

**A** Arenstein & Andersen Co.  
A Legal Professional Association

G. Gregory Arenstein  
Nicholas I. Andersen  
Eric R. McLoughlin  
Jessica L. Sohner  
Andrew P. Fraley  
James W. Park (Of Counsel)  
Kathleen A. Hanley (Of Counsel)  
Joseph A. Downing Co., LPA (Of Counsel)

5131 Post Road, Suite 350  
Dublin, Ohio 43017  
www.aacolpa.com  
Dublin: (614) 602-6550  
Tipp City: (937) 458-3855  
Fax: (866) 309-0892

Nicholas I. Andersen  
Direct: (614) 937-1147  
Email: Nick@aacolpa.com

March 11, 2016

**VIA FACSIMILE (740) 942-4693**

**17 Pages (inclusive of Cover Letter)**

Clerk of Courts  
Harrison County Court of Common Pleas  
100 W. Market Street  
Cadiz, Ohio 43907

Re: *Sunoco Pipeline L.P. v. Carol A. Teter, Trustee  
of the Carol A. Teter Revocable Living Trust, et al.*  
Case No. CVH-2015-0058

Dear Honorable Clerk:

Please find enclosed for filing Defendant, Carol A. Teter, Trustee of the Carol A. Teter Revocable Living Trust's *Closing Argument on its Motion to Stay* in the above-captioned matter. We would appreciate the return of a file-stamped copy.

Thank you in advance for your assistance with this matter. If you should have any questions please contact the undersigned at your earliest convenience.

Very truly yours,

ARENSTEIN & ANDERSEN CO., LPA



Nicholas I. Andersen

NIA/gms  
Enclosures  
Cc: All counsel

**IN THE COURT OF COMMON PLEAS  
HARRISON COUNTY, OHIO**

SUNOCO PIPELINE L.P.	:	CASE NO.	CVH-2015-0058
	:		
Plaintiff,	:	JUDGE T. SHAWN HERVEY	
	:		
-vs-	:	DEFENDANT TETER TRUST'S	
	:	CLOSING ARGUMENT ON ITS	
	:	MOTION TO STAY	
CAROL A. TETER, Trustee of the Carol	:		
A. Teter Revocable Living Trust, <i>et. al.</i> ,	:		
	:		
Defendants.	:		

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Now comes Carol A. Teter, Trustee of the Carol A. Teter Revocable Living Trust (“Teter Trust”), by and through its undersigned counsel, and respectfully submits its Closing Argument on its Motion to Stay.

**I. Introduction**

On February 18, 2016 the Teter Trust filed its Motion to Stay seeking a stay of the Court’s Orders granting Plaintiff Sunoco Pipeline L.P. (“Sunoco”) the right to appropriate its property, to build a pipeline during the pendency of its appeals of the same Orders to the Seventh District Court of Appeals. An evidentiary hearing was held on March 4, 2016 (the “Hearing”) and closing arguments for the same were ordered by the Court to be in writing and submitted on or before March 11, 2016.

At the Hearing, the Court indicated, and counsel for all parties conceded, that the proper method for determining whether a stay may be issued in a situation like the one at bar is to utilize a four part balancing test much like the test for obtaining an injunction. Except that instead of “prongs” the four parts of the test should be viewed as “factors” and each one reviewed and weighted accordingly. These four factors are: (1) has the Teter Trust made a strong showing that it is likely to prevail on appeal; (2) has the Teter Trust shown it will be irreparably injured if a stay is not granted; (3) would a stay substantially harm other parties to the litigation; and (4) where lies the public interest. (*See* Transcript of Proceedings of March 4, 2016, p. 14 ¶¶4-13.)

The Teter Trust submits that it is entitled to a stay in this matter utilizing the above stated balancing test. As discussed below, the Teter Trust meets or exceeds the requirements of each of the four factors and, on balance, should be granted a stay while this matter is on appeal.

## **II. The Balancing Test**

### ***a. The Teter Trust is more likely to prevail on appeal than most appellants***

As discussed at the Hearing, this factor is extremely odd. Requiring an appellant to prove to the court that just ruled against it that it has a likelihood of prevailing on appeal is a seemingly impossible hurdle. If this factor were weighted too heavily, it is almost assured that no stay would ever be granted. However, here, there is strong indicia that Teter Trust does have at least an “even shot” of prevailing on appeal.

