IN THE SUPREME COURT OF OHIO

Sunoco Pipeline, L.P.	:	
	:	**Case No. 2016-1486**
Plaintiff-Appellee,	:	
	:	**On Appeal from the Harrison County**
vs.	:	**Court of Appeals, Seventh Appellate**
	:	**District**
Carol A. Teter, Trustee, et al.	:	
	:	**Court of Appeals Case Nos.**
Defendants-Appellants.	:	**16 HA 0002 and 16 HA 0005**

MOTION TO STRIKE PLAINTIFF-APPELLEE SUNOCO PIPELINE, L.P.'S MOTION TO LIFT STAY OF EXECUTION OF APPELLATE COURT JUDGMENT OF DEFENDANT-APPELLANT CAROL A. TETER, TRUSTEE OF THE CAROL A. TETER REVOCABLE LIVING TRUST

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MOTION TO STRIKE PLAINTIFF-APPELLEE SUNOCO PIPELINE, L.P.'S MOTION TO LIFT STAY OF EXECUTION OF APPELLATE COURT JUDGMENT OF DEFENDANT-APPELLANT CAROL A. TETER, TRUSTEE OF THE CAROL A. TETER REVOCABLE LIVING TRUST

Now comes Defendant-Appellant Carol A. Teter, Trustee of the Carol A. Teter Revocable Living Trust ("Teter"), to respectfully move this court to strike Plaintiff-Appellee Sunoco Pipeline L.P.'s ("Sunoco") Motion to Lift Stay of Execution of Appellate Court's Judgment filed November 15, 2016 ("Motion to Lift Stay"). This Motion to Strike is not Teter's Memorandum in Opposition to the Motion to Lift Stay and Teter will file a full substantive Memorandum in Opposition to the Motion to Lift Stay no later than ten days from the date it was filed as permitted by S.Ct.Prac.R. 4.01(B), if this Motion to Strike has not been granted first.

As explained in the attached Memorandum in Support, Sunoco's Motion to Lift Stay is an impermissible motion for reconsideration in disguise. Specifically, in its Motion to Lift Stay, Sunoco asks this court to reconsider its October 14, 2016 Entry granting Teter's Emergency Motion to Stay Court of Appeals' Judgment Authorizing Appropriation of Real Property ("Motion to Stay") without bond. A motion for reconsideration of this court's October 14, 2016 Entry is not permitted under S.Ct.Prac.R. 18.02(B) and (D). Indeed, had Sunoco properly titled

its Motion to Lift Stay as what it really is, namely, a motion for reconsideration, the clerk would have rejected its filing under S.Ct.Prac.R. 18.02(D). Moreover, even if a motion for reconsideration of this court's October 14, 2016 Entry were permitted, Sunoco's Motion to Lift Stay should be stricken from the record because it was not filed within ten days of the filing of the Entry granting the stay with the clerk as required by S.Ct.Prac.R. 18.02(A). Accordingly, Teter respectfully requests this court to strike Sunoco's Motion to Lift Stay from the record.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Teter filed its Notice of Appeal and Motion to Stay contemporaneously as permitted by S.Ct.Prac.R. 7.01(A)(3) on October 11, 2016. The Motion to Stay explained in detail why a stay of the court of appeals' judgment authorizing Sunoco to appropriate easements from Teter's farm for Sunoco's Mariner East Phase 2 pipeline was necessary to preserve the status quo and prevent irreparable harm to the Teter farm until this court has an opportunity to accept and rule on the important issues of first impression presented by this appeal.

The next day this court ordered Sunoco to respond to the Motion of Stay no later than noon on October 13, 2016. Sunoco timely filed a thirty-five page Memorandum in Opposition complete with an affidavit from Sunoco's employee, Matthew Gordon, that attempted to establish that Sunoco would suffer significant monetary damages and other alleged harm from the stay. Sunoco's principal arguments were that the Motion to Stay should be denied because Teter allegedly does not have a substantial chance of success on the merits in this appeal since it lost in the lower courts, that Sunoco's alleged monetary damages from the stay outweigh the harm to Teter if denial of the stay, and that any harm to Teter that would result if Sunoco was permitted to construct the pipeline across the Teter farm would be mitigated by Sunoco's alleged commitment to remove the pipeline should Teter be successful in this appeal.

In its October 14, 2016 Entry, after fully considering Teter's Motion to Stay and Sunoco's Memorandum in Opposition to the same, this court granted the stay without bond.

