

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

TEXAS PACIFIC LAND TRUST and, solely in their  
respective capacities as trustees for Texas Pacific Land  
Trust, DAVID E. BARRY and JOHN R. NORRIS III,

Plaintiffs,

v.

ERIC L. OLIVER,

Defendant.

and

ERIC L. OLIVER, SOFTVEST, L.P., HORIZON  
KINETICS LLC, and ART-FGT FAMILY PARTNERS  
LIMITED,

Counterclaim Plaintiffs,

v.

DAVID E. BARRY and JOHN A. NORRIS III, in their  
individual capacities and in their capacities as trustees for  
the Texas Pacific Land Trust,

Counterclaim Defendants.

Case No. 3:19-CV-01224-B

**COUNTERCLAIM PLAINTIFFS' MEMORANDUM OF LAW IN  
SUPPORT OF THEIR MOTION FOR A HEARING ON THEIR MOTION  
FOR A DECLARATORY JUDGMENT AND PRELIMINARY INJUNCTION**

Counterclaim Plaintiffs Eric L. Oliver, SoftVest, L.P., Horizon Kinetics LLC, and ART-FGT Family Partners Limited have filed a Motion for a Declaratory Judgment and Preliminary Injunction ("Motion"). Under the Court's Individual Practice Rules I(I) and II(F), Counterclaim Plaintiffs respectfully move for a hearing on their Motion be held on August 5, 2019, or as soon thereafter as the Court is available.

As we explain below, the disputes at issue are ripe for a prompt resolution because the key facts underlying the disputes are uncontroverted and because the incumbent trustees' ongoing illegal governance of the Texas Pacific Land Trust ("TPL"), a publicly traded entity with a market capitalization of over \$6 billion, warrants it. Because the declaratory and injunctive relief sought concern the same facts and legal issues, and because resolution of the parties' disputes are of paramount importance to the rights of TPL's shareholders—over 15,000 of them—and the governance of TPL, Counterclaim Plaintiffs respectfully submit that the requests for declaratory and injunctive relief should, in the interests of efficiency and under the Court's inherent authority and power to "order a speedy hearing of a declaratory-judgment action," Fed. R. Civ. P. 57, and "advance the trial on the merits and consolidate it with [a preliminary injunction] hearing," Fed. R. Civ. P. 65(a)(2), be heard at the same hearing.

### **FACTUAL BACKGROUND**

Below are key facts relevant to this motion. For a more detailed discussion of the events leading up to the parties' disputes, Counterclaim Plaintiffs respectfully refer the Court to their Motion for a Declaratory Judgment and Preliminary Injunction.

TPL is governed by a Declaration of Trust ("DoT"). ¶ 18; AC Ex. A.<sup>1</sup> The DoT "requires three Trustees," ¶ 19, and "[u]pon election, trustees serve until 'death, resignation or disqualification,'" ¶ 18; AC Ex. A, § 3. On February 25, 2019, a TPL trustee resigned. ¶¶ 19, 25; AC Ex. C. Under TPL's DoT, upon a trustee's resignation, the remaining trustees are required to call and notice a special meeting of TPL's shareholders, at which "a successor shall

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<sup>1</sup> "¶ \_\_\_" refers to paragraphs of Plaintiffs' Amended Complaint, and "AC Ex. \_\_\_" refers to exhibits of the Amended Complaint. "Factual assertions in pleadings are . . . judicial admissions *conclusively* binding on the party that made them." *Davis v. A.G. Edwards & Sons, Inc.*, 823 F.2d 105, 108 (5th Cir. 1987) (alteration and emphasis in original) (quotation and citation omitted).

be elected . . . by a majority in the amount of the certificate holders present in person or by proxy.” AC Ex. A, § 3.

