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March 3, 2016

VIA FACSIMILE 740-942-4693 **15 Pages, Including Cover Letter**

Clerk of Court
Harrison County Common Pleas Court
100 E Market Street
Cadiz, OH 43907

RE: ***Sunoco Pipeline L.P. v. Carol A. Teter, Trustee of the Carol A. Teter Revocable Living Trust***
Case No. CVH-2015-0058
Reminger File No.: 8410-39-21736C-15

Dear Clerk:

Enclosed for filing please find *Plaintiff Sunoco Pipeline L.P.'s Post-Hearing Brief* in the above-captioned matter. If you could fax the time-stamped first page of the pleading back to 614-232-2410 it would be greatly appreciated. Thank you for your assistance.

Very truly yours,

REMINGER CO., LPA

/s/ Gregory D. Brunton

Gregory D. Brunton

GDB/rlr
Enclosure
cc: Nicholas I. Andersen, Esq. (via email)
Jessica L. Samuel, Esq. (via email)
C. Craig Woods, Esq. (via email)
Andrew H. King, Esq. (via email)

IN THE COURT OF COMMON PLEAS
HARRISON COUNTY, OHIO

Sunoco Pipeline L.P.	:	
	:	
Plaintiff,	:	**Case No.** :CVH-2015-0058
	:	
v.	:	**Judge:** T. Shawn Hervey
	:	
Carol A. Teter, Trustee of the Carol A. Teter Revocable Living Trust, et al.	:	
	:	
Defendants.	:	

PLAINTIFF SUNOCO PIPELINE L.P.'S POST-HEARING BRIEF

Defendant Carol A. Teter, Trustee of the Carol A. Teter Revocable Living Trust ("Defendant") failed to meet the burden of proof required for its requested stay. The only evidence presented by Defendant was examples of how it would be inconvenienced by the construction of the Mariner East 2 Pipeline. However, mere inconvenience does not give rise to irreparable harm. Further, Defendant presented no evidence that Plaintiff Sunoco Pipeline L.P. ("Sunoco") would be incapable of removing the pipeline and remediating Defendant's property if necessary. In fact, the only evidence presented to this Honorable Court explicitly contradicted that contention—Sunoco has significant experience removing and remediating pipe and would undoubtedly do so if required in this case. In contrast, Sunoco presented ample evidence of the significant irreparable harm it faces as a result of delayed construction—Defendant presented no evidence to the contrary. Additionally, it is clear the public interest would only be disserved by delaying construction of the Mariner East 2 Pipeline. Accordingly, Defendant's request for a

stay should be denied. In the alternative, this Court would need to set a bond equal to no less than $70 million to compensate Sunoco for potential losses from delay.

I. BRIEF SUMMARY OF TESTIMONY

Vice President of Business Development for Sunoco, testified that the Mariner East 2 Pipeline slated to be constructed beneath Defendant's property is a $3 billion dollar project designed to carry 275,000 barrels of petroleum. The pipeline is being constructed from Scio, Ohio to Marcus Hook, Pennsylvania. In order to comply with federal regulations, Sunoco is not able to begin collecting revenue from the 247,500 barrels committed shippers are contractually required to transport on the pipeline each day until the **entire** pipeline is completed. If even one property along the length of the pipeline cannot be developed, Sunoco will lose revenue of approximately $933,000 per day until the pipeline can be completed. These committed shippers are in dire need of an efficient means to take Ohio petroleum to profitable markets. Accordingly, they are very closely observing the progress of the Mariner East 2 pipeline and any delays will harm Sunoco's business reputation.

Due to the complex nature of constructing a $3 billion dollar project that spans three states, any delay create an enormous amount of additional work and potential lost profits for sub-contractors. Accordingly, Sunoco is contractually obligated to pay its construction subcontractors (1) $317,870 to move around the Defendant's property if necessary; and, (2) up to $430,000 per day or $2,580,000 per week in standby delays until the project is completed. Tree clearing has already commenced in Ohio and needs to occur to a limited extent on the Teeter Trust property. Sunoco has the necessary permits to begin land disturbance in Ohio **immediately** and anticipates construction to begin no later than the summer of 2016, which will put the pipeline in service during the first quarter of 2017. If construction is not delayed, Sunoco anticipates that construction activities on Defendant's property will last approximately three

months. During which time, Sunoco will provide trench crossings in order to mitigate any interference Defendant will have with the surface use of the property. Due to the nature of the appropriated easement, at the conclusion of construction Defendant will be able to utilize the surface area over the easement in most any manner it sees fit aside from the construction of permanent structures. This even includes traversing the easement with heavy highway loads and farming. In fact, Sunoco has already modified its construction plans after consulting with Chesapeake Energy to ensure Chesapeake could cross the trench with its heavy equipment in order to construct the permanent well pad that it has planned on Defendant's property.

