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December 23, 2009

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Re: In the Matter of Texas Eastern Overseas, Inc.
C.A. No. 4326-VCN
Date Submitted: December 17, 2009

Dear Counsel:

I.

Texas Eastern Overseas, Inc. (“TEO”) has moved, pursuant to Supreme Court Rule 42, for certification of an interlocutory appeal from this Court’s Memorandum Opinion of November 30, 2009 (the “Memorandum Opinion”).¹ In the Memorandum Opinion, the Court granted AmeriPride Service Inc.’s (“AmeriPride”) petition for the appointment of a receiver for TEO, pursuant to 8 *Del. C.* § 279. TEO is a defendant

¹ *In re Tex. E. Overseas, Inc.*, 2009 WL 4270799 (Del. Ch. Nov. 30, 2009).

in an action pending in the United States District Court for the Eastern District of California (the “Federal Action”);² it may be liable for contribution for environmental cleanup expenses incurred by AmeriPride. Although TEO dissolved more than fifteen years ago, the Court found there to be good cause for the appointment of a receiver because it was reasonably likely that TEO had assets in the form of insurance proceeds that could be used to satisfy a judgment against it in the Federal Action.

TEO has not properly filed its interlocutory appeal. Supreme Court Rule 42 lays out the procedure for the Supreme Court “to hear and determine appeals in civil cases from interlocutory orders of a trial court.”³ This Court has entered no order and TEO instead seeks to appeal from the Court’s Memorandum Opinion.⁴ Our Supreme Court has made clear that interlocutory appeals may only be taken upon an order of the lower court.⁵ Although the Memorandum Opinion may fairly be considered interlocutory in nature, it is not an order of the Court, and thus an appeal may not yet be taken.

² *AmeriPride Servs. Inc. v. Valley Indus. Servs., Inc.*, No. Civ. S-00-113 LKK/JFM (E.D. Cal.).

³ Supr. Ct. R. 42(a).

⁴ The Court requested in the Memorandum Opinion that the parties submit a form of order for the appointment of a receiver.

⁵ See *Singh v. Batta Envtl. Assocs., Inc.*, 846 A.2d 239 (TABLE) 2003 WL 22415999, at *1 (Del. Oct. 21, 2003); *Delmarva Warehouse, Inc. v. Yoder*, 782 A.2d 263 (TABLE) 2001 WL 770322, at *1 (Del. June 25, 2001).

More importantly, even if the Court assumes that the Memorandum Opinion acts as an order for Rule 42 purposes, TEO's appeal does not merit interlocutory consideration. Although the Memorandum Opinion may have determined a substantial issue and established a legal right, it does not meet any one of the five additional criteria enumerated in Rule 42 that must be found for certification.

TEO argues that the Memorandum Opinion conflicts with the Chancellor's decision in *In re Dow Chemical International Inc. of Delaware*.⁶ In *Dow Chemical*, the Chancellor held that a receiver may not be appointed under § 279 for a dissolved corporation when the corporation has no assets left to distribute.⁷ The petitioner in *Dow Chemical* failed because he had merely speculated that the dissolved corporation possessed undistributed assets.⁸ This Court, in contrast, concluded that it was

⁶ 2008 WL 4603580 (Del. Ch. Oct. 14, 2008). The Chancellor also addressed a motion for reargument in a separate opinion, which dealt with substantially the same issues as considered in the first opinion. *In re Dow Chem. Int'l Inc. of Del.*, 2008 WL 4989069 (Del. Ch. Nov. 18, 2008).

⁷ *Dow Chem. Int'l*, 2008 WL 4603580, at *1 ("Thus, § 279 provides 'little solace' for one possessing an after-discovered claim against a dissolved corporation with no undistributed assets.").

⁸ *Dow Chem. Int'l*, 2008 WL 4989069, at *1 ("Petitioner's speculation that respondent may hold assets is not supported by anything in the record or in petitioner's motion and does not even come close to showing that I predicated my decision on a misunderstanding of material fact.").

“materially more than mere speculation” that TEO holds insurance assets that could be used to satisfy a judgment against it in the Federal Action. In fact, it determined, although from less than a fully-developed record after trial, that it is reasonably likely that such insurance coverage exists. The two opinions are therefore not inconsistent, and together provide a standard for determining the propriety of appointing a receiver under § 279.

