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*, – against – ERIC L. OLIVER, *Defendant*, and ERIC L. OLIVER, SOFTVEST, L.P., HORIZON KINETICS LLC, and ART-FGT FAMILY PARTNERS LIMITED, *Counter-Plaintiffs*, – against – DAVID E. BARRY and JOHN R. NORRIS III, in their individual capacities and in their capacities as trustees for the Texas Pacific Land Trust, *Counter-Defendants*.	§	CASE NO. 3:19-cv-01224-B

PLAINTIFFS' REPLY BRIEF IN FURTHER SUPPORT OF EXPEDITED MOTION FOR LIMITED DISCOVERY RELATED TO COUNTER-PLAINTIFFS' DECLARATORY JUDGMENT AND PRELIMINARY INJUNCTION MOTION

I. PRELIMINARY STATEMENT

Counter-Plaintiffs[1] have already agreed that discovery is appropriate for the Declaratory Judgment/PI Motion—the only question before the Court is the scope of such discovery. Counter-Plaintiffs have requested significant discovery from Plaintiffs, and Plaintiffs agreed to respond to all discovery requested by Counter-Plaintiffs, including additional requests for discovery beyond that included in the Court's July 15, 2019 Scheduling Order (Dkt. 53). Indeed, Plaintiffs are working hard to provide responses to the broad discovery sought by Counter-Plaintiffs. Yet despite a mutual exchange of discovery,[2] Counter-Plaintiffs insist that they can selectively use the PSLRA stay in a way that it was never intended—as both a sword to allow it to marshal evidence in its sole possession in favor of its position[3] and as a shield to prevent Plaintiffs from being able to access key evidence relating to disputed fact issues.

Counter-Plaintiffs' assertion that the Declaratory Judgment/PI Motion is somehow limited to "straightforward questions of law governed by TPL's DOT," is a gross mischaracterization belied by Counter-Plaintiffs' submission of a 463-page appendix in support of their Motion. Resp. at 19. At its core, Counter-Plaintiffs' Motion requests the following relief: "[A] declaratory judgment that . . . the vote conducted at the May 22, 2019 special meeting was valid and Mr. Oliver has been duly elected a TPL trustee; and (v) the vote conducted at the January 12, 2017 special

[1] Defined terms are as in Plaintiffs' Memorandum of Law In Support of Expedited Motion for Limited Discovery Related To Counter-Plaintiffs' Declaratory Judgment And Preliminary Injunction Motion (the "Discovery Motion") [Dkt. 55].

[2] Counter-Plaintiffs wrongly accuse Plaintiffs of seeking to delay or frustrate the rights of TPL's shareholders. See Resp. at 1–2. Not so. Plaintiffs seek discovery (much of which was served on Counter-Plaintiffs nearly two months ago and before the stay was ordered) in accordance with the agreed schedule for production already. July 15, 2019 Scheduling Order at 2–3. Counter-Plaintiffs' sudden suggestion that they would not be able to produce discovery according to the agreed schedule is surprising, and concerning, given that, as explained in the Discovery Motion, the majority of the document requests will impose no burden at all on Defendant or Counter-Plaintiffs unless there is concerning information such as evidence of conflicts or self-dealing. Disc. Mot. at 12–13.

[3] Plaintiffs note extensive disagreement with the factual history presented by Counter-Plaintiffs. Rather than re-hash the facts of this dispute yet again, however, Plaintiffs direct the Court to Plaintiffs' assertions of fact in the Amended Complaint [Dkt. 15]; Plaintiffs' Opposition to Defendant's Rule 12(c) Motion [Dkt. 51]; and the Discovery Motion.

meeting was invalid and Mr. Barry has never been duly elected a TPL trustee." Dkt. 37 at 26. Despite repeated references to the Declaratory Judgment/PI Motion, Counter-Plaintiffs do not refer to the full scope of relief sought a single time in their Response, and it is easy to understand why—the Motion goes far beyond raising pure questions of law and instead requests that the Court validate Defendant's lawful status as trustee. The sweeping nature of this request requires a determination of, among other things, whether the May 22, 2019 shareholder "meeting" was properly noticed, whether the shareholder "vote" allegedly conducted at the meeting was authorized and appropriately conducted, and whether the Defendant was free from conflicts of interest and qualified to serve as a trustee. Dkt. 37 at 21–23. Similarly, to determine the validity of Mr. Barry's election as trustee, the Court must analyze the procedural mechanisms surrounding the 2017 proxy vote, including communications between the Trust, brokers, and shareholders. These questions are inherently factual and their resolution is inextricable from the "legal issues" Counter-Plaintiffs assert are solely before the Court.