During the appropriation hearing in this matter, held on October 22, 2015, the Court stated as follows, “From the Court’s perspective it’s important that we keep a record. As far as the Court knows this is the first time we’ll be hearing the argument at issue in this case

and making a decision in [the] state so we want to make sure that we keep a clear record so if there are any appeals or anybody wants a transcript.” (See Exhibit “A”<sup>1</sup> attached hereto.) Obviously, the Court feels it made the correct decision and it is not the Teter Trust’s goal herein to convince it otherwise. However, the Court plainly understands that this case is one of first impression in the State of Ohio, or at least, is the first time this extremely important issue has ever gone through a full appropriation hearing prior to going up on appeal.

Accordingly, although the Teter Trust does not expect the Court to find that it has a likelihood of success on appeal, it is the Teter Trust’s hope that the Court will reflect on the numerous appeals that it has seen and admit that the Teter Trust has a better chance on appeal with this issue than most appeals that come out of the cases before it.

As such, the Teter Trust submits that this factor is not as heavily in favor of Sunoco as one would normally guess it would be and that under the circumstances, this factor may be closer to a “push”.

***b. The Teter Trust will be irreparably harmed if a stay is not issued***

As the Court mentioned numerous times, on and off the record, this factor is pretty obviously in favor of the Teter Trust. Here, the pipeline construction will take months and months and will deprive the Teter Trust of the use of its property subject to the easement and, due to the route of the pipeline, render several dozen more acres of its property inaccessible.

John Lovejoy, a Trustee of the Teter Trust, testified that the easement area is routinely utilized by the Teter Trust for walks, hay production, and the maintenance of

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<sup>1</sup> The transcript of the proceedings of October 22, 2015 has been filed with the Appellate Court but Counsel is unsure if it is available to the trial court herein.

flowering plants for bees. (Tr. at p. 21 ¶¶ 14-18.) Mr. Lovejoy also testified to the unique emotional importance of the easement area due to Mrs. Teter's bouts with cancer and the placement of her mother's ashes. (*Id.* at p. 22 ¶¶14-19 and p. 24 ¶¶10-11.) Mr. Lovejoy further testified regarding the mature trees that will be removed and the fact that this is one of the small areas of the farm that has never been strip-mined. (*Id.* at p. 22 ¶20 to p. 23 ¶17 and p. 30 ¶¶10-13.)

Mr. Lovejoy was also able to provide a unique perspective since he has been privy to pipeline construction in the past. Mr. Lovejoy described the process he witnessed for pipeline construction, namely: cutting down trees; bulldozers "sculpting" the land; the digging of a large trench; directional drilling of terrain that is difficult to traverse; trucking in pipeline; welding; and more bulldozers to cover up the pipeline. (*Id.* at p. 27 ¶13 to p. 30 ¶13.) During this entire period, the Teter Trust was unable to use the easement areas for any purposes. (*Id.* at p. 30 ¶¶14-16.) No testimony from Sunoco received at the Hearing implied that the Teter Trust's expected experience with Sunoco's pipeline would definitely differ much from this previous experience. Finally, Mr. Lovejoy testified that due to the location of the pipeline easement, there is about 30 acres of property that will be inaccessible. (*Id.* at p. 31 ¶¶12-13)

Sunoco did attempt to differentiate its policies and procedures when dealing with landowners from those previously experienced by the Teter Trust, but admitted that it could not guarantee that it would be able to provide bridges to cross the large trench or that it would allow certain equipment to cross its easement. (*Id.* at p. 101 ¶24 to p. 102 ¶18 and p. 108 ¶¶5-24.)

Finally, Sunoco argued that even if it were required to remove the pipeline after it was installed it could reclaim the property. (*Id.* at p. 88 ¶1 to p. 94 ¶21.) However, no one from Sunoco testified that it could reclaim the property back to its original condition. And, again, Mr. Lovejoy, having had previous experience with a pipeline project on the Teter Trust property, testified the property is not the same, nor will it ever be the same. (*Id.* at p. 40 ¶¶9-18.)

Accordingly, when looking at this factor, it should be plain that the Teter Trust will be irreparably harmed if the pipeline is built while this matter is on appeal. The loss of use of the property, the loss of access to large portions of the property, the muddy, constant hassle and annoyance of having Sunoco tearing up the land, and the simple fact that the property will never be the same, even if Sunoco were to remove the pipeline at a later date, must skew this factor largely in favor of the Teter Trust.

