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6 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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8 In re: JAY T. JANECEK,
co-trustee/beneficiary, and JILL J.
9 (JANECEK) COBB,
co-trustee/beneficiary and the
10 JANECEK TRUST, a Washington
express trust and the JANECEK
11 CHILDREN'S TRUST, a
Washington express trust,

12 Petitioners,

13 v.

14 JON J. JANECEK,
15 co-trustee/beneficiary

16 Respondent.

NO. CV-13-287-LRS

**ORDER DENYING
MOTION TO REMAND,
INTER ALIA**

17
18 **BEFORE THE COURT** is the Petitioners' Motion To Remand (ECF
19 No. 46). On its own motion, the court hears the Motion To Remand on an
20 expedited basis without oral argument.

21 **SUBJECT MATTER JURISDICTION**

22 The jurisdictional argument presented in the Motion To Remand has
23 already been presented by Petitioners in their response to Respondent's Motion
24 For Appointment of Third-Party Corporate Trustee (ECF No. 19), and
25 Respondent has filed a reply which addresses Petitioners' argument that this
26 court lacks subject matter jurisdiction. Moreover, the court has an independent
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1 obligation to examine whether subject matter jurisdiction exists before deciding
2 any issue on the merits, *Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1116 (9th
3 Cir. 2004), and the absence of federal subject matter jurisdiction may be raised
4 at anytime. *Rains v. Criterion Systems, Inc.*, 80 F.3d 339, 342 (9th Cir. 1996).

5 This TEDRA (Trust and Estates Dispute Resolution Act) petition, RCW
6 Chapter 11.96A, was removed by Respondent from Spokane County Superior
7 Court on August 21, 2013. It was removed on the basis of federal diversity
8 jurisdiction. The “Notice of Removal” (ECF No. 1 at p. 3) asserts the amount
9 in controversy exceeds \$75,000 and there is complete diversity of citizenship
10 because Petitioners Jay T. Janecek and Jill L. (Janecek) Cobb are residents and
11 citizens of Washington and Idaho, respectively, and Respondent Jon J. Janecek
12 is a resident and citizen of California. The “Notice of Removal” further
13 asserts:

14 T]he trust-related tort claims (breach of fiduciary duty), trust-
15 related accounting demands, and property issues (California real
16 property issues and requests for disgorgement of trust funds),
17 alleged herein do not fall under the “probate exception” to this
Court’s exercise of jurisdiction because they do not relate to the
probate of a will, administration of an estate, or property that is in
the custody of a probate court.

18 Petitioners contend the “probate exception” applies. This exception
19 provides that a federal court may not probate a will, administer an estate or
20 entertain an action that would interfere with pending probate proceedings in
21 state court or with the control of property in custody of the state court.
22 *Markham v. Allen*, 326 U.S. 490, 494, 66 S.Ct. 296 (1946). In *Marshall v.*
23 *Marshall*, 547 U.S. 293, 126 S.Ct. 1735, 1748-49 (2006), the Supreme Court
24 articulated a simple test of whether a case fits within the probate exception:
25 whether a plaintiff seeks an *in personam* judgment against a defendant, as
26 opposed to the probate or annulment of a will or other relief seeking to reach a
27 res in the custody of a state court, and whether sound policy considerations,
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1 specifically, the special proficiency of state courts with respect to the issues
2 presented by a case, militate in favor of extending the probate exception to that
3 case. In *Marshall*, the Court specifically held that a claim based on a “widely
4 recognized tort” such as tortious interference with an expectancy of an
5 inheritance or gift is outside the exception. *Id.* at 1748.

6 Petitioners cite to certain deposition testimony of Respondent Jon J.
7 Janecek as indicating the dispute regarding the trusts is inextricably intertwined
8 with the probate of the estate of Lionell Janecek and therefore, this court’s
9 entertaining of that dispute would interfere with the pending probate
10 proceedings in Spokane County Superior Court, or with the control of property
11 in the custody of that court. The following colloquy occurred during the
12 deposition of Jon J. Janecek:

13 Q: Would you agree that marshaling the trust asserts, dividing
14 by three equal ways is the resolution to this action?

15 A: Actually, sir, they’re combined. It’s a . . . pour over will. So
16 frankly, even the stuff that goes into the probate by virtue of
17 the will is automatically going to the trust. So it’s all
18 combined, sir. It’s a unified trust and estate issue, wills and
19 trust issue. So they’re all combined.

20 Frankly, the probate is supposed to send to the trust because
21 the trust is the sole beneficiary under the will. So it’s all
22 combined.

23 (ECF No. 39-11 at pp. 46-47).