On March 4, 2019, Counterclaim Defendant John R. Norris III, a TPL trustee, and Counterclaim Defendant David E. Barry, a purported TPL trustee (collectively, “Incumbents”), announced their nomination of 39-year-old Preston Young to a lifetime appointment as TPL’s third trustee. RJN Ex. 1.<sup>2</sup> On March 15, a group of TPL shareholders, including Counterclaim Plaintiffs, announced an agreement to support the election of 60-year-old Eric L. Oliver. RJN Ex. 55. In response, Incumbents promptly assembled a team of professional advisors to orchestrate what their counsel declared on Twitter was a “#proxycontest defense against a group of dissident shareholders.” EM Ex. E.

On April 8, 2019, Incumbents formally commenced their “proxy contest defense” by filing a definitive proxy statement with the U.S. Securities and Exchange Commission (“SEC”), dropping Mr. Young, proffering General Donald G. Cook as their new nominee, and noticing a special meeting for TPL shareholders to cast their votes in person or by proxy “on May 22, 2019 at 10:00 a.m. Central Time in Room 20502 of the offices of Sidley Austin LLP at 2021 McKinney Avenue, Suite 2000, Dallas, TX 75201.” RJN Ex. 4 at 2.

Incumbents filed this lawsuit on the afternoon of May 21, less than 24 hours before the scheduled special shareholder meeting at 10:00 a.m. on May 22, Dkt. 1, and announced minutes later they were indefinitely postponing the meeting “until further notice,” RJN Ex. 50. On May 21, Counterclaim Plaintiffs “publicly filed with the SEC a copy of the Trustees’ disclosure complaint so shareholders c[ould] review it on their own.” AC Ex. I; RJN Ex. 66. Counterclaim

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<sup>2</sup> “RJN Ex. \_\_\_” refers to exhibits of Mr. Oliver’s Request for Judicial Notice; “EO Ex. \_\_\_” refers to exhibits of the Eric Oliver Declaration; “EM Ex. \_\_\_” refers to exhibits of the Ed McCarthy Declaration; “JK Ex. \_\_\_” refers to exhibits of the Jay Kesslen Declaration.

Plaintiffs also reiterated that Incumbents had no authority to postpone the May 22 special meeting, and that they would move forward with the election as scheduled. AC Ex. I; ¶ 47.

On May 22, after Incumbents' counsel at Sidley Austin LLP refused to allow any TPL shareholders into the elevator bank for its offices, TPL's shareholders met in a conference room on a different floor of the same building. Oliver Decl. ¶ 53. With Incumbents' counsel in attendance, the May 22 special meeting was held. *Id.* ¶ 57. Before a duly sworn inspector of election, Counterclaim Plaintiffs' proxy holder voted 3,660,812 shares (47.2% of all outstanding shares) in favor of Mr. Oliver's election. AC Ex. K. Although a final proxy card was delivered to Incumbents the night before the May 22 meeting, Incumbents chose not to vote their proxies at the meeting. Declaration of Ed McCarthy ("EM Decl."), ¶ 23. As a result, Mr. Oliver received 98.1% of the votes cast by shareholders present in person or by proxy at the meeting. *Id.* ¶ 25. The outcome would not have been any different if Incumbents had voted their proxies at the meeting. The official proxy card delivered to Incumbents showed that only 1,994,267 shares (25.7% of all outstanding shares) had been voted in favor of General Cook's election, and 222,411 shares (2.9%) had been voted against General Cook's election. AC Ex. K. Between the 47.2% of shareholders who voted for Mr. Oliver on Counterclaim Plaintiffs' card and the 2.9% who voted against General Cook on Incumbents' card, a majority (50.1%) of all outstanding shares had affirmatively rejected General Cook's candidacy. EM Decl. ¶¶ 23–26.

Incumbents not only refuse to recognize Mr. Oliver as a new trustee, but also continue to vest Mr. Barry with all the powers of a trustee, even though he was never duly elected by TPL's shareholders. On June 12, 2019, a New York Stock Exchange representative disclosed information revealing that the shares voted in favor of Mr. Barry's election at a January 12, 2017 special meeting were *not* all lawfully cast. JK Ex. B. Instead, many were improperly cast by

retail brokers—through which more than 60% of TPL’s shares are held—acting without authorization from the holders of those shares under NYSE Rule 452 due to the erroneous classification of Mr. Barry’s election as a “routine” proposal. The error should have been apparent to TPL and its proxy solicitor in 2017, but they failed to report this development to TPL’s shareholders.