***c. Sunoco will not suffer substantial harm if a stay is ordered***

The first thing that should be discussed here is that the Teter Trust has done absolutely nothing in this case to delay, even though it has had multiple occasions to do so. It filed the first lawsuit. It did not ask for one extension or continuance during the pendency of the action. Additionally, it cooperated and filed a joint motion to expedite the appeal of this matter. The attached Exhibit "B" granted this joint motion, in part. As the Court can glean from the Court of Appeals' Judgment Entry, the Teter Trust's brief is due April 1, 2016 (the transcript was filed on March 2, 2016), which makes Sunoco's brief due on or about May 1, 2016 (of course, it can file its brief sooner), the filing of Sunoco's brief triggers a ten day period for the Teter Trust to file a reply brief on or about May 11, 2016 (at the latest), and a hearing within thirty days after that, at the latest June 11, 2016. The

parties did attempt to get the Court of Appeals to agree to a date by which it would render its decision, but the Court of Appeals did not provide the same. This is not the fault of the Teter Trust. However, as can be seen by this expedited schedule, it is not impossible that there will be a decision from the appellate court by the end of June or sometime in July.

Given this, Sunoco's testimony regarding the state of its pipeline construction is extremely important to the analysis of this factor. Mr. Gordon, Sunoco's project engineer for this pipeline, testified as follows:

- That the pipeline runs from Marcus Hook to Scio and is broken into several 50 mile construction segments. (Tr. at p. 74 ¶¶15.)
- That all of the segments must be started at the same time. (*Id.*)
- That Sunoco does not yet have its water crossing permits in Ohio and there is no certainty when or if they will be granted. (*Id.* at p. 77 ¶¶3-6.)
- That the pipeline construction on the segment in Ohio will start at the Ohio River and work its way west towards Scio, Ohio. (*Id.* at p. 79 ¶¶11-17.)
- That the Teter Trust property lies in the last 10 miles of this segment. (*Id.* at p. 79 ¶¶21-23.)
- That it takes 8-10 months to build a segment. (*Id.* at p. 81 ¶¶11-23.)
- That Sunoco does not have all of its permits in Pennsylvania and it is uncertain when or if these will be granted. (*Id.* at p. 83 ¶¶20 to p. 84 ¶5 and p. 97 ¶¶2-9.)
- That Sunoco does not expect construction to start until summer at the earliest and could possibly be as late as August. (*Id.* at p. 101 ¶¶6-10.)

From this testimony it should be clear that there is a very, very real possibility (even a likely one) that Sunoco will not even be able to start any portion of this pipeline until July-

August of 2016. Additionally, given the location of the Teter Trust's property along the pipeline route, it may take Sunoco an additional 2-3 months to even get to the Teter Trust's property. (*Id.*) Accordingly, any statement that Sunoco will, with any amount of certainty, be injured if a stay is issued, is speculative at best. In fact, from the testimony and from the Court of Appeals' Judgment Entry, it is way more likely that this matter will be decided on appeal before Sunoco even starts construction on any portion of the pipeline.

Sunoco stipulated, "third party accelerator or damages clause for failure to ship timely is not part of [Sunoco's] claim that they will be irreparably harmed." (Tr. at p. 64 ¶¶7-16.) Accordingly, the issuance of a stay will not cause Sunoco injury sounding in breach of contract claims from the committed shippers.

Sunoco further argued that it would lose revenue in the amount of \$933,000 per day that the pipeline is not in service. (Tr. at p. 53 ¶¶2-17.) It arrived at this number by taking 90% of 275,000 barrels/day or 247,500 and multiplying that by the amount per barrel it will be receiving from committed shippers. (*Id.*) Interestingly, Sunoco failed to testify to this "per barrel amount" at the Hearing, but simple math lends itself to the conclusion that Sunoco is charging committed shippers \$3.77 per barrel to use the pipeline.

This testimony is woefully deficient and does not allow the Court to make a determination on the damages, if any, that Sunoco would reasonably expect to suffer if a stay is issued, notwithstanding the fact that the pipeline will not begin construction anytime soon. Sunoco's projected revenue is not the same as damages or lost profits. Sunoco provided no evidence of the costs involved in operating the pipeline. (Tr. at p. 65 ¶¶3-7.) In fact, Mr. Alexander admitted that if the cost per day exceeded the revenue figure he provided, Sunoco would not realize any profits from the operation of the pipeline and



that, since he cannot see the future, he was unable to give the Court a profit number. (*Id.* at p. 65 ¶¶8-22.) Accordingly, Sunoco did not provide any evidence of lost profits and all of its alleged monetary injuries are speculative.

