IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

NOLEN SCOTT ELY, *et al.*,	)	
	)	CASE NO. 3:09-cv-02284-MCC
Plaintiffs,	)	
	)	Chief Magistrate Judge Martin C.
v.	)	Carlson
	)	
CABOT OIL & GAS CORPORATION,	)	
	)	
Defendant.	)	
	)	

DEFENDANT CABOT OIL & GAS CORPORATION'S MOTION *IN LIMINE*

Cabot Oil & Gas Corporation ("Cabot") files this motion *in limine*, and requests rulings on the items below (indicating "granted" or "denied," if not agreed) prior to the trial in this case. The Court's inherent authority to manage the cases brought before it allows this Court to decide this motion *in limine*. *Luce v. United States*, 469 U.S. 38, 41 n. 4 (1984); *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 260 (3d Cir. 1983), *rev'd on other grounds sub nom.*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (the court exercises its discretion to rule *in limine* on evidentiary issues "in appropriate cases"). Accordingly, the Court may decide such motions to ensure the jury is not exposed to unfairly prejudicial, confusing, or irrelevant evidence. *See United States v. Romano*, 849 F.2d 812, 815 (3d Cir. 1988). An *in limine* motion "is designed to narrow the evidentiary issues for trial and to

eliminate unnecessary trial interruptions." *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1069 (3d Cir. 1990) (citation omitted). It also may be appropriate for the Court to consider an *in limine* motion when it is more efficient to rule prior to trial, and the pre-trial motion facilitates more thorough briefing than likely would be available during the course of trial. *Japanese Elec.*, 723 F.2d at 260. In that regard, Federal Rule of Evidence 103(d) mandates that, to the extent practicable, "the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means."

In deciding this motion, the Court is guided by the substantive law of the State of Pennsylvania, and the federal evidentiary rules. The Court, therefore, also should be guided in ruling on the motion *in limine*, when appropriate, by Federal Rules of Evidence 401, 402, and 403. Federal Rule of Evidence 402 provides that evidence is not admissible if it is not relevant, and evidence is not relevant when it does not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," Fed. R. Evid. 401. Even if evidence is relevant, however, it nevertheless may be subject to exclusion under Federal Rule of Evidence 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the

issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Unfair prejudice is an "undue tendency to suggest decision on an improper basis." *Bhaya v. Westinghouse Elec. Corp.*, 922 F.2d 184, 188 (3d Cir. 1990) (citing Fed. R. Evid. 403 advisory committee's note).

Therefore, prior to the *voir dire* examination of the jury panel and selection of the jury, and prior to the opening statements and introduction of any evidence, Cabot makes the following motion *in limine* and respectfully requests that the Court instruct all parties, their counsel, and witnesses not to mention, inquire, or elicit testimony or other evidence of the following in the presence of the jury panel or jury in this case:

1. The existence or terms of the December 15, 2010 Consent Order and Settlement Agreement ("COSA") between Cabot and the Pennsylvania Department of Environmental Protection ("DEP"), as well as all drafts of the COSA, and all prior consent orders and drafts thereof which were subsumed within and replaced by the COSA, including but not limited to any findings in these documents and any provisions regarding the settlement of Cabot's alleged obligations under Section 208 of the Oil and Gas Act. This Court already has ruled that the consent orders are settlement agreements and therefore inadmissible as evidence to prove liability pursuant to Fed. R.

Evid. 408. Doc. 510 at pp. 37-39; Doc. 567. Consequently, Plaintiffs should be prevented from mentioning, referencing, or eliciting testimony regarding their existence or contents. Fed. R. Evid. 401-403, 408. This includes but is not limited to preventing experts from telling the jury that their opinions are based in part on provisions of the consent orders, as such would be highly prejudicial to Cabot and therefore inadmissible pursuant to Federal Rule of Evidence 703. Fed. R. Evid. 703 ("if the facts or data [relied upon by an expert] would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect"); Fed. R. Evid. 403. *See* accompanying memorandum of law.

AGREED: _____ GRANTED: _____ DENIED: _____

2. The existence or terms of any Notice of Violation ("NOV") issued by the DEP to Cabot. NOVs are charges or allegations which are inadmissible to prove liability, are hearsay, are irrelevant to liability, and are highly prejudicial to Cabot. Fed. R. Evid. 401-403, 408, 802. This includes but is not limited to preventing experts from telling the jury that their opinions are based in part on provisions of the NOVs, as such would be highly prejudicial to Cabot and therefore inadmissible at trial pursuant to Federal Rule of Evidence 703. Fed. R. Evid. 703 ("if the facts of data [relied upon by an expert] would

otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect"); Fed. R. Evid. 403. *See* accompanying memorandum of law.