Even more troubling, Counter-Plaintiffs' desired relief would effectively resolve the merits of this action—a determination they seek to secure without allowing Plaintiffs access to the full discovery that would otherwise be their right. Indeed, Counter-Plaintiffs effectively concede, by failing to challenge Plaintiffs' request for declaratory relief related to the May 22, 2019 "meeting" as inadequately pled, that discovery is necessary to resolve the Parties' factual dispute. To avoid the import of this tacit admission, Counter-Plaintiffs repeatedly, and falsely, assert that "the DJ/PI Motion does not seek a declaratory judgment on the merits of Plaintiffs' claims." However, Plaintiffs specifically request a declaration that "the Invalid Meeting conducted by Defendant . . . on May 22, 2019 was not a lawful special meeting . . . [and that] any votes cast at the Invalid Meeting . . . are invalid, null, and void." Am. Compl. ¶ 117. This claim for declaratory relief is the mirror image of the declaration described above, a fact studiously omitted by Counter-Plaintiffs

from their Response—and the resolution of that question lies at the very heart of this proceeding. In short, Counter-Plaintiffs seek to resolve the core dispute among the Parties on the merits by obtaining a judgment declaring Defendant a lawfully elected trustee—a question the Court cannot resolve based solely on the Declaration of Trust and without the evaluation of key disputed facts bearing on the procedural validity of the shareholder vote, the May 22, 2019 meeting, and Defendant's qualifications to serve as trustee. Accordingly, Plaintiffs ask that the Court grant the Discovery Motion to allow for the expedited, carefully targeted discovery necessary to contest the sweeping factual assertions implicated by Counter-Plaintiffs' Declaratory Judgment/PI Motion.

II. ARGUMENT AND AUTHORITIES

As explained at length in the Discovery Motion, key factual disputes are central to adjudication of the Declaratory Judgment/PI Motion, including whether Defendant is disqualified from serving as a trustee of TPL and whether Counter-Plaintiffs have misled shareholders so as to necessitate corrective disclosures before the shareholder vote they seek in their motion. Despite Counter-Plaintiffs' latest attempts to reframe the Declaratory Judgment/PI Motion as only considering the authority and obligations of the Trustees—the requested relief clearly goes beyond such a limited scope. Counter-Plaintiffs expressly seek to force a shareholder vote (potentially tainted by misrepresentations and omissions) or, more troublingly, to insert Defendant into the operations of a multi-billion dollar enterprise based on an improperly-noticed and invalid "meeting." These unique circumstances create significant danger of undue prejudice that cannot be remedied after the fact. It is therefore paramount that Plaintiffs have access to the limited discovery requested in the Discovery Motion, particularly discovery relating to (1) Defendant's qualifications to serve as trustee including whether he has conflicts of interest or has engaged in self-dealing and (2) communications with shareholders that may have tainted the proxy solicitation process.

A. Counter-Plaintiffs' Requested Relief Is Broad, Encompassing Numerous Merits Issues To Cause Undue Prejudice

Counter-Plaintiffs' requested relief goes *far* beyond consideration of the scope of the Trustees' authority and obligations. Counter-Plaintiffs entirely misstate the relief sought by trying to frame their request as mere commentary on the Trustees' authority. Resp. at 13. In reality, Counter-Plaintiffs' Declaratory Judgment Motion seeks, *inter alia*:

Declaratory Judgment/PI Motion Relief Sought by Counter-Plaintiffs	Danger of Undue Prejudice
A declaration that the vote at the invalid meeting was valid. Mot. Decl. J. at 2.	This directly mirrors declaratory relief sought by Plaintiffs on the merits and implicates discovery relating to misrepresentations, omissions, and communications with shareholders. Am. Compl. ¶ 117.
A declaration that Defendant "has been duly elected a TPL trustee." Mot. Decl. J. at 2.	This directly mirrors Plaintiffs' merits claims, and which implicates Defendant's qualifications, as well as any misrepresentations or omissions made to shareholders. Am. Compl. ¶ 117.
A declaration that Mr. Barry "has never been duly elected a TPL trustee." Mot. Decl. J. at 2.	This threatens a permanent change to the Trust's leadership, necessitating factual investigation.
Preliminary injunctive relief prohibiting Mr. Barry from acting on TPL's behalf. Mot. Decl. J. at 2.	This threatens a permanent change to the Trust's leadership, necessitating factual investigation.
Injunctive relief to insert Defendant into TPL's board of trustees. Mot. Decl. J. at 2.	This could grant Defendant present control over TPL during active litigation, giving Defendant the opportunity to engage in self-dealing or other wrongdoing that Plaintiffs' preliminary investigation indicates Defendant may have engaged in in the past. Am. Compl. ¶ 43.
Alternatively, injunctive relief that would immediately trigger a shareholder vote within *five days* of the Court's ruling. Mot. Decl. J. at 2 (seeking vote within five days in violation of the four-week notice provision in the Declaration of Trust).	Such a vote would be, by nature, uninformed and/or misinformed without the discovery sought by Plaintiffs in the Discovery Motion, and therefore directly implicates communications and misrepresentations made to shareholders.