Obviously, Sunoco was unhappy with this court's decision. Its response was to hire new counsel, whose first action following a notice of substitution was to file the Motion to Lift Stay on Sunoco's behalf. The new counsel <u>again</u> attempts to argue that the balancing of the equities

favors the denial of the stay, but adds an unprecedented alternative proposal to flip the bond requirement on its head in an attempt to tip the balancing of the equities in Sunoco's favor –a proposal Sunoco's prior counsel could have presented to the court in its Memorandum in Opposition. Sunoco's new counsel's Motion to Lift Stay presents no new evidence or changed circumstances and does not identify any errors in this court's Entry granting the stay. Thus, it is nothing more than a motion for reconsideration in disguise, which this court should strike from the record pursuant to S.Ct.Prac.R. 18.02(B) and (D).

II. LAW & ARGUMENT

A. A motion that asks this court to reconsider an entry granting a stay of an appellate court's judgment is prohibited by S.Ct.Prac.R. 18.02(B) and (D) and must be stricken from the record.

S.Ct.Prac.R. 18.02 governs the filings of motions for reconsideration in this court and limits their use to limited circumstances. Specifically, S.Ct.Prac.R. 18.02(B) provides:

> A motion for reconsideration shall not constitute a reargument of the case and may be filed *only* with respect to the following Supreme Court decisions:
>
> (1) Refusal to accept a jurisdictional appeal;
> (2) The sua sponte dismissal of a case;
> (3) The granting of a motion to dismiss;
> (4) A decision of the merits of the case.

(Emphasis added.) Additionally, Sup.Ct.Prac.R. 18.02(D) provides: "the Clerk *shall* refuse to file a motion for reconsideration that is not *expressly* permitted by this rule or is not timely." (Emphasis added.) This court's October 14, 2016 Entry granting Teter's Motion to Stay does not fall within any of the foregoing categories. Accordingly, a motion for reconsideration cannot challenge the Entry.

Even a cursory comparison of the arguments of Sunoco's new counsel in the Motion to Lift Stay with those advanced by its prior counsel in the Memorandum in Opposition to Teter's

Motion to Stay conclusively demonstrates that the Motion to Lift Stay is nothing more than a motion for reconsideration. For example, in Sunoco's Memorandum in Opposition, Sunoco's prior counsel argued extensively that the balancing of the equities favored the denial of the stay. (Memo in Opp. 1-2, 3, 15-32, 35.) Sunoco's new counsel makes the exact same balancing of the equities argument in its Motion to Lift Stay. (Mot. to Lift Stay 2 (should be ii), 2-7, 9.) Sunoco also argues repeatedly in both pleadings that Teter would not be harmed by the stay because it would remove the pipeline and remediate the property if Teter is successful in this appeal. (Memo in Opp. 1-2, 28-30; Mot. to Lift Stay 2 (should be ii), 1-2, 4, 7-8.) Finally, Sunoco attached the exact same affidavit from its employee Matthew Gordon to support its arguments in both pleadings. (Memo in Opp. Ex. A; Mot. to Lift Stay Ex. B.) Thus, it cannot be reasonably argued that Sunoco's Motion to Lift Stay is anything other than a motion for reconsideration masquerading as an alternative motion.

However, even assuming that an entry granting a motion to stay may be challenged in a motion for reconsideration, Sunoco's motion is still inappropriate. A motion for reconsideration is a mechanism to "correct decisions which, upon reflection, are deemed to have been made in error." (Internal citations omitted.) *State ex rel. Huebner v. W. Jefferson Village Council*, 75 Ohio St.3d 381, 383, 662 N.E.2d 339 (1995). It "shall not constitute a reargument of the case * * *." S.Ct.Prac.R. 18.02(B). Sunoco's motion does not point to any error this court made in its Entry granting Teter's Motion to Stay, rather, it simply restates the same allegations propounded by its previously Memorandum in Opposition to the Motion to Stay that this court previously rejected. Accordingly, the rules of this court should prevent reconsideration even if the court "is not wholly persuaded that the prior decision was correct." *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916, 874 N.E.2d 1162, ¶79 (O'Conner, J., dissenting), citing

State ex rel. Shemo v. Mayfield Hts., 96 Ohio St.3d 379, 2002-Ohio-4905, 775 N.E.2d 493, ¶ 9 and *Toledo Edison Co. v. Bryan*, 91 Ohio St.3d 1233, 1234, 742 N.E.2d 655 (2001) (Pfeifer, J., concurring).

Moreover, there is precedent from this court for the striking of a motion for reconsideration of a ruling on a motion to stay. *Mickey v. Rokakis*, Case No. 2012-0350, 131 Ohio St.3d 1527, 2012-Ohio-1935. In *Mikey*, a *pro se* appellant filed a document that was titled "motion to stay" that merely advised the court that the party was requesting a stay in the court of common pleas and did not request any relief. (Doc. 2/29/2012.) This court treated that filing as a motion to stay and denied it. (*Id*. 4/18/2012.) The *pro se* appellant then filed a motion for reconsideration of the entry denying the stay, which this court ordered to be "stricken as prohibited by S.Ct.Prac.R. 11.2(D) [now S.Ct.Prac.R. 18.02(D)]." Sunoco's Motion to Lift Stay is indistinguishable from the motion for reconsideration this court struck in *Mickey*. Thus, this court should follow its precedent and strike the Motion to Lift Stay.