24 This court does not believe the mere existence of a pour over will
25 deprives it of subject matter jurisdiction to adjudicate the parties’ dispute
26 regarding the trusts. It does not appear this court’s adjudication of the dispute
27 would interfere with the probate proceedings in Spokane County Superior
28 Court or with control of property in the custody of that court. None of the
relief sought by Petitioners appears to have anything to do with estate assets.
Rather, Petitioners seek relief only with regard to trust assets: 1) order

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1 compelling Respondent to provide complete and full accounting of the
2 Children's Trust; 2) order compelling Respondent to provide complete and full
3 accounting of the Janecek (Family) Trust; 3) order compelling Respondent to
4 disgorge all assets under his control that belong to the Children's Trust; 4)
5 order compelling Respondent to disgorge all assets under his control that
6 belong to the Janecek (Family) Trust; 5) order finding that Petitioners are not
7 required to respond to a Payoff Demand Statement under California law, and
8 prohibiting Respondent from enforcing such a demand; and 6) order
9 compelling Respondent to provide a full and complete accounting of all
10 payments claimed to have been made in full or partial satisfaction of the
11 Promissory Note regarding the Seal Beach house, including canceled checks
12 showing all payment. (Ex. A to ECF No. 1 at p. 12).

13 Petitioners do not seek a judgment out of estate property. Rather,
14 Petitioners seek an *in personam* judgment against Respondent. Petitioners are
15 akin to tort claimants seeking a declaration that Respondent has breached his
16 fiduciary duties with regard to the trusts and that Petitioners should be granted
17 the injunctive and declaratory relief they seek in order to remedy that breach.
18 Breach of fiduciary duty imposes liability in tort. *Miller v. U.S. Bank of*
19 *Washington, N.A.*, 72 Wn.App. 416, 426, 865 P.2d 536 (1994). Many courts
20 have held that a claim for breach of fiduciary duty is outside the probate
21 exception. *Curtis v. Brunsting*, 704 F.3d 406, 409-10 (5th Cir. 2013); *Campi v.*
22 *Chirco Trust UDT*, 223 Fed. Appx. 584, 585 (9th Cir. 2007); *Lefkowitz v. Bank*
23 *of New York City*, 528 F.3d 102, 107-08 (2nd Cir. 2007); *Jones v. Brennan*, 465
24 F.3d 304, 307-08 (7th Cir. 2006); and *Hamilton v. Nielsen*, 678 F.2d 709, 710
25 (7th Cir. 1982). In *Lefkowitz*, for example, the probate exception barred federal
26 jurisdiction over a beneficiary's claims against the executor of her parents'
27 estate to obtain assets that remained under the control of the state probate court,
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1 but it did not bar her tort claims against the executor for fraud and breach of
2 fiduciary duty which did not directly implicate the assets of the probate estate
3 and were not entirely intertwined with issues of estate administration.

4 Assuming there is a pour over will, that means once the probate in
5 Spokane County Superior Court is completed, the estate assets will be “poured
6 over” into the trust(s) and then subject to any orders this federal court has made
7 regarding management of trust assets. That does not, however, fall within the
8 probate exception and deprive this court of subject matter jurisdiction. Once
9 the assets are “poured over,” they will no longer be estate assets in custody of
10 the state court. The probate court will settle how the estate assets are to be
11 distributed per the terms of Lionell Janecek’s will. This court will have
12 nothing to do with that. Its orders will only impact the assets after they have
13 been “poured over” into the trusts.¹ To the extent, however, there is any impact
14 upon assets currently in the custody of the probate court, this does not
15 necessarily warrant application of the probate exception.

16 The probate exception incorporates the doctrine of custodia legis, “the
17 general principle that, when one court is exercising *in rem* jurisdiction over a
18 *res*, a second court will not assume *in rem* jurisdiction over the same *res*.”
19 *Marshall*, 547 U.S. at 311-12. This principle is narrow, however, and “has no
20 application to a case in federal court based upon diversity of citizenship,
21 **wherein the plaintiff seeks merely an adjudication of his right or his**

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23 ¹ Petitioners represent the estate has not been closed only because Lionell
24 Janecek owned 25% of a real estate partnership that owned two vacant lots in
25 Tacoma, and that the proposed closing date was February 7, 2014. (ECF No.
26 36 at p. 5). It is possible then that there currently is no ongoing probate
27 proceeding in Spokane County Superior Court.
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1 **interest as a basis of a claim against a fund in the possession of a state**
2 **court”** *Princess Lida v. Thompson*, 305 U.S. 456, 466, 59 S.Ct. 275
3 (1939)(emphasis added). This was reiterated by the Supreme Court in
4 *Markham* and quoted by the Court again in *Marshall*:

5 [W]hile a federal court may not exercise its jurisdiction
6 to disturb or affect the possession of property in the custody
7 of a state court, . . . it may exercise its jurisdiction to adjudicate
8 rights in such property where the final judgment does not
9 undertake to interfere with the state court’s possession
10 **save to the extent the state court is bound by the judgment**
11 **to recognize the right adjudicated by the federal court.**