Counter-Plaintiffs seek to immediately seat Defendant as a trustee and to simultaneously unseat a Trustee who has served for over two years. Such relief could upend *two-thirds* of the Board of Trustees in control of a six-billion-dollar public company, risking far more than mere undue prejudice. The irreparable harm that could occur if a conflicted individual is allowed to wrest control of an enormous enterprise and potentially engage in self-dealing or other untoward business activities is unthinkable. This would not be remediable by mere damages or injunctive relief after the fact, and is thus distinguishable from much authority on which Counter-Plaintiffs rely.[4] A change in control during the pendency of litigation could quickly result in rapid business decisions that would be difficult or impossible to unscramble, even if the Court ultimately decided—upon full discovery and merits briefing—that Defendant violated securities laws and the vote at the invalid meeting was, indeed, void. In this way, Plaintiffs have not made mere conclusory allegations relating to undue prejudice as claimed by Counter-Plaintiffs.[5]

B. The Requested Discovery Is Directly Relevant To The Declaratory Judgment/PI Motion

Counter-Plaintiffs allege that Plaintiffs fail to tie the requested discovery to the factual assertions relating to the Declaratory Judgment/PI Motion, but that is patently untrue. Plaintiffs

[4] *See, e.g.*, *City of Birmingham Ret. & Relief Sys. v. Armstrong*, No. 16-17-RGA, 2016 WL 880503, at *2 (D. Del. Mar. 1, 2016) (collecting cases finding no undue prejudice based on availability of post-closing remedies); *Alaska Laborers Emps. Ret. Fund v. Mays Clear Channel Commc'ns, Inc.*, No. SA-07-CA-0042-RF, 2007 WL 9710527, at *5 (W.D. Tex. Feb. 14, 2007) (recognizing that plaintiffs "may bring a statutory appraisal rights action after the merger if they are still dissatisfied"); *Med. Imaging Ctrs. of Am., Inc. v. Lichtenstein*, 917 F. Supp. 717, 722 (S.D. Cal. 1996) (noting availability of "post-election remedies" in finding that no undue prejudice existed).

[5] For example, Counter-Plaintiffs cite *380544 Canada v. Aspen Technology*, No. 07 CIV. 1204(JFK), 2007 WL 2049738, at *3 (S.D.N.Y. July 18, 2007), where the *only* argument made by plaintiff in favor of a lift of a discovery stay was based on the lack of burden on defendant, whereas here, Plaintiffs have made clear that significant injury will result from withholding discovery. Counter-Plaintiffs also cite *Desmarais v. First Niagra Financial Group*, No. 15-1226-LPS-CJB, 2016 WL 768257, at *4 (D. Del. 2016) to suggest that Plaintiffs cannot establish undue prejudice, but this case is distinguishable from the present action. *Desmarias* involved a merger, which could be remedied easily via a damages/appraisal process under Delaware law and there was no preliminary injunction pending. *See generally id.* Here, the undue harm standard is fulfilled because, in addition to the potential harm outlined above, monetary damages cannot compensate Plaintiffs for the injury that could result from the relief requested, a preliminary injunction is not only pending, but was filed by Counter-Plaintiffs, and Plaintiffs seek discovery specifically to prevent harm which could arise from the Court's ruling on the Declaratory Judgment/PI Motion.

explain at length in the Discovery Motion that by seeking to seat Defendant as a trustee and to validate the vote at the invalid meeting, Counter-Plaintiffs have directly implicated issues of misrepresentations to shareholders and Defendant's qualifications.[6] Disc. Mot. at 11–14. Counter-Plaintiffs bafflingly assert that discovery relating to communications with those in attendance at the invalid meeting are somehow not in their sole possession only because Plaintiffs' counsel was in the room during the "meeting"—but that has no bearing on the validity of notice given to shareholders or the availability of communications with attendees before or after the "meeting." *Compare* Resp. at 20 *with* Disc. Mot. at 11–12. It is readily apparent that communications by Counter-Plaintiffs with the shareholders who attended the invalid meeting would be highly relevant to the validity of the purported vote. The mere presence of a representative at the invalid meeting does not somehow make Plaintiffs privy to what Counter-Plaintiffs told attendees and shareholders dating back to February 1, 2019—the start date of the agreed production.

