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Re: In the Matter of Texas Eastern Overseas, Inc.
C.A. No. 4326-VCN
Date Submitted: January 20, 2010

Dear Counsel:

I have the Motion for Stay Pending Appeal filed by Texas Eastern Overseas, Inc. ("TEO"). Such motions are governed by Supreme Court Rule 32(a) which requires initial consideration by the trial court. A stay pending appeal is one of those matters initially committed to the trial court's discretion.[1]

TEO's motion generally reprises arguments presented in support of its application for a stay while it pursued an interlocutory appeal of the Court's

[1] Del. Supr. Ct. R. 32(a).

memorandum opinion appointing a receiver for TEO.[2] Those arguments were addressed, and rejected, in the Court's letter opinion of December 23, 2009,[3] and will not be revisited here, in the context of TEO's appeal of a final order. Nonetheless, a few additional comments may be appropriate.

TEO more carefully focuses on the contention that its appeal presents a serious legal question that raises a fair ground for further litigation. It emphasizes *Kirpat, Inc. v. Delaware Alcoholic Beverage Control Commission* in which the Supreme Court recognized the inherent tension encountered by a trial court when deciding a motion for a stay.[4] Such motions require the court to analyze the likelihood for success on appeal after it has already determined the merit of the action.[5] Finding a likelihood of success on appeal, and thus issuing the stay, would require the court essentially to undermine its prior ruling.

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[2] *In re Tex. E. Overseas, Inc.*, 2009 WL 4270799 (Del. Ch. Nov. 30, 2009) (the "Memorandum Opinion").
[3] *In re Tex. E. Overseas, Inc.*, 2009 WL 5173805 (Del. Ch. Dec. 23, 2009) (the "Letter Opinion").
[4] 741 A.2d 356, 358 (Del. 1998). *Kirpat* laid out the four factors a court is to consider when deciding a motion to stay: 1) the likelihood of success on the merits of the appeal; 2) whether the petitioner will suffer irreparable injury if the stay is not granted; 3) whether any other interested party will suffer substantial harm if the stay is granted; and 4) whether the public interest will be harmed if the stay is granted. *Id.* at 357.
[5] *Id.* at 358.

To address this potential conflict, the Supreme Court held that, in deciding a motion for a stay, the trial court should balance all pertinent considerations together instead of allowing a definitive determination under one factor, such as the likelihood of success on appeal, to control. If the several irreparable harm factors favor granting a stay, "then a court may exercise its discretion to reach an equitable resolution by granting a stay if the petitioner has presented a serious legal question that raises a 'fair ground for litigation and thus for more deliberative investigation.'"[6]

The Court remains unconvinced that a stay is appropriate even after greater focus on the considerations raised in *Kirpat*. In the Letter Opinion, the Court addressed and balanced all of the relevant factors together.[7] Moreover, even with the Court's attention directed to the irreparable harm factors, on balance, they do not tip in favor of a stay.[8] As stated previously, TEO will suffer no harm if a stay is not

[6] *Id.*
[7] *Tex. E. Overseas*, 2009 WL 5173805, at *2 ("On a balance of these factors, they favor denial of a stay.").
[8] In other words, even if the Court were to assume that TEO's appeal presents a serious legal question that raises a fair ground for litigation, a stay would still be unwarranted due to a neutral or countervailing balance among the irreparable harm factors.

granted—it will merely be a vehicle through which AmeriPride will seek recovery from the insurers. On the other hand, neither the public nor AmeriPride will suffer harm if a stay is granted. Litigation has been pending in California since 2000. AmeriPride has waited a long time to obtain contribution; it can wait a short while longer without prejudice. The public will be protected through the government's enforcement of CERCLA and the cleanup costs will probably be paid regardless of TEO's contribution. Irreparable harm therefore slants in no particular direction with respect to AmeriPride, TEO, and the public.

As for the insurers, 8 *Del. C.* § 278 is not a mechanism by which they may fortuitously and from time to time avoid liability under policies that they issued. Whether delay and the long-lived lingering risk of liability under CERCLA may cause them prejudice is an argument to be raised during coverage litigation. Those concerns are not a direct consequence of the receivership action. Whether such an argument would be successful in avoiding potential liability under the various policies is not for this Court—which is tasked only with determining whether or not to appoint a receiver—to decide.

Finally, and once again, there will be no cognizable harm to TEO's former officers and directors, and thus the policy considerations underlying the three-year limitation of 8 *Del. C.* § 278 will not be impaired. Although § 278 indeed implements the public policy "of allowing directors, officers, and stockholders to be free from claims relating to the dissolved corporation after sufficient time has passed,"[9] the action in California, by AmeriPride's own admission, was brought to recover from TEO's insurers, not its officers and directors. The mere risk that TEO's former officers and directors may be called upon to testify in the federal action presents such a minimal burden—especially in light of the likelihood that TEO has undistributed assets evidenced by insurance policies—that the Court should not stay the appointment of a receiver under 8 *Del. C.* § 279.

The irreparable harm factors do not tip in favor of a stay. Moreover, the Court has already explained in the Letter Opinion that it does not view this case as presenting a serious legal question that raises a fair ground for further litigation. In its renewed motion, TEO argues that the Court established a new test, or standard, for appointing a receiver when there is some doubt as to the existence of

[9] *In re Dow Chem. Int'l Inc. of Del.*, 2008 WL 4603580, at *2 (Del. Ch. Oct. 14, 2008).

undistributed assets. This is an inaccurate characterization of the Court's holding in the Memorandum Opinion. Instead of creating a new test, the Court applied the standard required under the statute—namely, good cause—to determine whether the appointment of a receiver was justified.[10] The Court concluded that there is a reasonable likelihood that TEO has insurance assets to meet, at least in part, its liability in the federal action; this served as a close proxy for assessing good cause and TEO has not offered a more appropriate standard.[11] Implicit in TEO's argument is the notion that this Court, before it can appoint a receiver, must have the same certainty as to available coverage as it would have had if it had addressed in substance the coverage litigation. Actions under § 279 should not be expanded to include resolution of such disputes, which are more readily addressed in another forum.

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[10] *Tex. E. Overseas*, 2009 WL 4270799, at *5 n.39 (explaining that there "must be a purpose for appointment of a receiver—a problem or opportunity to be resolved or pursued, and a reasonable likelihood that some outcome would result"). Indeed, unlike the underlying action in *Kirpat*, which turned on an interpretation of a statute, the appointment of a receiver under § 279 is a matter of discretion. *Cf. Kirpat*, 741 A.2d at 357-58 (noting that the Supreme Court had "not previously considered" specific language of the governing statutory standard).

[11] *Tex. E. Overseas*, 2009 WL 4270799, at *5 n.39 (holding that good cause ultimately "depends upon the perception that appointment of a receiver is likely to be—in a broader sense—worth the effort").

For these reasons and for those stated in the Letter Opinion, TEO's Motion for Stay is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K