AGREED: _____ GRANTED: _____ DENIED: _____

3. Any comment, reference to, or evidence concerning the United States Environmental Protection Agency ("EPA") having referenced that "reported violations" involving "documented discharges" to groundwater from Cabot wells, including the Gesford 3 and 9 wells at issue here, were caused by faulty cement jobs or well construction. The EPA never made any such determination, but rather merely noted the existence of certain NOVs issued by the DEP related to the Gesford wells (*see* nos. 1 and 2, *supra*). Any such statement or document is irrelevant hearsay, and if allowed would be highly prejudicial to Cabot. Fed. R. Evid. 401-403, 802.

AGREED: _____ GRANTED: _____ DENIED: _____

4. The fact that Cabot was required to provide temporary water supplies to Plaintiffs by the consent orders or NOVs, for the same reason that the terms and conditions of the consent orders and NOVs are inadmissible, to the extent that the delivery of temporary water was part of the settlement

reached by the parties. Fed. R. Evid. 401-403, 408. *See* accompanying memorandum of law.

AGREED: _____ GRANTED: _____ DENIED: _____

5. The fact that other residents in the area of the Ely Property previously sued Cabot and were plaintiffs in the case, and that Cabot settled with these plaintiffs, who no longer are parties to this case. This evidence is inadmissible pursuant to Fed. R. Evid. 408, is irrelevant and highly prejudicial to Cabot, and would cause confusion. Fed. R. Evid 401-403. *Portuges-Santana v. Rekomdiv Int'l*, 657 F.3d 56, 63 (1st Cir. 2011) (Rule 408's prohibition "applies equally to settlement agreements between a defendant and a third party…. This is so because '[t]he admission of such evidence would discourage settlements in either case.'"); *see also Ross v. Am. Red Cross,* 567 F. App'x 296, 308 (6th Cir. 2014) ("The district court did not abuse its discretion by concluding that any probative value of … evidence [of other lawsuits] was substantially outweighed by the danger of unfair prejudice," despite plaintiff's argument that it was relevant to proximate cause); *McCleod v. Parsons Corp*., 73 F. App'x 846, 853-54 (6th Cir. 2003) (holding that evidence of other lawsuits against defendant was not relevant, the potential for prejudice would outweigh substantially its probative value, and risked misleading the jury); *Wolfe v. McNeil-PPC Inc*., CA 07-0348, 2012 WL 38914, at * 3 (E.D. Pa. Jan. 9,

2012) (granting motion in limine to exclude testimony or questions regarding evidence of other lawsuits, claims, or settlements).[1]

AGREED: _____ GRANTED: _____ DENIED: _____

6. Alleged claims of contamination/injuries/damages to any other properties or persons in the area, including but not limited to alleged contamination/injuries/damages to former plaintiffs in this lawsuit who settled with Cabot, or whose claims were disposed of by summary judgment or otherwise dismissed. This includes, but is not limited to, allegations that Norma Fiorentino's water well "exploded" on January 1, 2009 (Norma Fiorentino settled her claims against Cabot), and allegations that Cabot's operations contaminated/damaged the property of Nolen Scott Ely's deceased father, Kenneth Ely (Kenneth Ely Estate claims were disposed by summary judgment). Alleged contamination of properties or alleged activities of Cabot/GDS at properties other than the Plaintiffs' property is not evidence of whether those activities contaminated Plaintiffs' water and is thus irrelevant to the issues remaining in this case, and would be highly prejudicial to Cabot. Fed. R. Evid 401-403, 408; *see Ross,* 567 F. App'x at 308 (probative value of evidence of other lawsuits was outweighed substantially by danger of unfair prejudice, despite plaintiff's argument that it was relevant to proximate

[1] Per Local Rule 7.8(a), copies of unpublished opinions are attached, in alphabetical order.

cause); *McCleod,* 73 F. App'x at 853-54 (evidence of other lawsuits against defendant was not relevant, the potential for prejudice outweighed substantially its probative value, and risked misleading the jury); *Ramirez v. U.P.S.*, No. 06-1042, 2010 WL 1994800, at *2 (D.N.J. May 17, 2010) ("The Court agrees with UPS that it would now be improper to allow Plaintiff to introduce evidence, testimonial or otherwise, regarding the previously dismissed … claims.").