In addition, Counter-Plaintiffs have already agreed that certain discovery, including depositions of key individuals associated with Counter-Plaintiffs, is appropriate in advance of the hearing on the Declaratory Judgment/PI Motion. July 15, 2019 Scheduling Order at Ex. A. The discovery sought by Plaintiffs in the Discovery Motion bears strongly on the credibility and reliability of testimony by these deponents and is therefore directly relevant to the matters at hand.

C. The Discovery Requested Is Sufficiently Particularized

Counter-Plaintiffs argue that the requests at issue are insufficiently particularized to overcome the PSLRA stay, but even a cursory review of the case law fails to support this contention, and authority relied on by Counter-Plaintiffs is readily distinguishable. For example,

[6] By pointing out the clear connection between the requested discovery and the issues in the Declaratory Judgment/PI Motion, Plaintiffs have also rendered Counter-Plaintiffs' authority *Rampersad v. Deutsche Bank Securities*, 381 F. Supp. 2d 131, 133 (S.D.N.Y. 2003) inapplicable. *See id.* (finding that plaintiff failed to show "any" discovery that would affect ability to respond to pending motions to dismiss and no preliminary injunction pending).

Counter-Plaintiffs cite to authority involving sweeping requests for documents and communications that extended well beyond the claims at issue and where the plaintiff failed to "list any specific discovery items or categories of discovery" that satisfy the requirements for lifting the PSLRA stay. *See Benbow v. Aspen Tech., Inc.*, No. Civ. A. 02-2881, 2003 WL 1873910, at *4 (E.D. La. Apr. 11, 2003). Here, by contrast, Plaintiffs have gone to great lengths to narrow the requested discovery—including withdrawing numerous requests, modifying requests to only require sufficient documentation as opposed to all documentation, and placing narrow limits on relevant time periods—and have tied the needed discovery directly to the relief sought by Counter-Plaintiffs in the Declaratory Judgment/PI Motion. This is in stark contrast to Counter-Plaintiffs' cited authority, whereby plaintiffs in those cases often request broad swaths of information without any tie to the issues at hand.[7] Counter-Plaintiffs spill significant ink over *Davis v. Duncan Energy Partners L.P.,* 801 F. Supp. 2d 589 (S.D. Tex. 2011), but that case is also readily distinguishable from the present dispute, because the *Davis* plaintiff presented no argument at all as to why discovery would be appropriate and proposed no limits to discovery. *Id.* at 592–94.

D. The Discovery Requested Is Not Burdensome; Rather, Plaintiffs Seek Parity In The Mutual Exchange Already Underway

Plaintiffs are currently working diligently to respond to all of Counter-Plaintiffs' requests by engaging in expedited electronic discovery and only ask for parity in the process. As explained in the Discovery Motion, for the majority of the requests in the Discovery Motion, there will be

[7] *See Herrley v. Frozen Food Exp. Indus., Inc.*, No. 3:13-cv-3004-B (BF), 2013 WL 4417699, at *3 (N.D. Tex. Aug. 19, 2013) (noting that plaintiff failed to address the proper standard for overcoming the PSLRA stay and rejecting discovery requests stretching back years and broadly covering all aspects of defendant's business); *Benbow*, 2003 WL 1873910, at *4 (involving a motion for discovery in which plaintiff entirely failed to "list any specific discovery items or categories of discovery"); *Botton v. Ness Techs. Inc.*, CA No. 11-3950 (SRC) (MAS), 2011 WL 3438705, at *2-3 (D.N.J. Aug. 4, 2011) (finding that sweeping requests related to production of "communications or documents subject to search terms" and lacking temporal limitations were insufficiently particularized); *In re Countrywide Fin. Corp. Derivative Litig.*, 542 F. Supp. 2d 1160, 1180-81 (C.D. Cal. 2008) (rejecting discovery requests essentially covering all aspects of defendant's business practices and operations and that did not overlap with documents already produced in parallel litigation).