John Lovejoy testified on behalf of Defendant. John Lovejoy testified as to how construction of the pipeline would inconvenience Defendant's use of the property. Mr. Lovejoy testified regarding concerns he had about beekeeping, access to certain portions of the property during the construction process, visual impairment of the surface during construction, and concerns about hay production and general enjoyment of the property, such as picking berries and picking mushrooms.

However, Mr. Lovejoy also acknowledged that Defendant currently has an existing oil and gas lease on the property with a large oil and gas producer (Defendant Chesapeake Exploration, LLC), and that by the terms of the oil gas lease, the surface of the property is subject to extensive development from well pads and gathering pipelines. Thus, the use of the surface of the property is already subject to much more potential extensive disruption from horizontal drilling activities than it would be from Sunoco's underground pipeline.

In addition, Mr. Lovejoy acknowledged that Defendant already sold an easement to Defendant Enterprise TE Products Pipeline LLC for a pipeline that crosses the property

currently. Mr. Lovejoy admitted that the easement that Defendant granted to Enterprise Liquids is even closer to the residence than the currently proposed route for the Sunoco pipeline.

II. LEGAL ARGUMENT

A. Defendant has Failed to Meet the Requirements for a Stay of Execution of Judgment.

Ohio Revised Code section 163.19 provides for a stay of execution pending appeal at the discretion of the court. Ohio Rev. Code Ann. § 163.19 (West 2016) ("the court **may** grant, a stay on appeal . . . .") (emphasis added). As a form of injunctive relief, courts reviewing motions to stay execution with a discretionary perspective employ a modified four part injunctive relief standard. *Int'l Diamond Exch. Jewelers v. U.S. Diamond & Gold Jewelers, Inc.*, 70 Ohio App. 3d 667, 672, 591 N.E.2d 881 (2nd Dist. 1991); *City of Ravenna v. State Emp't Relations Bd.*, Portage C.P. No 85-Cv-1687, 1986 WL 295941, *4 (May 7, 1986). In order to prevail on a motion to stay execution of judgment falling under the discretionary purview of a trial court the moving party must show: (1) a substantial likelihood that it will prevail on the merits of its appeal; (2) it will suffer irreparable harm if the stay is not granted; (3) the lack of substantial harm to the opposing party should the stay be granted; and (4) the public interest will be served by granting the stay. *Int'l Diamond Exch.* at 672, *Ravenna* at *4.

Defendant's contention that it is permitted a stay as a matter of right provided the posting of an adequate supersedeas bond is incorrect. Hearing Tr., 6, Mar. 4, 2016. While it is true that in most proceedings, a party moving for an appeal may obtain a stay upon the posting of an adequate bond, this general rule is not applicable in actions involving the appropriation of land. *See* Civ. R. 1(C)(2); Civ. R. 62(B). The Ohio Supreme Court case cited by Defendant as support for this argument, specifically interprets Ohio Rule of Civil Procedure 62(B). *State Fire Marshall v. Curl*, 87 Ohio St. 3d 568, 570, 722 N.E.2d 73 (2000). However, Ohio Rule of Civil

Procedure 1(C)(2) specifically excludes actions for the appropriation of lands from the constitutional purview of the Ohio Rules of Civil Procedure when the Rules "would by their nature be clearly inapplicable . . . ." Civ. R. 1(C)(2). Due to the unique nature of appropriation actions, the Ohio legislature deemed it appropriate to grant the judiciary discretion over any stay requested on appeal. Ohio Rev. Code Ann. § 163.19 (West 2016). When Ohio Revised Code section 163.19 is read in *pari materia* with Ohio Civil Rule 1(C)(2), it is clear that Ohio Civil Rule 62(B) is inapplicable in this case. For this reason, the holding in *Fire Marshall*—relying on a strict interpretation of Ohio Civil Rule 62(B)—does not apply. Accordingly, the procedural requirement found in Ohio Revised Code Section 163.19 that provides for discretionary review of all motions to stay in appropriation actions controls.