Sunoco put on evidence of its current construction contract to build the pipeline in Ohio. (Tr. at p. 106 ¶19 to p. 107 ¶16.) Even though there was some evidence regarding potential “move around” and per day costs if the project were started but the Teter Trust property issue unresolved, these costs are again speculative as the construction contract is in stages and can be cancelled without incurring large amounts of damages for failure to perform. (*Id.*) Finally, with regard to the construction contract, since there is no date certain to start construction, it is impossible for this Court to put a number on any potential damages. In any event, this is not an irreparable damage, and had Sunoco provided evidence of actual damages on this issue, the Court may have been able to include this in any bond, if one is required.

Sunoco argued that its reputation would be injured if it were unable to build this pipeline. (Tr. at p. 57 ¶¶16-19.) This opinion by Mr. Alexander was allowed by the Court as a lay opinion. Sunoco provided no testimony from anyone outside of Sunoco that either the stay or Sunoco’s failure to build the pipeline at all would injure Sunoco’s reputation. Surely Sunoco had time to obtain testimony from someone in the industry to testify to this alleged harm to its reputation. Since it did not, Sunoco failed to put on even an iota of credible testimony as to this potential injury.

Finally, no Sunoco witness was able to confirm or deny whether or not Sunoco would build this pipeline if it were only able to get from Marcus Hook to Hopedale and not all the way to Scio. They did confirm that they could build the pipeline from Marcus Hook

to Hopedale. (Tr. at p. 98 ¶¶12-22.) Additionally, the revenue number provided by Sunoco was for the entire pipeline route. (Id. at p. 67 ¶¶13-15.) Accordingly, even if the revenue number were not deficient, Sunoco did not provide any evidence of the lost profits or damages that would be associated with its inability to continue the pipeline beyond Hopedale. This further shows the speculative nature of any lost profits or damages that Sunoco may theoretically suffer if a stay is issued.

The bottom line is that Sunoco has no idea when it will be able to start building this pipeline, regardless of the pendency of this matter or the appeal. Sunoco does not have all of its permits in Ohio or Pennsylvania. Sunoco's "best guess" on when it will be able to start construction is sometime in the "summer". And, even if it does begin construction in the summer, it will take them months to get to the Teter property. Based upon the expedited schedule provided by the Court of Appeals, it is more likely that this case will be decided on appeal before Sunoco even begins or could begin construction of the pipeline. Additionally, Sunoco has utterly failed to show how or to what extent a stay issuing in this case would harm it.

As such, given the uncertainty and speculative nature of any and all of Sunoco's claims that it will be injured in any way by the stay, this factor should not be given much weight, if any at all, in the Court's balancing analysis.

***d. The public interest lies with granting the stay***

We have already seen this Court attaching its December decision in this case to orders in other cases allowing surveys. The impact of this Court's decision is far reaching and, if eventually overturned, will potentially affect hundreds of property owners.

On a micro level, Mr. Lovejoy testified that the pipeline construction would create an access issue for an adjoining property owner. (Tr. at p. 31 ¶¶11-13.) This property owner's land is landlocked and the only access is the Teter Trust farm. (*Id.*)

On a macro level, it stands to reason that the issues here should be resolved, namely Sunoco's right to utilize eminent domain, by the Seventh District Court of Appeals as it has jurisdiction over all of the counties utilized by the proposed route of Sunoco's pipeline, not just Harrison County. As the Court noted in the attached Exhibit "A", this may be an issue of first impression in the State of Ohio. But it almost certainly is one of first impression in the Seventh District Court of Appeals and, by extension, all of the counties affected by this pipeline. Surely the Court, and Sunoco, will not disagree or argue with the fact that Sunoco has utilized the threat of eminent domain (or at least hinted at this ability) for this pipeline in every dealing it has had with landowners along the pipeline route. As will be more fully discussed below, although it is possible Sunoco would be required to remove its pipeline from the Teter Trust property if the Teter Trust is successful on appeal, can anyone imagine a scenario where a court would require Sunoco to tear up an entire, completed pipeline, approximately 40 miles long, from Scio, Ohio to the Ohio River? The result is almost inconceivable. Accordingly, until this issue is resolved on a macro level, especially at a level with a court having jurisdiction over all of the affect counties, a stay is necessary to protect the public interest.