little to no burden to answer unless highly relevant, concerning information exists (*i.e.*, evidence of self-dealing or conflicts of interest). *See* Disc. Mot. at 11–12. Counter-Plaintiffs argue that the need for electronic discovery makes discovery burdensome and therefore not particularized but this argument is simply inapplicable here, where the Parties have *already* agreed to discovery and are thereby *already* engaged in electronic discovery. *See* July. 15, 2019 Scheduling Order at Ex. A. Counter-Plaintiffs' requests to Plaintiffs, which Plaintiffs agreed to respond to, are quite broad, including "All non-privileged documents and communications . . . regarding solicitation activities related to the election of a TPL successor trustee in 2019." *Id.* That request, of course, would include communications between Plaintiffs and shareholders. By asking for Counter-Plaintiffs' communications with shareholders, Plaintiffs seek parity with the requests that Plaintiffs are currently responding to. Counter-Plaintiffs' double standard—particularly with regard to shareholder communications—is inequitable and nothing the PSLRA was designed to facilitate.[8]

Likewise, Counter-Plaintiffs seek documents relating to the background and qualifications of David Barry *and* Preston Young—the latter being a former candidate who is no longer involved in the proxy dispute. *See* July 15, 2019 Scheduling Order at Ex. A. (requiring, *inter alia*, production of "All non-privileged documents and communications . . . related to the consideration and nomination of Preston Young"). To suggest that documents relating to Mr. Young's background—a *former* candidate—is somehow more relevant to a motion seeking to seat Defendant as trustee than Defendant's *own* background is laughable at best. By requesting background on Oliver, Plaintiffs again seek parity in discovery.

[8] *See In re WorldCom, Inc. Sec. Litig.*, 234 F. Supp. 2d 301, 305 (S.D.N.Y. 2002) ("Congress enacted the discovery stay in order to minimize the incentives for plaintiffs to file frivolous securities class actions" and to reduce the chance "that the plaintiff will find during discovery some sustainable claim not alleged in the complaint").

Counter-Plaintiffs repeatedly overemphasize the number of requests agreed to or sought by each side,[9] and assert that they have agreed to significant discovery because they identified fifteen categories of agreed production. This simplistic analysis overlooks the fact that in almost every instance, Plaintiffs' document requests are far narrower than Counter-Plaintiffs' document requests. *See id.* Specifically, almost every request from Plaintiffs to Counter-Plaintiffs that they agreed to is limited to communications between specified individuals or entities, whereas Counter-Plaintiffs' requests to Plaintiffs, though fewer in number, are significantly broader, encompassing all documents and communications regardless who is involved. *See id.*

Finally, regarding Request for Production to Oliver No. 39, which Counter-Plaintiffs repeatedly take issue with in the Response, Plaintiffs clarify that they do not seek every document and communication relating to Mr. Oliver's family of businesses, but are simply trying to find out the intersection between Defendant's businesses and TPL's business—to identify any potential conflicts of interest or instances of self-dealing that may impact Defendant's qualifications as a candidate for trustee. In that spirit, Plaintiffs are willing to limit this request for purposes of the Declaratory Judgment/PI Motion to *documents sufficient to show* any and all entities that Defendant owns, controls (directly or indirectly); serves as an Executive Officer, partner, or director for; or of which Defendant holds 5.0% or more of the voting securities, so long as Counter-Plaintiffs provide all documents underlying Interrogatories to Oliver Nos. 14 and 16, and all documents responsive to Requests for Production to Oliver Nos. 43, 50, 51, 56, and 62.

[9] Notably Counter-Plaintiffs mischaracterize the number of discovery requested in the Discovery Motion. There are not "an additional 59 document requests and 13 interrogatories," as Counter-Plaintiffs claim, but rather **35 document requests and only 5 interrogatories**. *See* Disc. Mot. at Ex. 1. Counter-Plaintiffs reach this number by double-counting requests served on multiple of Counter-Plaintiffs, but as explained in the Discovery Motion, such requests are "largely duplicative and Plaintiffs do not request or need multiple copies of the same materials. Such requests are simply intended to encompass all entities that may have responsive information." Disc. Mot. at 10 n.5.

III. CONCLUSION AND REQUESTED RELIEF

Accordingly, Plaintiffs respectfully request that the Court grant Plaintiffs' Discovery Motion in its entirety, with discovery to be answered in accordance with the agreed schedule for production set out in this Court's Scheduling Order dated July 15, 2019. Plaintiffs also request all other relief, general or special, to which they may be justly entitled.

Dated: July 23, 2019

Respectfully submitted,

s/ Yvette Ostolaza

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CERTIFICATE OF SERVICE

I hereby certify that on this day, July 23, 2019, I caused Plaintiffs' Reply in Further Support of Expedited Motion for Limited Discovery Related to Counter-Plaintiffs' Declaratory Judgment and Preliminary Injunction Motion filed on behalf of Plaintiffs 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, to be electronically served via the Court's CM/ECF system on the following parties:

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