12 *Marshall*, 547 U.S. at 310 (quoting *Markham*, 326 U.S. at 494)(emphasis
13 added). See also *F.T.C. v. J.K. Publ’ns, Inc.*, 2009 WL 997421 at *3 (C.D. Cal.
14 2009)(“[A] federal court properly adjudicates rights regarding property that is
15 the subject of a probate proceeding so long as the federal court does not order
16 the transfer of any property belonging to the probate estate”). Here, Petitioners
17 do not ask this court to order the transfer of any property belonging to the
18 probate estate; at most, they ask this court to adjudicate their rights and the
19 rights of Respondent regarding property that is the subject of the Spokane
20 County probate proceeding.

21 Petitioners also assert there is no diversity of citizenship because
22 Respondent should be treated as a resident of Washington due to the fact he is a
23 legal representative of Lionell Janecek’s estate, and Lionell Janecek was a
24 resident of Washington.² 28 U.S.C. §1332(c)(2) provides that “the legal
25 representative of the estate of a decedent shall be deemed to be a citizen only of
26 the same State as the decedent” This argument is essentially
27 indistinguishable from Petitioners’ argument that the probate exception to
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² All three of the siblings, Petitioners and Respondent, are co-personal
representatives of the estate. They are also the sole beneficiaries of the estate.

1 federal jurisdiction applies because of the existence of a pour over will.
2 Because that exception does not apply, however, the only relevant
3 consideration is Respondent’s capacity as a trustee. In actions by or against a
4 trustee, diversity is determined by the trustee’s own domicile. Whereas a
5 trustee is the legal owner of trust property, an executor is not the legal owner of
6 estate property, but merely a representative of the estate. See *Andrews v.*
7 *Modell*, 636 F.Supp.2d 213, 220-22 (S.D. N.Y. 2008). Respondent is a citizen
8 of California for the purpose of this TEDRA lawsuit and therefore, there is
9 complete diversity between him and the Petitioners.

10 The Supplemental Declaration of Jay T. Janecek (ECF No. 45) suggests
11 \$75,000 may not be in controversy with regard to the trusts. This is the first
12 time Petitioners have called the jurisdictional amount into question.
13 Respondent, in his opening memorandum regarding his motion to appoint a
14 third-party corporate trustee, indicates the Janecek (Family) Trust currently
15 holds approximately \$1,500,000 in assets and that the probate action in
16 Spokane County Superior Court involves approximately \$1,000,000 in assets.
17 (ECF No. 19 at p. 3).³ In their response memorandum, the Petitioners do not
18 specifically take issue with the jurisdictional amount and indeed, state: “The
19 total amount of combined assets exceeds \$2,000,000. The value of personal
20 property is approximately \$3,600.00. The vast majority of trust assets are held
21 in securities at Merrill Lynch and DA Davidson.” (ECF No. 36 at p. 3). It is
22 unclear if “combined assets” means combined trust assets or combined trust
23 and probate assets.

24
25 ³ According to Petitioners, the Janecek (Family) Trust is actually comprised
26 of three trusts: (a) Credit Shelter Trust; (b) Marital Trust; and (c) Survivor’s
27 Trust. (ECF No. 36 at p. 2, n. 1).
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1 Based on the information currently before it, this court concludes the
2 probate exception does not apply and that it has subject matter jurisdiction to
3 adjudicate the parties' dispute regarding the trusts. Petitioners' Motion To
4 Remand (ECF No. 46) is **DENIED**.

5
6 **MEDIATION**

7 On August 16, 2013, Petitioners filed in this court a "Notice Of
8 Mediation Under RCW 11.96A.300." (ECF No. 3). RCW 11.96A.300(1)
9 provides that: "A party may cause the matter to be subject to mediation by
10 service of written notice of mediation on all parties or the parties' virtual
11 representatives as follows." The matter is to be resolved using mediation
12 procedures unless a petition objecting to mediation is filed within twenty days.
13 RCW 11.96.300(2)(b). The record does not indicate that Respondent ever filed
14 a petition objecting to mediation. In fact, Petitioners' "Notice Of Mediation
15 Under RCW 11.96A.300" represents that "[t]he parties previously mutually
16 agreed through counsel that attorney Peter Witherspoon (WSB #7956) will be
17 appointed as mediator."

18 **Within ten (10) days of the date of this order, the parties shall serve**
19 **and file statements showing cause why the court should not compel them to**
20 **engage in the mediation procedure set forth in RCW 11.96A.300.**

21 If the court does not compel mediation, it will promptly decide
22 Respondent's Motion For Appointment Of Third-Party Corporate Trustee (ECF
23 No. 19). If mediation is compelled, the court will await the outcome of the
24 mediation before ruling on the motion.

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