It is also worth noting here the Ohio Supreme Court's holding in *City of Norwood v. Horney*, 110 Ohio St.3d, 353 (2006). In this case, the Ohio Supreme Court struck a provision in the eminent domain statute that allowed the state to deposit the jury's determination of value with the trial court and to proceed with an appropriation during the

pendency of any appeal. *Id.* at ¶11. The Court’s opinion contains a lengthy discussion of the importance of meaningful appellate review when it comes to the taking of property pursuant to the power of eminent domain for a state agency. *See Id., generally.* One can easily surmise that if the Supreme Court deems meaningful appellate review necessary for a state agency taking, it would take an even more liberal approach to a taking by a private entity.

In sum, there is certainly a public interest, both micro and macro, to having this matter reviewed by the Seventh District Court of Appeals. Sunoco may argue that it is more in the public interest to have this ethane, butane, and propane pipeline. However, given the uncertainty of the construction schedule and the failure to provide any evidence of an actual benefit to the public of its pipeline, this factor must be construed in favor of the Teter Trust.

### **III. Mootness**

Sunoco has made possibly the most circular argument ever seen with regard to whether or not placing the pipeline on the Teter Trust property before a determination on appeal will render the appeal moot. Sunoco has argued in this case that it cannot go around the Teter Trust property. However, at the Hearing, it testified how it could remove the constructed pipeline, pay “move around” costs to move the pipeline to another property, and reclaim the property to its prior state. How anyone can reconcile these two positions is beyond counsel for the Teter Trust.

In any event, it is the Teter Trust’s position that despite Sunoco’s assertions, this is a “bell that cannot be unrung” regardless of whether voluntariness is considered. Let’s examine this practically using real world experiences to guide us. In this scenario, this

Court denies the stay and Sunoco builds its pipeline (presumably the entire pipeline from the Ohio River to the Scio plant) before this Court is overturned. Upon being overturned, the case is remanded to this Court by an appellate court to take actions consistent with its ruling.

This Court would then be faced with a dilemma, as Sunoco will certainly argue, even contrary to their current position, that the removal of the pipeline would constitute economic waste. If this Court, as it sits here today, feels that it would agree with Sunoco on this point, then a decision denying the stay will render the appeal moot, for all intents and purposes. If this Court were to order Sunoco to remove the pipeline, Sunoco would surely appeal this decision or simply refuse to follow the Court's order. On appeal Sunoco would argue economic waste, and would probably prevail. If the Court's order were refused, the Court would be forced to hold Sunoco in contempt. If the "price is right" on the daily contempt charge, Sunoco may likely just pay the fine rather than removing its pipeline. Neither result helps the Teter Trust.

Additionally, the Court must look at this decision on a global scale. If the Seventh District Court of Appeals or Ohio Supreme Court overturns this Court's decision, it is extremely likely there will be a deluge of lawsuits against Sunoco and other "NGL" pipeline builders for using the threat of eminent domain to obtain easements when, under this scenario, they did not have the ability to do so. One would imagine that some or all of these lawsuits would include requests to remove the pipelines. Now, we are not even looking at economic waste on the scale of one property, we are looking at the entire pipeline in Ohio. Does this Court imagine that it, and the Courts of Common Pleas along the entire pipeline route, will make Sunoco (and others) take up their "NGL" pipelines in Ohio? Doubtful. As

such, this Court's decision here whether or not to grant a stay has far reaching implications not only to Harrison County and not only to just this proposed pipeline, but to many other counties and pipelines in the State of Ohio.

Accordingly, given everything above, and when considering the practical reality of the situation, the failure of this Court to grant a stay here could result in the Teter Trust and many other Harrison County and other Ohio county landowners having a Sunoco pipeline on their properties permanently, regardless of the outcome of the current appeal.

#### **IV. Conclusion**

Simply put, Sunoco will not be injured by a stay. With the expedited appeal schedule and the uncertainty of the start date of construction, not due to this case, but instead due to permitting issues, there is really no evidence that Sunoco will suffer any injury at all. However, if the stay is not granted and Sunoco does begin construction, the Teter Trust will suffer irreparable injury and, as discussed above, the public will be injured too if this Court's decision is eventually overturned on appeal. To that point, as discussed by the Court itself, this is a case of first impression and unlike many appeals this Court surely sees, there is a chance, or at least a better than most chance, that the Teter Trust prevails on appeal. Given the discussion on the factors above, the Teter Trust submits that the Court should issue a stay. Additionally, since Sunoco provided no credible evidence of damages that it would sustain with any certainty, the bond should be set at \$0.