At issue in this case is whether the Gesford 3 and 9 wells caused contamination of the Ely/Hubert water supplies, and that issue is unique to the Elys and Huberts. Indeed, Plaintiffs' experts have not opined that any other sites were impacted by the Gesford 3 and 9 wells. Therefore, evidence of alleged contamination/injuries/damages to other persons or properties not at issue in this case is irrelevant, would be offered solely to inflame the jury or cause confusion, and is inadmissible as alleged other wrongs or acts under Rule 404(b). Fed. R. Evid. 401, 403, 404(b).

AGREED: _____ GRANTED: _____ DENIED: _____

7. Cabot's alleged conduct and/or environmental wrongdoings in Dimock or Susquehanna County, Pennsylvania other than those that allegedly relate to the Gesford 3 and 9 wells, the only remaining gas wells at issue in this case. *See* Ex. A, Excerpts from the Deposition of Anthony Ingraffea

("Ingraffea Depo."), pp. 42-44, (identifying Gesford 3 and 9 as the only gas wells to have caused adverse impacts to the Plaintiffs' water); Ex. B, Excerpts from the Deposition of Paul Rubin ("Rubin Depo."), p. 322, (claiming that Gesford 3 and 9 were the wells that impacted the Ely and Hubert water supply). This includes, but is not limited to, Nolen Scott Ely's allegations related to conduct or wrongdoings of Cabot or Cabot subsidiary employees at other properties or to other persons. By way of example only, Nolen Scott Ely makes the following irrelevant and speculative allegations of Cabot wrongdoing:

- Cabot or Cabot subsidiary employees were directed by their supervisor, Paul Harden, "to sabotage … Ely 2 [well site on Kenneth Ely Estate's property which no longer is in the case] by throwing stones at the pit liners" in order to "put holes in them on my father's property," allegedly because Cabot was "[a]ngry at my father … [for] creating havoc with Cabot" and wanted to "blame [the sabotage and contamination of his creek] on my father" (*see* Ex. C, Excerpts from the 5/12/11 Deposition of Nolen Scott Ely ("5/12/11 NS Ely Depo."), pp. 192-95; Ex. D, Excerpts from the 8/1/11 Deposition of Nolen Scott Ely ("8/1/11 NS Ely Depo."),

pp. 119-26; (Docs. 493, 547, granting summary judgment on all of the Ely Estate Claims);

- There was "bubbling" around four of the well heads at Nolen Scott Ely's father's property, which he claims a DEP representative told him was a "methane release" (Ex. D, 8/1/11 NS Ely Depo., pp. 143-44);
- Cabot's subsidiary GDS would "cover up" surface spills (Ex. C, 5/12/11 NS Ely Depo., p. 197), and would take waste water from one property location and "dump it in the pit" at Nolen Scott Ely's father's property. Ex. D, 8/1/11 NS Ely Depo., p. 141.

These and other allegations of wrongdoing that relate to properties and wells other than the Gesford 3 and 9 are not relevant to any remaining issue in the case. Fed. R. Evid. 401. Further, these other allegations of wrongdoing are based on hearsay and speculation, would be offered solely to put Cabot in a bad light, would be highly prejudicial to Cabot, and are inadmissible under Rule 404(b) as other alleged wrongs or acts Fed. R. Evid. 401-403, 404(b), 802; *see, e.g.,* Ex. D, 8/1/11 NS Ely Depo., pp. 120, 123 (accusation about sabotaging the pit liner based on what another employee told Mr. Ely: "[Joe said] Paul told Dana to throw stones at the pit liners").

AGREED: _____ GRANTED: _____ DENIED: _____

8. Prior monetary settlement offers made by Cabot to settle the claims made by these Plaintiffs and any statements made in connection with the settlement discussions between the parties in this lawsuit and in connection with the prior related proceeding involving Plaintiffs before the Pennsylvania Environmental Hearing Board ("EHB"), *Ely v. Commonwealth of Pennsylvania*, EHB Docket NO. 2011-003-L (consolidated with 2011-165-L). Fed. R. Evid. 408; 401-403. Moreover, the EHB proceeding was an appeal from the COSA, which is an inadmissible settlement and, therefore, the appeal from the COSA also is inadmissible. Fed. R. Evid. 408; *see supra* at No. 1.