1. Defendant does not have a Substantial Likelihood of Success on the Merits of its Appeal.

As evidenced by this Court's December 14, 2015, Judgment Entry, Defendant cannot meet its burden of demonstrating a substantial likelihood of success on the merits as it has indeed already failed to succeed on the merits of its case in this very matter. Accordingly, Defendant's request for injunctive relief—in the form of a stay of execution of judgment—must be denied absent a showing of a significant degree of irreparable harm so great that it can overcome Defendant's deficiencies in satisfying the first prong of the discretionary stay standard. *See Cleveland v. Cleveland Elec. Illum. Co.*, 115 Ohio App.3d 1, 14, 684 N.E.2d 343, 351 (8th Dist. 1996). ("In other words, what plaintiff must show as to the degree of irreparable harm varies inversely with what plaintiff demonstrates as to its likelihood of success on the merits."). Accordingly, absent a showing of tremendous irreparable harm Defendant's request for a stay of execution should be denied.

2. Denial of the Stay Will not Result in Irreparable Harm to Defendant.

The Seventh District Court of Appeals has stated that "'[i]rreparable harm exists when there is a substantial threat of material injury which cannot be adequately compensated through monetary damages.'" *Alan v. Andrews,* 7th Dist. No 06MA 151, 2007-Ohio-2608, ¶ 53(quoting *Restivo v. Fifth Third Bank*, 113 Ohio App. 3d 516, 521, 681 N.E.2d 484 (6th Dist. 1996)). Defendant presented no evidence to indicate that it would be irreparably harmed if Sunoco exercises its right to construct the Mariner East 2 Pipeline over its property.

a. Defendant's Inconvenience is Not Equivalent to Irreparable Harm.

The only evidence presented by Defendant came from John Lovejoy, Defendant's trustee, who testified that construction—and if necessary removal and remediation of the pipeline—would interfere with his ability to: (1) walk the property; (2) maintain his beekeeping hobby in its current area; (3) pick mushrooms and berries; and (3) allow hay production. Hearing Tr., 21, 31, Mar. 4, 2016. Mr. Lovejoy further stated that the construction of the pipeline would result in the removal of trees in the northwest corner of the property. *Id.* at p. 23. The majority of Mr. Lovejoy's concerns were due to his assumption that he would not be able to access thirty (30) acres of field due to the trench that would traverse Defendant's property during construction and any necessary remediation. *Id.* at p. 31. However, testimony provided by Matt Gordon, Project Manager for the Mariner East 2 Pipeline, proved Mr. Lovejoy's assumption to be unfounded. *Id.* at pp. 38, 88–89. Sunoco can and will provide for trench crossings at any point along the route where a landowner deems it necessary. *Id.* at pp. 88–89. Further, not a single concern raised by Mr. Lovejoy was sufficient to rise to the level of irreparable harm. Sunoco is more than capable of compensating Defendant through monetary damages for any inconvenience, lost revenue from hay, and the value of any removed timber.

Mr. Lovejoy also testified that the construction of a pipeline changes the face of the property in general. *Id.* at pp. 27–30. However, as recognized by the Second District Court of Appeals, a landowner who successfully challenges an award of condemnation at the court of appeals may "be reimbursed for damages sustained in an amount which will enable them to restore their real property in substantially the same condition as before the appeal." *Ohio Edison Co. v. Gantz*, 85 Ohio Law Abs. 405, 159 N.E2d 477, 478 (2nd Dist. 1958) (upholding denial of motion to stay the installation of powerlines pending appeal because it was evident that the landowner could be fully reimbursed for any cost required to have their property restored should they win on appeal). Accordingly, Defendant will in no way be irreparably harmed by unimpeded construction of the Mariner East 2 Pipeline in the unlikely event that the Seventh District Court of Appeals finds that Sunoco did not have the right to appropriate Defendant's property. Further, if the Seventh District finds that Sunoco did not have the right to appropriate Defendant's property, Sunoco has the ability and experience to remove the installed pipeline and restore the property to its pre-appeal state. Matt Gordon testified that Sunoco is experienced at removing underground pipe and remediating the surface area. Hearing Tr., 90–95, Ex. C1–C4, D1–D4 Mar. 4, 2016.

b. Defendant's Appeal will not be Rendered Moot if this Honorable Court denies its Request for Stay.

Defendant's argument that its right to appeal will in some way be foreclosed if this Honorable Court fails to grant its requested stay is simply incorrect. Indeed, the Parties have filed an agreed judgment entry preserving Defendant's right to appeal. Moreover, if Sunoco proceeds with its right to construct the pipeline beneath its acquired easement, Defendant's claim on appeal cannot be deemed moot—if the Seventh District finds Sunoco did not have the right to

appropriate, the presence of the pipeline beneath Defendant's property would represent a continuing infringement on Defendant's property rights.