Respectfully submitted,

ARENSTEIN & ANDERSEN CO., LPA

By: 

Nicholas I. Andersen (0077732)

Jessica L. Sohner (0089232)

*Attorneys for Carol A. Teter, Trustee of the  
Carol A. Teter Revocable Living Trust*

5131 Post Road, Suite 350

Dublin, Ohio 43017

Tel: (614) 602-6550

Fax: (866) 309-0892

Email: [nick@aacolpa.com](mailto:nick@aacolpa.com)

[jessica@aacolpa.com](mailto:jessica@aacolpa.com)

**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that a copy of the foregoing was mailed, via email, on March 11, 2016, upon the following:

Gregory D. Brunton, Esq.

Daniel J. Hyzak, Esq.

Bruce Moore, Esq.

Reminger Co., LPA

Attorneys for Sunoco Pipeline, L.P.

Capitol Square Office Building

65 East State Street, 4<sup>th</sup> Floor

Columbus, Ohio 43215

Andrew H. King

Attorneys for Enterprise TE Products

Pipeline Company, LLC

2000 Huntington Center

41 South High Street

Columbus, Ohio 43215

ARENSTEIN & ANDERSEN CO., LPA

By: 

Nicholas I. Andersen (0077732)

Jessica L. Sohner (0089232)

1 MR. BRUNTON: The other issue is the parties  
2 I believe have a stipulation with regard to certain kind of  
3 preliminary procedural matters with regard to the case that  
4 Sunoco met its statutory obligations to send a timely good  
5 faith offer letter with an appropriate appraisal under the  
6 Ohio statute. And so those types of preliminary technical  
7 matters have been complied with and those are not at issue in  
8 the case.

9 THE COURT: Is that correct?

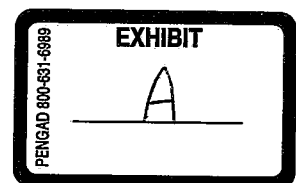
10 MR. ANDERSEN: That is correct.

11 THE COURT: One other issue that the Court  
12 will raise, we're under construction, we're putting a roof on  
13 and I hear it's not as bad as it was two days ago but I do  
14 hear they're still hammering upstairs. From the Court's  
15 perspective it's important that we keep a record. As far as  
16 the Court knows this is the first time we'll be hearing the  
17 argument at issue in this case and making a decision in state  
18 so we want to make sure that we keep a clear record so if  
19 there are any appeals or anybody wants a transcript. So if  
20 anyone has a concern that the pounding is causing someone not  
21 to hear or be able to concentrate on this case please make the  
22 Court aware of that and we will ask that the work stops while  
23 we're conducting the hearing.

24 All right. Five minutes.

25 MR. BRUNTON: Thank you, Your Honor.

Rebecca L. Wood  
Court Transcriptionist  
Harrison County, Ohio





MAR - 4 2016

jh

LESLIE A. MILLIKEN, CLERK

STATE OF OHIO )  
HARRISON COUNTY ) IN THE COURT OF APPEALS OF OHIO  
SS: SEVENTH DISTRICT

SUNOCO PIPELINE L.P., )  
PLAINTIFF-APPELLEE, )  
VS. ) CASE NOS. 16 HA 0002  
and 16 HA 0005  
CAROL A. TETER TRUSTEE, ET AL., )  
DEFENDANTS-APPELLANTS. ) JUDGMENT ENTRY

The parties' joint motion to consolidate Appeal Nos. 16 HA 0002 and 16 HA 0005 is granted. It would conserve judicial resources to consolidate these appeals. Accordingly, these appeals are hereby consolidated. Future filings to bear both case numbers. A single opinion will issue from this Court.

The parties' joint motion to expedite these appeals is granted. Revised briefing schedule as follows:

1. Appellants' shall file a single brief, raising any assignments of error in both appeals, within thirty (30) days after the filing of the transcript of proceedings. The transcript is anticipated to be filed on or about March 1, 2016.
2. Appellee shall have thirty (30) days after the service of Appellants' brief to file a responsive brief.
3. If Appellee has filed a brief, Appellant shall have ten (10) days after the service of Appellee's brief to file a reply brief.
4. No extensions of time will be granted to file briefs.
5. Oral argument to be heard, unless waived, within thirty (30) days after the briefs are filed or the time period for filing briefs has elapsed, whichever is the shorter period.

*[Handwritten Signature]*  
*[Handwritten Signature]*  
JUDGES