AGREED: _____ GRANTED: _____ DENIED: _____

9. Comments and criticisms allegedly were made by Cabot's competitors and/or in the regulatory communities critical of Cabot's alleged "rushing to drill" in the Northeastern Pennsylvania area, resulting in "problems" with and "defects" in Cabot's early wells, including the Gesford 3 and 9 wells at issue here. *See, e.g.,* Ex. A, Ingraffea Depo., pp. 159-162, 166-68. Any such testimony or evidence is inadmissible hearsay, amounts to opinion testimony from an undesignated expert, is irrelevant to the issue of whether the Gesford 3 and 9 wells resulted in contamination of Plaintiffs' water, and would be highly prejudicial to Cabot and therefore may not be disclosed by an

expert. Fed. R. Evid. 401- 403, 703, 802; *see also* Fed. R. Civ. P. 26 (requiring experts be designated).

AGREED: `_____ GRANTED: _____ DENIED: _____

10. Any alleged personal injuries or ailments Plaintiffs claim were sustained by them or by their children as a result of alleged contamination of water supplies, including any physical ailments, symptoms, diseases, or conditions. This includes but is not limited to the medically unsupported physical ailments/symptoms identified by Plaintiffs during discovery in this case, including rashes, cramps, nausea/vomiting, headaches/lightheadedness, shortness of breath or difficulty breathing, impairment of senses (vision, taste), joint pain/stiffness, and fatigue. *See* Ex. E, Excerpts from the Deposition of Monica Ely, pp. 84, 86, 126, 130, 139-40, 144, 158-59, 170, 184, 244, 246; Ex. F, Excerpts from the Deposition of Victoria Hubert, pp. 46, 49, 51, 157-58. The Court granted summary judgment in favor of Cabot as to all of Plaintiffs' claims for personal injury (Doc. 497, pp. 24-26; Doc. 550, p. 2, n.2; Doc. 567, p. 4 n.4) and, therefore, any such evidence is inadmissible as irrelevant, unsupported by proof of medical causation, and unduly prejudicial to Cabot. Fed. R. Evid. 401, 403. For the same reason, Plaintiffs should not be allowed to accomplish indirectly what they cannot do directly in seeking alleged nuisance damages.

AGREED: _____ GRANTED: _____ DENIED: _____

11. Any alleged claim of fear of cancer or other physical ailment, symptom, condition, or disease, on the ground that Plaintiffs have no physical manifestation of injury. *Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa. 1996); *see supra* at No. 10.

AGREED: _____ GRANTED: _____ DENIED: _____

12. Any so-called "off-the-record" statements allegedly made by representatives of the EPA regarding the quality/safety of Plaintiffs' water supplies after EPA had completed its evaluation in Dimock and concluded there were no health related concerns to the residents of Dimock. Specifically, Nolen Scott Ely was quoted in a newspaper article as saying that he was told by an unnamed EPA representative "off-the-record" not to drink or bathe in his water, despite the fact that the EPA was ceasing water deliveries to Plaintiffs' homes, having concluded, publically in July-August 2012, there were no health risks to residents. *See* Ex. G, July 26, 2012 Article appearing in thetimes-tribune.com, entitled "EPA to Stop Dimock Water Deliveries." The EPA specifically has denied any "off-the-record" conversations with residents, and stated that the risk assessors concluded their evaluation, having thoroughly reviewed all sampling results, compared them to risk-based levels, and determined that none of the levels presented health concerns to

residents. *Id.* Any out-of-court statement allegedly made by an unidentified EPA representative is inadmissible hearsay and is unreliable further because it was denied specifically by EPA. Fed. R. Evid. 801, 802; *Williamson v. United States*, 512 U.S. 594, 598 (1994) (Rule 802 "is premised on the theory that out-of-court statements are subject to particular hazards. The declarant might be lying; he might have faulty memory; his words might be misunderstood or taken out of context by the listener.").

AGREED: _____ GRANTED: _____ DENIED: _____

13. Any so-called EPA "leaked document" allegedly appearing in the *Los Angeles Times*, and allegedly referencing a position contrary to the EPA's July-August 2012 public pronouncement that there are no health risks to residents of Dimock from the water. *See, e.g.*, Ex. H, Excerpts from the Deposition of David Pyatt ("Pyatt Depo."), p. 259: 13-19 (Leslie Lewis questioning defense expert as to whether he considered or is familiar with a so-called "**leaked document** [appearing in the *Los Angeles Times*] showing that regional EPA staff [was] studying methane as both a contaminant and a catalyst for further water quality damage….") (emphasis added); Ex. I, Excerpts from the Deposition of James Pinta ("Pinta Depo."), pp. 252-59 (Leslie Lewis questioning defense expert at length about "unofficial" EPA document allegedly leaked, and asking "[i]f it were EPA authenticated, and

these were [the official] conclusions of EPA officials, would you then take this as something that you should consider in your reports, in this and other cases having to do with alleged water contamination in proximity of gas drilling operations"); Ex. J, Excerpts from the Deposition of Tarek Saba ("Saba Depo."), pp. 112-127, 134-136 (Leslie Lewis questioning defense expert extensively about the alleged EPA PowerPoint document, which the witness repeatedly says he cannot identify or authenticate as an official EPA finding).