On June 14, 2019, Incumbents issued a press release stating they were “obliged to remind shareholders that the proxy solicitation is suspended while the litigation is pending.” RJN Ex. 54. On June 21, 2019, Incumbents requested in a Rule 26(f) report that a trial on the merits not commence until at least August 31, 2020. Dkt. 25, ¶ 12. These recent statements – in addition to the daunting discovery requests served last week by Incumbents’ counsel on non-parties affiliated with the Investor Group—including Mr. Oliver’s son and Allan Tessler’s two daughters—make clear TPL’s true motivations behind its lawsuit: intimidate the Investor Group, impose on over 15,000 shareholders at least a year-long delay, and incur the costs of protracted litigation—all in an effort to dodge the shareholders’ election of Mr. Oliver as trustee. In the meantime, the Incumbents continue to illegally manage TPL without the necessary checks Mr. Oliver would bring as a duly elected trustee.

On June 17, 2019, Mr. Oliver moved for dismissal of the federal securities claims asserted against him in Incumbents’ Amended Complaint.

To restore and confirm TPL shareholders’ rights, Counterclaim Plaintiffs now request a declaratory judgment that: (i) TPL was required to hold a special meeting to elect a successor trustee after one of its trustees resigned in February 2019; (ii) Incumbents had no authority to unilaterally and indefinitely postpone the special meeting they had noticed; (iii) Incumbents have no authority to “disqualify” Mr. Oliver from election; (iv) the vote at the May 22, 2019 special

meeting was valid and Mr. Oliver has been duly elected a TPL trustee; and (v) the vote at the January 12, 2017 special meeting was invalid and Mr. Barry has never been duly elected a TPL trustee.

To prevent any further abrogation of TPL shareholders' rights in connection with the May 2019 election, Counterclaim Plaintiffs request a preliminary injunction (i) prohibiting Incumbents from taking any action on TPL's behalf without Mr. Oliver's participation as a trustee; or (ii) prohibiting Incumbents from any further unauthorized postponement of the election. To prevent any further denial of TPL shareholders' rights in connection with the January 2017 election, Counterclaim Plaintiffs request a preliminary injunction prohibiting Mr. Barry from taking any action on TPL's behalf until a new election can be held.

## **ARGUMENT**

### **I. Hearing for Counterclaim Plaintiffs' Request For a Preliminary Injunction**

"The right of shareholders to vote for the trustees of a business trust is one of the most important rights arising from stock ownership." *Brigade Leveraged Capital Structures Fund Ltd. v. PIMCO Income Strategy Fund*, 995 N.E.2d 64, 72 (Mass. 2013). Here, Incumbents have trampled all over that right with actions that far exceed their authority under TPL's DoT and that breach their fiduciary duties to TPL's shareholders.

As further detailed in the Counterclaim Plaintiffs' Motion, Incumbents have disenfranchised TPL's shareholders by refusing to recognize the election of Mr. Oliver and preventing him from serving as a TPL trustee. Moreover, by purporting to have postponed any election of a successor trustee "until further notice," Incumbents are refusing to allow *any* shareholders to vote and to have but two trustees—Incumbents themselves—do as they please for an indefinite period of time, notwithstanding that TPL's DoT "requires three Trustees." ¶ 19.

Courts have routinely held that the deprivation of shareholder voting rights would result in irreparable harm absent an injunction. *See, e.g., Danaher Corp. v. Chicago Pneumatic Tool Co.*, 1986 WL 7001, at \*14 (S.D.N.Y. June 19, 1986) (“[C]orporate management subjects shareholders to irreparable harm by denying them the right to vote their shares and to exercise their rightful control over the corporation.”); *Int’l Banknote Co. v. Muller*, 713 F. Supp. 612, 623 (S.D.N.Y. 1989) (“Courts have consistently found that corporate management subjects shareholders to irreparable harm by denying them the right to vote their shares or unnecessarily frustrating them in their attempt to obtain representation on the board of directors.”).