Teter acknowledges that this court once denied a motion to strike a "motion to lift stay or require bond" in *In re Duke Energy Ohio, Inc.*, Case No. 2014-0328, 2014-Ohio-3298. However, that case is readily distinguishable from the instant case due to the unique stay rules of R.C. 4903.16. R.C. 4903.16 absolutely requires the posting of a bond to obtain a stay of an administrative order of the Public Utility Commission of Ohio ("PUCO") during the pendency of an appeal. Indeed, although this court denied the motion to strike in *Duke Energy*, it also denied the motion to lift stay and, instead, ordered briefing on the amount of the bond that should be required to be posted in that particular situation. R.C. 163.19, which applies here, does not contain a similar mandatory bond requirement. Instead, R.C. 163.19 leaves the amount of the bond to the discretion of the court and there is substantial precedent that an "adequate bond" can

be no bond at all. *Whitlatch and Co. v. Stern*, 9th Dist. No. 92-LW-4342, 1992 WL 205071, *9; *Vanguard Transp. Sys. Inc. v. Edwards Transfer & Storage Co.*, 109 Ohio App.3d 786, 793, 673 N.E.2d 182 (10th Dist. 1996); *Irvine v. Akron Beacon Journal*, 147 Ohio App.3d 428, ¶¶ 108-09, 2002-Ohio-2191, 770 N.E.2d 1105 (9th Dist.). Thus, the precedent that was established by *Duke Energy* is that in an appeal from a PUCO order, this court may grant a temporary stay without bond to preserve the status quo and then order briefing on the amount of the bond to be set by the court at a later date. *See Duke Energy*, 2 (O'Donnell, J. concurring). That precedent has not applicability here because R.C. 163.19 does not contain a similar mandatory bond requirement.

Finally, Justice Pfeifer's dissenting opinion in *Duke Energy* directly supports Teter's arguments herein and contains the precedent that should be followed here since R.C. 163.19 does not have a mandatory bond requirement. Similarly to what Justice Pfeifer noted in *Duke Energy*, Sunoco's Motion to Lift Stay is asking this court to reverse its October 14, 2016 Entry granting Teter's Motion to Stay. To apply Justice Pfeifer's words directly to this situation, "the rules of this court do not allow [Sunoco] to seek this relief. S.Ct.Prac.R. 18.02 does not authorize a party to file a motion for reconsideration of a decision granting a stay with or without bond, and [Sunoco] should not be permitted to circumvent that rule simply by characterizing its motion as one to 'lift' the stay * * * rather than as a motion for reconsideration." *Id.* at 2-3 (Pfeifer, J. dissenting). Accordingly, this court should strike Sunoco's disguised motion for reconsideration from the record.

B. Even if Sunoco's Motion to Lift Stay is not prohibited by this court's rules, it should be stricken from the record because it was not filed within ten days of the filing of this court's Entry granting the stay with the clerk.

Sup.Ct.Prac.R. 18.02(A) requires motions for reconsideration to be filed within ten days of the filing of this court's judgment entry or decision with the clerk. Sup.Ct.Prac.R. 18.02(D)

likewise prohibits the clerk from filing an untimely motion for reconsideration. Here, this court filed its Entry granting the stay on October 14, 2016 and Sunoco waited 32 days, until November 15, 2016, to file its Motion to Lift Stay. Therefore, this court should strike the Motion to Lift Stay from the record as untimely.

C. The failure to strike an improper motion for consideration that has been filed by a party's subsequent counsel would create a bad precedent that will encourage parties to hire new attorneys to make new arguments on their behalf.

The proposal of Sunoco's new counsel in its Motion to Lift Stay to post a bond in exchange for this court's lifting of the stay could have been made by Sunoco's prior counsel in its Memorandum in Opposition. Even if this court were otherwise inclined to consider the merits of the Motion to Lift Stay, it should not do so here because it would create a precedent that would encourage parties to hire new counsel to obtain reconsideration of decisions this court has already ruled on. This court should not set this precedent for obvious reasons and should strike Sunoco's Motion to Lift Stay from the record.

III. CONCLUSION

Sunoco has attempted to circumvent this court's rules by merely calling its motion for reconsideration a motion to lift stay. This Court should recognize that the Motion to Lift Stay is just a disguised motion for reconsideration that was untimely filed and should strike it from the record. Teter will file its substantive response to the Motion to Lift Stay by the November 28, 2016, filing deadline (given the Thanksgiving holiday) if this Motion to Strike has not been granted beforehand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the forgoing document was served upon the following by email on November 18, 2016.

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