texas Estates Code (which allows ad litems to "represent the interests of any person") and Section 115.014 of the Property Code (which allows appointment of ad litems "to represent the interest of a minor, an incapacitated, unborn, or unascertained person, or person whose identity or address is unknown, if the court determines that representation of the interests otherwise would be inadequate") are

[4] As noted in the Corporate Trustee's objection, many of the charges appear excessive.

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, Tex. R. Civ. P. 42 imposes a much more specific set of 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 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." *Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425, 435 (Tex. 2000). The Ad Litem has made no showing that any of these requirements are capable of being satisfied.

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,[5] the specific requirements for class actions should control over the general provisions regarding ad litems. Moreover, when considering an individual rule or provision, courts "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

[5] 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."). But even if representative actions like this were permissible, they should be subject to Rule 42, which the Ad Litem has not met and cannot meet.

in a representative capacity (and recover attorney's fees in advance) would frustrate the well-established scheme for class actions set forth in the Texas Rules of Civil Procedure.

Construing the ad litem statute to permit class-like representative claims 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. The Trust Code gives ***trustees*** the 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). Texas law bars individual beneficiaries from suing in a representative capacity on behalf of the entire trust against a trustee. *See Ray Malooly Trust v. Juhl*, 186 S.W.3d 568, 570 (Tex. 2006) (holding that trusts are not legal entities and may not sue or be sued); *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.").

It is thus the Trustees' right to determine whether the Trust's assets should be depleted to fund what is at best a moonshot claim that must overcome the substantial barriers to liability in the Trust Agreement, including a strict limitation-on-liability clause, limitations on the Trustees' discretion and specific provisions allowing the Trustees to rely on experts (which they did).

Texas appellate courts strongly disfavor representative actions on behalf of unitholders or shareholders and will regularly grant mandamus relief when an individual holder is wrongfully permitted to bring fiduciary duty claims against trustees or directors in a representative capacity. *See In re XTO*, 471 S.W.3d at 136-37 (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 (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). The Trustees anticipate filing special exceptions to the FAC shortly to challenge the sufficiency and sustainability of the FAC.

As stated above, it is the Trustees' right to determine whether Trust funds should be expended on litigation matters. The Court should reject the Ad Litem's effort to usurp the Trustees' ability to decide whether pursuing these types of claims is in the Trust's interests.

B. <u>Allowing the Ad Litem To Continue Funding These Claims Out of Trust Assets Creates a Conflict With Absent Unitholders Who Do Not Want To Spend Trust Funds on These Claims.</u>

The fact that the Ad Litem's fees are rapidly depleting the Trust's assets also creates an impermissible conflict between unitholders who support the claims and those who do not want the Trust assets spent in this manner. Section 115.014 of the Property Code only allows an ad litem to represent more than one person "if there is not a conflict of interests . . . ." The Ad Litem has failed to establish the absence of a conflict between unitholders who support this claim and unitholders who do not want the Trust funds gambled away on this counterclaim. In

applying the similar rule against certifying class actions where a potential conflict exists, courts have placed the onus on the party seeking to represent multiple absent parties to demonstrate the absence of a conflict. *Supportkids, Inc. v. Morris*, 167 S.W.3d 422, 426 (Tex. App.—Houston [14th Dist.], pet. dism'd 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 . . . ."). Section 115.014 of the Property Code similarly imposes an affirmative requirement that there be no "conflict of interests" before an ad litem can represent multiple individuals. Because it is implausible that all 3,000 unitholders support spending Trust funds to pursue this case, the Court should bar these claims and deny funding.

C. It Is Not Reasonable, Necessary, Equitable or Just to Require Absent Unitholders To Fund The Counterclaim Before Any Determination of the Merits.

It is also manifestly unreasonable, unnecessary, inequitable and unjust to force absent class members to foot the bill in real time for a counterclaim involuntarily brought on their behalf. A class action or derivative plaintiff in district court has no right to force the target company (and, by extension, its shareholders) to pay their attorneys' fees in real time before they obtain a recovery. If the class or derivative plaintiff obtains a recovery in district court, they may be able to request fees at the end of the matter (such that the company or shareholders do not have to go out of pocket before there is a recovery), but they are not entitled to dragoon absent shareholders who are involuntary participants in the counterclaim into funding their case in real time before the class representatives recover anything on the merits of their counterclaims. If it is inappropriate to require such funding in a district court class action, it is similarly unnecessary, unreasonable, inequitable and unjust to require the Trust to fund the Ad Litem's counterclaim efforts here.

D. There is no contractual or other legal basis for an award of attorney's fees for the newly asserted derivative and class action counterclaims.

Likewise, a prevailing party in an individual action ordinarily cannot recover attorney's fees from an opposing party unless permitted by a contract between the parties, by statute, or under equity. *Holland v. Wal-Mart Stores*, 1 S.W.3d 91, 95 (Tex. 1999) (statute or contract); *Knebel v. Capital Nat'l Bank*, 518 S.W.2d 795, 799 (Tex. 1974) (equity). The Trust Agreement does not provide for attorney fees. In fact, the case law is clear that attorney fees are *not* recoverable for a breach of fiduciary claim. *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)). There is no reason not to apply a similar rule here.

E. The Ad Litem Has Not Segregated Recoverable From Non-Recoverable Fees

It would therefore not be equitable or just to force the Trust and its unitholders to foot the bill for this counterclaim. To the extent any of the Ad Litem's fees are properly recoverable, the Ad Litem has not segregated the permissible fees from the impermissible ones related to the FAC. *See Lesikar v. Moon*, 237 S.W.3d 361, 378 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (requiring attorney to segregate costs and fees related to defending beneficiaries from those related to tort counterclaim, the latter being unrecoverable).

III. CONCLUSION

For the reasons set forth above and in the Corporate Trustee's objection, the Court should deny the Attorney Ad Litem's September 2016 Fee Application. Alternatively the Court should defer ruling on the fee application until later in this case.

Respectfully submitted,

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Substituting Attorneys for Individual Trustees Gary C. Evans, Jeffrey S. Swanson, and Thomas H. Owen, Jr.

CERTIFICATE OF SERVICE

I hereby certify that, on September 12, 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