TEO also argues that the Memorandum Opinion presents an unsettled question of law relating to the construction or application of a statute that should be settled by the Supreme Court. Although there may be no definitive appellate analysis of § 279 in this context, the statute is clear on its face: it permits the appointment of a receiver to “take charge of the corporation’s property, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend . . . all such suits as may be necessary or proper for the purposes aforesaid.” Section 279 plainly envisions the appointment of a receiver to take charge of undistributed assets, and it imposes no time limit on the appointment. The ultimate question here is not one of law; it is, instead, one of the Court’s discretion as exercised in a particular setting.

The Memorandum Opinion, which interprets § 279, provides a workable test for determining whether to appoint a receiver when there is some doubt as to the

existence of undistributed assets. It recognizes that § 279 does not require that the Court find that such assets actually exist; such a rigorous demand would transform § 279 into a vehicle for litigating disputes in Delaware that should be litigated elsewhere. On the other hand, it also recognizes that appointing a receiver upon mere speculation would often result in unnecessary aggravation for former officers and directors and would lead to inefficient outcomes. The Memorandum Opinion mandates a showing of reasonable likelihood, which represents both a sound compromise to these competing policy concerns as well as a logical application of § 279.

Lastly, TEO argues that a review of the interlocutory order would otherwise serve considerations of justice by having the Supreme Court clarify an otherwise unsettled area of law. This is, in substance, a reprise of an argument previously addressed.

TEO has not shown that the Memorandum Opinion meets any of the five criteria laid out in Rule 42(b).⁹ For this reason and because there is, in fact, no order

⁹ TEO has not argued, nor can it, that the Memorandum Opinion sustained the trial court's jurisdiction, reversed a decision of a court, jury, or administrative agency while acting in an appellate capacity (although its motion does identify Supreme Court Rule 42(b)(iii) as applicable), or opened a judgment of a trial court.

from which an interlocutory appeal might lie, TEO's motion for certification of an interlocutory appeal of this Court's Memorandum Opinion of November 30, 2009, to the Supreme Court of the State of Delaware will be denied.

II.

In addition to seeking certification of an interlocutory appeal of the Memorandum Opinion, TEO has also moved for a stay pending appeal.

For the reasons set forth above, there is no order from which an appeal may be taken and, thus, any motion for a stay pending appeal is not yet ripe.

The Court, nonetheless, turns to the substance of the motion for a stay. In considering a motion to stay pending appeal, this Court is required "(1) to make a preliminary assessment of likelihood of success on the merits of the appeal; (2) to assess whether the [movant] will suffer irreparable injury if the stay is not granted; (3) to assess whether any other interested party will suffer substantial harm if the stay is granted; and (4) to determine whether the public interest will be harmed if the stay is granted."¹⁰ The Court is expected to "consider all of the relevant factors together to determine where the appropriate balance should be struck."¹¹

¹⁰ *Kirpat, Inc. v. Del. Alcoholic Beverage Control Comm'n.*, 741 A.2d 356, 357 (Del. 1998).

¹¹ *Id.*

Although the decision to appoint a receiver for TEO is not one free of doubt, it also is not one fairly considered to be subject to a reasonable likelihood of success on appeal. The statutory provisions are clear and the decision is the result of the Court's exercise of its discretion. There may be some room for debate as to how certain the presence of insurance coverage for TEO must be to justify appointing a receiver. Under any standard short of a full trial of an insurance coverage dispute, AmeriPride, as Petitioner, made a substantial and reasonable showing of the likelihood of such coverage. If one accepts the notion that 8 *Del. C.* § 279 does not provide an appropriate platform for final resolution of complex environmental insurance coverage disputes relating to sites in California, then the Court cannot reasonably be expected to go any further in resolving the merits of any such dispute. Moreover, if a stay is not granted, neither TEO nor its former officers and directors will suffer any irreparable harm. TEO will essentially be nothing more than a pass-through conduit for insurance coverage litigation; former officers and directors of TEO will, at the worst, be nothing more than marginal fact witnesses, a burden that befalls many. On the other hand, neither AmeriPride nor the public interest would be harmed if a stay were granted. On a balance of these factors, they favor denial of a stay.

Accordingly, TEO's motion for a stay pending appeal is denied.

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Implementing orders will be entered.

Very truly yours,

/s/ John W. Noble

JWN/cap

cc: Register in Chancery-K