References to the so-called "leaked document" are unreliable and impermissible hearsay (as is the document itself, which has not been authenticated), are highly speculative, and are irrelevant because the so-called "leaked document" does nothing to change the EPA's public pronouncement and conclusion that the water in Dimock was safe and posed no health risks to residents. Fed. R. Evid. 401, 802; *see also supra* No. 12. Plaintiffs seek to make reference to this unreliable document solely to inflame and confuse the jury regarding the EPA's unequivocal public position. Fed. R. Evid. 403.

AGREED: _____ GRANTED: _____ DENIED: _____

14. Any evidence or testimony related to Plaintiffs' prior claims of fraud, breach of contract/lease, and/or alleged lost royalties, which claims have been dismissed by the Court on summary judgment for Cabot. Docs. 497, 510, 550, 567. This includes but is not limited to any testimony, reference, or

evidence regarding the circumstances surrounding Plaintiffs' negotiation and execution of their oil and gas leases with Cabot and any statements Cabot allegedly made to them, which formed the basis of Plaintiffs' prior fraudulent inducement claims but which are irrelevant to any claims or defenses remaining in the case.

It also includes but is not limited to Nolen Scott Ely's unsupported and false accusation that Cabot maintained a separate set of books (two separate meter readings, one to show royalty owners and one that they were not to show royalty owners) for the alleged purpose of under-paying royalty owners, and that Cabot employees were instructed to falsify and "tamper[] with" records, which accusation purported to relate to a claim that Nolen Scott Ely's father, Kenneth Ely, was being "shorted" on royalties, a claim that was disposed by summary judgment. Fed. R. Evid. 401-403; Ex. D, 8/1/11 NS Ely Depo., pp. 51-70; Doc. 567, p. 3 at ¶ b & n. 3 (granting summary judgment with regard to the Ely Family's claim for breach of contract, as well as any claim for lost royalties). In addition to the fact that these accusations are irrelevant to any claims at issue in the lawsuit and highly prejudicial to Cabot (Fed. R. Evid. 401-403), Nolen Scott Ely admitted that he has no actual proof of such conduct and that these accusations are pure speculation and hearsay. Ex. D, 8/1/11 NS Ely Depo., pp. 50, 52, 53, 65, 69 ("Like I said, I don't physically

have any proof…."; "I've heard that through the grapevine"; "That's what I was being told"; "Like I said, it's just hearsay"; "I've just heard rumors from various people").

AGREED: _____ GRANTED: _____ DENIED: _____

15. As to the Ely Plaintiffs, any evidence concerning alleged property damages for cost of repair or cost to replace, including but not limited to (1) the cost to make the proposed connection to the public water line from Montrose to the Ely Property; and (2) the cost to deliver water/cost to replace potable water supplies. Plaintiffs contend this is a permanent injury to property case; thus, the correct measure of damages is diminution in market value. *See, e.g.*, Doc. 452, ¶ 15 (Plaintiffs state that "[d]amages to Ely and Hubert family water and properties are not temporary as has been aptly demonstrated by Paul Rubin, plaintiffs' expert hydrologist…."); *see Christian v. Yanoviak*, 945 A.2d 220, 226-27 (Pa. Super. Ct. 2008) (the proper measure of damages for permanent injury to property was "retrospective appraisal," to determine the diminution in value immediately before and after the injury). Evidence of any alleged cost to repair or replace is irrelevant and would tend to confuse the jury as to the issues in the case, and would prejudice Cabot. Fed. R. Evid. 401, 403. *See* accompanying memorandum of law.