In the meantime, TPL continues to operate at the sole discretion of Incumbents—one of whom was not duly elected—and in the absence of Mr. Oliver, a duly elected trustee. The risk presented by Incumbents’ unauthorized exertion of control over TPL during the pendency of this litigation is not hypothetical: it is real and it is immediate for the over 15,000 shareholders of TPL. On June 24, Incumbents announced that they had formed a “Conversion Exploration Committee” to explore whether TPL “should be converted into a C-corp,” as Counterclaim Plaintiffs have been advocating, or instead “should remain a business trust,” as Incumbents desire. EO Ex. N. Not surprisingly, the committee is comprised of Mr. Norris and three individuals who were never elected by TPL’s shareholders—(i) Mr. Barry; (ii) General Cook; and (iii) Dana McGinnis, who has already rejected as “nonsensical” any suggestion that TPL convert into a Delaware corporation. *Id.*; RJN Ex. 72.<sup>3</sup>

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<sup>3</sup> In a transparent public relations stunt, concurrent with the announcement, Incumbents filed with the SEC a letter purporting to invite Horizon Kinetics LLC to designate a member of the committee, on the condition that Horizon execute what Incumbents inaccurately described as a “confidentiality agreement.” EO Ex. N at 15. The terms of the “confidentiality agreement” confirm that it was drafted so as to ensure that Horizon could not accept the illusory invitation to join the committee. *See id.* at 6 ¶ 1 (agree to be bound by Charter); *id.* at Charter at B (other members can remove Horizon designee for any reason); *id.* Charter at F (without Incumbents’ permission, Horizon cannot make “any public announcements or other disclosures,” regardless of whether those disclosures in any way relate to the committee).

Because of the urgent nature of this matter and the ongoing deleterious effect of Incumbents' actions, Counterclaim Plaintiffs request that the Court hold a hearing on August 5, 2019, or as soon thereafter as the Court is available and deems appropriate, to prevent any further abrogation of TPL shareholders' rights.

Counterclaim Plaintiffs' Motion is well suited for prompt resolution because it presents only issues of law. The key facts are uncontroverted and no discovery is required. It is undisputed that Incumbents noticed the May 22, 2019 special meeting. RJN Ex. 4 at 2. It is undisputed that, the evening before the special meeting, the Incumbents purported to indefinitely postpone the meeting. RJN Ex. 50. The text of the DoT is undisputed. AC Ex. A. The entirety of the May 22, 2019 special meeting is captured on video and therefore is not subject to dispute. EO Ex. M. In addition to this video evidence, the results of the special meeting are confirmed by the official proxy cards delivered to both sides by Broadridge Financial Solutions, Inc. EM Decl. ¶¶ 21–22, Ex. A. The facts regarding the purported election of Mr. Barry in 2017 are likewise not in dispute. No discovery is necessary to determine the text of the DoT or of NYSE Rule 452. And the fact that unauthorized votes were cast during the 2017 special meeting is reflected in an email from an NYSE representative and is not subject to reasonable dispute. JK Ex. B.

Accordingly, following the completion of briefing on the Motion, and a hearing on August 5, 2019, or as soon thereafter as the Court is available, the Court can rule on Counterclaim Plaintiffs' request for a preliminary injunction based on the facts admitted by the Incumbents in their pleadings, as well as the declarations and exhibits submitted in support of Counterclaim Plaintiffs' Motion. The Counterclaim Plaintiffs request that the Court do so.

## **II. Hearing for Counterclaim Plaintiffs' Request For a Declaratory Judgment**

Under Fed. R. Civ. P. 57, a court “may order a speedy hearing of a declaratory-judgment action.” Because Counterclaim Plaintiffs’ declaratory judgment claims present questions of law, the Court may also “advance the trial on the merits and consolidate it with the [preliminary injunction] hearing” under Fed. R. Civ. P. 65(a)(2). In addition, the Court may advance resolution of the Counterclaim Plaintiffs’ declaratory judgment claims under its “inherent authority to manage [its] docket[] to ensure ‘the orderly and expeditious disposition of cases.’” *Childs v. Resident Collect, Inc.*, 2016 WL 11493528, at \*2 (N.D. Tex. Apr. 29, 2016) (quoting *Woodson v. Surgitek, Inc.*, 57 F.3d 1406, 1417 (5th Cir. 1995)).