Defendant cites to an Eleventh District Case as support, but in that case—and those cited within—the appellant consciously failed to request a stay of execution. *Roman Plumbing Co. v. Cherevko*, 11th Dist. No. 2010-P-0069, 2011-Ohio-1991, ¶¶30–35. This is consistent with the Twelfth District's decision to refuse to allow a party to avail themselves of the appellate process when the party "did not request a stay and stood by idly as the [judgment was satisfied]." *Villas at Pointe Settles Walk Condominium Ass. V. Coddman Dev. Co. Inc.*, 12th Dist. No. CA2009-12-165, 2010-Ohio-2822, ¶ 16. In contrast, the Second and Eleventh districts have allowed cases to proceed—despite prior satisfaction of judgment—when the appellant's failure to obtain a stay was due to circumstances beyond the appellant's control. *Chase Manhattan v. Locker*, 2nd Dist. No. 19904, 2003-Ohio-6665, ¶ 34; *Ameriquest Mortg. V. Wilson*, 11th Dist. No. 200-A-0032, 2007-Ohio-2576 ¶ 19.

Further, all of the forgoing cases—including the one relied on by Defendant—are foreclosure actions. In a foreclosure action, once a foreclosed property is sold it cannot simply be unsold. Ohio Rev. Code Ann. § 2329.45 (West 2016) ("If a judgment in satisfaction of which lands, or tenements are sold, is reversed, such reversal shall not defeat or affect the title of the purchaser."). This is markedly different from the facts presented by this case, because it is clear that if property is improperly acquired through appropriation title revests in the landowner. Accordingly, a denial of Defendant's request for a stay of execution does not render its appeal moot.

3. Sunoco Faces Significant Irreparable Harm should this Honorable Court Grant Defendant's Stay.

In stark contrast to the lack of irreparable harm that will result to Defendant should its request for a stay of execution of judgment be denied, the potential harm facing Sunoco should Defendant's request be granted is truly irreparable. "Irreparable harm exists when there is a substantial threat of material injury which cannot be adequately compensated through monetary damages." *Restivo v. Fifth Third Bank*, 113 Ohio App. 3d 516, 521, 681 N.E.2d 484 (6th Dist. 1996). Courts have further refined the definition of irreparable harm to include: (1) damage to a businesses' good will, (2) incalculable damages—including escalating construction delay penalties; and, (3) the inability of the aggrieving party to compensate the victor for his damages. *Texas Eastern Transmission, LP v. 3.2 Acres*, No. 2:14-cv-2650, 2015 WL 152680, **5–6 (S.D. Ohio Jan. 12, 2015) (finding irreparable harm because "the inability to timely complete the Project would likely injure Texas Eastern' s business reputation and goodwill."); *NEXUS Gas Transmission, LLC v. Griffith,* No. 15 CV 330, p. 8 (Wood C.P. TRO issued July 14, 2015) ("[r]eputational injury is not a type of harm that can be completely remedied at law after it occurs. Nor can it be completely remedied by an award of monetary damages." Further, "monetary restitution would be 'impossible, difficult or incomplete' [if] the owners will likely never have the means or ability to repay their portions of any monetary damages."); *Gulf Crossing Pipeline Co. LLC v. 86.36 Acres of Land*, No. 08–689, 2008 WL 2465892, at *6 (W.D. La. June 18, 2008) (finding escalating construction delay penalties to constitute irreparable harm); *see also Kinder Morgan Cochin LLC v. Luber*, Harrison C.P., No. CVH-2015-0106, at p. 4 (Jan. 16, 2016).

In the present action, the harm and potential damage that could result from construction delays to the Mariner East 2 Pipeline are not only fully incalculable, but they are so great as to

render Defendant financially incapable of fully compensating Sunoco. Testimony from Hank Alexander, Vice President of Business Development for Sunoco unquestionably confirms that Sunoco's business reputation will be damaged if the Mariner East 2 Pipeline is delayed. Hearing Tr., 21, 31, Mar. 4, 2016. Mr. Alexander also testified to the staggering potential lost revenue—**$933,000 per day**—for every day that the Mariner East 2 Pipeline remains incomplete and the significant capital expenditures required to carry an uncompleted $3 billion project. *Id.* at pp. 49–50, 53. Further. Matt Gordon testified that Sunoco is subject to escalating construction delay penalties of: (1) **$317,870** to move around the Teter Property; and, (2) up to **$430,000 per day or $2,580,000 per week** in standby delays. *Id.* at pp. 84–87, Pl.'s Ex. B. Accordingly, there is simply no adequate remedy at law to compensate Sunoco for the irreparable harm which will occur if Sunoco is prevented from beginning construction on its easement over Defendant's property.