AGREED: _____ GRANTED: _____ DENIED: _____

16. As to the Hubert Plaintiffs, any alleged damage or injury to the property owned by the Huberts (because such claims were disposed of on summary judgment, Doc. 497, p. 21, Doc. 550), and any testimony or suggestion that the Huberts are entitled to or incurred damages or injury to the Ely Property (because the Huberts lack standing to assert damage to property which they do not own, Doc. 497, p. 22, Doc. 550). This includes but is not limited to alleged damages to the Huberts for diminution in value to property, as well as damages in the form of the cost to make the proposed connection to the public water line, and cost of water deliveries. Under Pennsylvania law, an injury to a water supply is an injury to real property. *See, e.g., Rabe v. Shoenberger Coal Co.,* 62 A. 854, 854-55 (Pa. 1906). As this Court has already found, the Huberts do not own the land on which they reside; they reside on the Ely Property. Doc. 497, p. 21 ("The parcel of property on which the Huberts' home is located is actually owned by Nolen Scott Ely"). The two water wells on the Ely Property, including the one that serves the Hubert's trailer and for which they are claiming damages, are part of the Ely Property and are owned by Nolen Scott Ely. 21 PA. STAT. ANN. § 3; *Rabe*, 62 A. at 855. The Huberts have no damage to property claim, and any alleged replacement water costs are necessarily subsumed within the Ely's alleged market value loss claim; to allow the Huberts to recover replacement

water costs would be an impermissible double recovery. Therefore, evidence of any alleged property damages incurred by the Huberts is contrary to Pennsylvania law and irrelevant, and would be offered solely in an attempt to confuse the jury, and would be highly prejudicial to Cabot. Fed. R. Evid. 401-403. *See* accompanying memorandum of law.

AGREED: _____ GRANTED: _____ DENIED: _____

17. Any alleged non-groundwater contamination risks, adverse health effects, or damages from oil and gas production activities, including but not limited to alleged air pollution, soil contamination, noise contamination, earthquakes, or climate change (global warming). None of these alleged hazards are at issue in this case. Such evidence is irrelevant and highly prejudicial to Cabot. Fed. R. Evid. 401-403.

AGREED: _____ GRANTED: _____ DENIED: _____

18. Plaintiff Nolen Scott Ely's employment related disputes or issues with Cabot or its subsidiary, including that Mr. Ely was a "whistleblower" or the use of other similar terms to describe his actions leading to his leaving the employ of Cabot's subsidiary, and also including the circumstances and reasons for Mr. Ely being placed on paid leave while Cabot investigated certain claims he made. *See, e.g.,* Ex. C, 5/12/11 NS Ely Depo.,

pp. 137-140. Such evidence is irrelevant to any claims at issue in this suit, and is highly prejudicial to Cabot. Fed. R. Evid. 401-403.

AGREED: _____ GRANTED: _____ DENIED: _____

19. Cabot's purchase of the Craig and Julia Sautner property and its subsequent demolition, deed restriction, and sale of the surface estate to the Sautner's neighbor, Mr. and Mrs. Maye, on the ground that same is irrelevant to any issues remaining in the case, is a backdoor attempt to admit Cabot's confidential settlement agreement with former plaintiffs Craig and Julia Sautner ("Sautners"),[2] and improperly injects the existence of other plaintiffs (who have settled) into the case. Fed. R. Evid. 401, 408; *see supra* at 5. Moreover, it would be unfairly prejudicial to Cabot if admitted; Plaintiffs' counsel is likely to use the facts regarding the sale and subsequent purchase to prejudice and mislead the jury. Fed. R. Evid. 401-403. If admitted, it consequently would require undue delay and a waste of time for Cabot to explain all of the unique circumstances surrounding such purchase/sale, which would be difficult if not impossible because the terms of the settlement are confidential. *Id.*

Cabot anticipates that Plaintiffs improperly will seek to elicit testimony of the fact and terms of the purchase and sale to prove that the Sautner

[2] If the Court deems it necessary, Cabot will tender the settlement agreement for an in camera inspection.

property was damaged by Cabot and therefore by innuendo it would be reasonable for the jury to believe that Cabot also damaged the Ely property. *See, e.g.,* Doc 620, ¶ 22, n. 7 (Plaintiffs' counsel arguing the terms of the Sautner purchase and sale by Cabot). The purchase and subsequent sale of the Sautner property should be excluded because it is irrelevant to any issue in this case, and is explained only through part of an overall confidential settlement. Moreover, even if the purchase and sale were relevant (which they are not), and not prohibited by Rule 408 regarding settlements, the Court nonetheless should exclude the evidence under Fed. R. Evid. 403 because it would confuse the issues in the case, cause undue delay, and result in undue prejudice to Cabot because Cabot could not explain the purchase and sale adequately without violating a confidential settlement with the Sautners.