Because the declaratory judgment claims concern the same uncontroverted facts and legal issues as those at issue on Counterclaim Plaintiffs’ request for a preliminary injunction, Counterclaim Plaintiffs respectfully submit that, in the interests of efficiency, the Court consider the requests for declaratory and injunctive relief at the same hearing.

For the same reasons discussed in Section I above regarding Counterclaim Plaintiffs’ request for a preliminary injunction, Counterclaim Plaintiffs’ declaratory judgment claims present only legal issues that do not require further factual development. *See Tri-State Generation & Transmission Ass’n, Inc. v. BNSF Ry. Co.*, 2008 WL 2465407, at \*7 (D. Ariz. June 17, 2008) (ordering a speedy hearing where the relevant issues was a “fairly straight-forward issue of contract interpretation”). The prompt resolution of legal questions such as those presented here accords with the broader purpose of the declaratory judgment procedure: “Rule 57 embodies a strong policy favoring early resolution of declaratory judgment actions.” *Chevron Corp. v. Donziger*, 800 F. Supp. 2d 484, 491 (S.D.N.Y. 2011). Advancement of the trial on the Counterclaim Plaintiffs’ declaratory judgment claims in a consolidated hearing with

Counterclaim Plaintiffs' request for a preliminary injunction is likewise appropriate under Rule 65(a)(2). *Drummond v. Fulton Cty. Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1204 (5th Cir. 1977) (affirming Rule 65(a)(2) consolidation where "the consolidation represented a responsible exercise of judicial discretion in view of the essentially legal nature of the contest and the need for prompt action on this case").

Moreover, a swift resolution of Counterclaim Plaintiffs' declaratory judgment claims will substantially narrow, if not effectively end, the parties' controversy. *See Allergan, Inc. v. Valeant Pharm. Int'l, Inc.*, 2014 WL 4181457, at \*3 (C.D. Cal. Aug. 21, 2014) (explaining that, in assessing a request for a "speedy hearing" under Rule 57, "[o]ne factor that a district court may consider is whether declaratory judgment would 'terminate the controversy' or at least substantially narrow the issues"); *Klungvedt v. Unum Grp.*, 2012 WL 2368623, at \*3 (D. Ariz. June 21, 2012) (granting speedy hearing where "expedited consideration of this issue could save the court and the parties tremendous expense"); *Kickapoo Traditional Tribe of Texas v. Chacon*, 46 F. Supp. 2d 644, 648-49 (W.D. Tex. 1999) ("In a case in which the relevant facts are undisputed, exigent circumstances exist and the granting preliminary injunctive relief will effectively give a party all of the relief it would obtain after trial on the merits, consolidation of the hearing with trial on the merits under Rule 65(a)(2) is particularly appropriate.").

Finally, Counterclaim Plaintiffs and other TPL shareholders alike have an urgent need for clarification of the parties' legal obligations and status as TPL trustees, thus warranting a "speedy hearing." *See Turner Indus. Grp., LLC v. Int'l Union of Operating Engineers, Local 450*, 2013 WL 2147515, at \*4 (S.D. Tex. May 10, 2013) (granting expedition under Rule 57 where there was "urgency" present "because of the nature of the . . . business").

**CONCLUSION**

For these reasons, Counterclaim Plaintiffs respectfully request that the Court schedule the hearing on their Motion for August 5, 2019, or as soon thereafter as the Court is available, and that Counterclaim Plaintiffs' requests for declaratory and injunctive relief both be heard at the same hearing.

Dated: June 25, 2019

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 25, 2019, a true and correct copy of the foregoing document was served through the Court's CM/ECF System on all counsel of record.

*/s/ Robert C. Walters*  
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