There is absolutely no way for Sunoco or this Honorable Court to anticipate when exactly the Seventh District will issue a ruling on Defendant's appeal. With just one week of damages from standby costs and lost revenue totaling more than **$9.5 million dollars** there is simply no realistic way Defendant is capable of compensating Sunoco for its potential damages. Sunoco recognizes that these numbers are staggering—despite being only a small part of Sunoco's actual potential damage—but they are simply the consequence of stalling a mammoth $3 billion dollar project designed to carry 275,000 barrels of petroleum per day.

4. Public Interest will be disserved if Defendant's Requested Stay is Granted.

Defendant failed to provide any evidence to this Court that a single public interest will be served if this Court grants its request to stay the execution of judgment. As this Honorable Court decided in its order granting Sunoco the right to acquire an easement over Defendant's

property—and further articulated in its *Luber* Decision—Ohio is in desperate need of common carrier petroleum pipelines capable of transporting valuable petroleum from Ohio Shale formations to profitable markets. *See Luber*, at p. 3. Accordingly, it is clear that the public interest will not be served by preventing Sunoco from executing its judgment against Defendant. Instead, delay to this important energy infrastructure project will simply delay the ability of Ohio to fully utilize its shale resources, delay landowners getting royalties, and delay necessary natural gas liquids to the United States overall. When this is balanced against the lack of any evidence amounting to a resemblance of irreparable harm it is clear that Defendant has not met its burden for a stay.

B. If this Honorable Court Finds a Upon a Balancing of the Equites that a Stay is Appropriate, Defendant should be Required to Post a Bond of at least $70 Million Dollars.

If a stay order is granted during the pendency of a condemnation appeal, "the owner [must post] a supersedeas bond in an amount the court determines." Ohio Rev. Code Ann. § 163.19 (West 2016). The amount of a bond is to be set by the trial court and is a "discretionary matter[] which will not be overturned by an appellate court absent a showing of abuse of discretion." *Bibb v. Home Savings and Loan Co.*, 63 Ohio App. 3d 751, 752, 580 N.E. 2d 52 (6th Dist. 1989). A bond must be "in a sum that is not less than, if applicable, the cumulative total for all claims covered by the final order, judgment, or decree and interest involved . . ." Ohio Rev. Code Ann. §2505.09 (West 2016). The purposes of a supersedeas bond is to ensure compensation of appellees anticipated damages should they continue to prevail at the appellate level. *See Tuteur v. P. & F. Enterprises*, 21 Ohio App.2d 122, 126–27, 255 N.E.2d 284 (8th Dist. 1970); Ohio Rev. Code Ann. §§ 2505.09, 2505.14 (West 2016).

In this case, Sunoco is doing everything in its power to mitigate potential damages that will accrue if construction of the Mariner East 2 Pipeline is delayed by Defendant. Hearing Tr.,

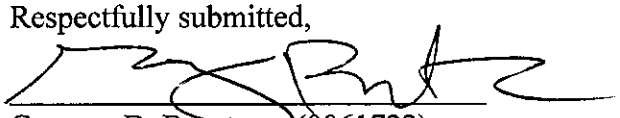
79–80, 95, Mar. 4, 2016. Sunoco has already proactively changed its construction plans to stall the accumulation of construction damages as much as possible. *Id.* However, despite its best efforts there is simply no way Sunoco can mitigate all of its potential damages. With the potential of accumulating more than **$9 million per** week in damages, Sunoco will exceed its requested $70 million dollar bond in less than 6 weeks of delay. *Id.* at pp. 49–50, 53, 84–87. This calculation does not even begin to take into account the significant financing expense that will be incurred to carry a $3 billion dollar project; the **$317,870** in move around expenses; or the significant loss of goodwill that Sunoco will potentially endure as a result of construction delays.

III. CONCLUSION

Defendant has failed to meet the burden of proof required for a discretionary stay of execution of judgement. The evidence presented to this Honorable Court by Defendant demonstrates that Defendant will be inconvenienced by the construction of the Mariner East 2 Pipeline, but it no way indicates that Defendant will be irreparably harmed. In contrast, the undisputed testimony presented by Sunoco shows that the irreparable harm it faces is not only fully immeasurable, but it is so staggering that Defendant could not possibly compensate Sunoco for the damages it will incur if the stay is granted. Finally, as this Honorable Court is well aware the public interest will be best served by the timely completion of the Mariner East 2 Pipeline. Accordingly, on a balance of the equities, this Honorable Court can reach but one conclusion and that is to deny Defendant's request for a stay of execution of judgement.

However, if this Honorable Court does grant Defendant's request it should require Defendant to post a bond of at least $70 million due to Sunoco's potential damages which are in excess of **$9 million per week.**

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served upon the following, by electronic mail this 11th day of March, 2016:

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