AGREED: _____ GRANTED: _____ DENIED: _____

20. Any attempt to reference or rely on Addendum A to Ex. K, Paul Rubin's July 20, 2015 Response Report ("Rubin Response Report")[3] or the contents thereof, on the ground that the information contained therein is produced untimely, incomplete, and irrelevant to this case and would be used

[3] Addendum A was not labeled as "Addendum A" in the report from Mr. Rubin. The Addendum was identified at the conclusion of the main report, in a listing of addenda. But for the convenience of the Court and parties, Cabot has added a designation of "Ex. K, Addendum A" in the upper-right corner of the first page of the Addendum A.

solely for purposes of inflaming and prejudicing the jury. Fed. R. Evid. 401-403. In particular, Addendum A to Ex. K purports to be a "November 14, 2013 Working Draft—Not for Distribution," material Mr. Rubin is preparing for a HydroQuest "joint report regarding groundwater contaminant risk stemming from burial of drill cuttings and fluids waste at gas drilling sites in Pennsylvania," a topic not at issue in this case.

Moreover, Plaintiffs can offer no excuse why a "November 14, 2013" draft could not have been produced prior to July 20, 2015, making it untimely and unreliable. And, the materials are highly inflammatory, repeatedly using the unfounded comparison between "Cabot's gas fields" and the "Love Canal" Superfund Site. *Id.* at pp. 1, 7-8 (comparing chemicals found in Dimock to "chemicals found at the Love Canal hazardous waste site"; stating that "[m]any of the chemicals found in Cabot drill cuttings and fluids were determined to be contaminants of concern in the Love Canal hazardous waste site" and describing it as "one of the worst health disasters in the United States"). The report, which relies solely on the unsubstantiated statements of Nolen Scott Ely, repeatedly references alleged "burial of chemical waste materials" at numerous Cabot sites other than the Gesford 3 and 9 well sites that are at issue in this case and is, therefore, irrelevant and highly prejudicial to Cabot. *See, e.g.*, Ex. K, Rubin Response Report, Addendum A at pp. 4-6 and figures

depicting alleged waste sites (relying solely on statements in interviews with Nolen Scott Ely, and conclusively stating that "HydroQuest has received information that large quantities of chemically-laced drill cuttings are buried in pits at 23 or more gas well sites in Dimock, PA (Scott Ely, pers. comm)."); Fed. R. Evid. 401-403.

AGREED: _____ GRANTED: _____ DENIED: _____

21. Further to No. 20, *supra.*, no reference or comparison of this case to the "Love Canal" Superfund Site (*see generally* Ex. K , Addendum A for analogies to "Love Canal") on the ground that any such attempts or comparisons are totally unfounded and speculative, irrelevant, and included solely for the purposes of inflaming and prejudicing the jury. Fed. R. Evid. 401-403.

AGREED: _____ GRANTED: _____ DENIED: _____

22. Any attempts by Plaintiffs or their experts to reference or rely upon opinions or statements of an undesignated, previously unidentified and un-deposed toxicologist and/or pediatrician, as referenced in the Ex. K, Rubin Response Report. Specifically, Plaintiffs chose not to designate an expert toxicologist, and in a blatant attempt to circumvent this omission, Plaintiffs' expert Paul Rubin impermissibly attempts to "parrot" the statements and opinions of a toxicologist and pediatrician about the Ely and Hubert water

based on Rubin's alleged conversations with them (thereby simply acting as a mouthpiece to pass along opinions he admittedly is unqualified to give, from previously undisclosed and undesignated witnesses). *See, e.g.,* Ex. K, Rubin Response Report, p. 1 ("As a hydrogeologist, I would not drink water from either of their wells. This agrees with the recommendations of Dr. David Brown, toxicologist and Dr. Kathleen Nolan, a Board-certified pediatrician with training in epidemiology with whom I have discussed."), p. 5 ("It is both my, Dr. David Brown's, and Dr. Kathy Nolan's professional opinions that these homeowners and their families should not be mandated to again use their adulterated and degraded well water."), p. 10 ("Cabot correctly points out that I am not a toxicologist. Health based statements I have made regarding gas field medical concerns are based on discussions with Dr. David Brown and Dr. Kathleen Nolan over many years"), p. 11 ("Dr. Brown recommends that neither the Scott Ely nor Ray Hubert families use their groundwater").

This is an impermissible use of hearsay by an expert within the meaning of Federal Rule of Evidence 703 and would be unduly prejudicial to Cabot. Fed. R. Evid. 403, 703, 802. This is not a situation where an expert relies in part on hearsay in reaching her own opinion; instead, it is in effect Paul Rubin parroting to the jury hearsay opinions that he personally is unqualified to make, without any ability of Cabot to cross-examine those opinions or

testimony. Numerous courts have held this to be impermissible under Rule 703. *Factory Mut. Ins. v. Alon USA L.P.*, 705 F.3d 518, 523-24 (5th Cir. 2013) ("Courts nevertheless must serve a gate-keeping function with respect to Rule 703 opinions to ensure 'the expert isn't being used as a vehicle for circumventing the rules of evidence.' .... Rule 703 'was not intended to abolish the hearsay rule and to allow a witness, under the guise of giving expert testimony, to in effect become the mouthpiece of the witnesses on whose statements or opinions the expert purports to base his opinion.' ... The rule 'was never intended to allow oblique evasions of the hearsay rule.'") (citations omitted); *Dura Auto. Sys. of Indiana, Inc. v. CTS Corp.*, 285 F.3d 609, 614 (7th Cir. 2002) (Posner, J.) ("A scientist, however well credentialed he may be, is not permitted to be the mouthpiece of a scientist in a different specialty. That would not be responsible science."); *In re Wagner*, CIV A 6-CV-01026, 2007 WL 966010, at *4 (E.D. Pa. Mar. 29, 2007) ("The Federal Rules of Evidence do not permit experts to simply 'parrot' the ideas of other experts or individuals"). *See* Defendant Cabot Oil & Gas Corporation's Motion to Exclude Testimony From Paul A. Rubin, and accompanying memorandum of law, filed concurrently herewith.

AGREED: _____ GRANTED: _____ DENIED: _____

23. Any attempt by Plaintiffs to show documentary or demonstrative evidence or exhibit to the jury during *voir dire* or opening statements without first showing such material to Cabot's counsel and the Court before the start of *voir dire* or opening statement.

AGREED: _____ GRANTED: _____ DENIED: _____

24. Any mention or evidence of the financial condition of Cabot, including Cabot's assets, income, profits, revenues or net worth, without Plaintiffs showing a legally tenable basis for recovery of punitive damages. *See, e.g., Williams v. Betz Lab. Inc.*, No. CIV.A 93-4426, 1996 WL 114815, at *3 (E.D. Pa. March 14, 1996) ("Before evidence of the financial condition or net worth … is admissible, this Court must determine the legal sufficiency of plaintiff's claim for punitive damages, which must await trial. Should plaintiff make reference to the financial condition or net worth of Betz in the opening statement at trial or in any other way in the presence of the jury before this Court determines that the evidence of record is sufficient to prove outrageous conduct, defined as evil motive or reckless indifference, the jury will hear irrelevant confusing matters, the receipt of which is proscribed by Fed. R. Evid. 403.").

AGREED: _____ GRANTED: _____ DENIED: _____

25. Any mention or reference to any colloquy between counsel during depositions, objections, sidebars, or responses to objections made by Cabot's counsel in any depositions, including but not limited to any reference to any claim of privilege asserted by Cabot, as well as the refusal of any Cabot witness to answer questions to which objections were made. These are pure questions of law for the court and would be used solely to inflame or confuse the jury. Fed. R. Evid. 401-403.

AGREED: _____ GRANTED: _____ DENIED: _____

26. Any mention or reference that this Motion has been filed or of any rulings by the Court on this Motion, suggesting or implying to the jury that Cabot has moved to prohibit proof or that the Court has excluded proof of any particular matter.

AGREED: _____ GRANTED: _____ DENIED: _____

27. Any mention, reference, or inquiry to any Cabot witness about the nature or extent of preparation with counsel for the testimony of such witness.

AGREED: _____ GRANTED: _____ DENIED: _____

28. Any mention, reference, or inquiry related to Cabot's request, as alleged at paragraph 137 of Cabot's First Amended Answer and Affirmative Defenses to Second Amended Complaint (Doc. 595), for

recoupment/settlement credit for monies accepted by Plaintiffs for alleged injury to Plaintiffs' water supplies, including without limitation the sums Plaintiffs withdrew from their escrow accounts. This evidence is irrelevant to any jury issue, as the recoupment/ settlement credit issue is a question of law for the Court to be decided post-verdict and only in the unlikely event judgment is entered for Plaintiffs. Fed. R. Evid. 401; *Reed v. Honeywell Int'l, Inc.*, No. 3022 EDA 2010, 2011 WL 6645694, at *7 (Pa. Super. Ct. Dec. 6, 2011) (settlement credit issue handled post-trial as a legal issue).

AGREED: _____ GRANTED: _____ DENIED: _____[4]

Respectfully submitted:

Date: November 30, 2015

/s/ Jeremy A. Mercer
Jeremy A. Mercer, Esq. (PA 86480)
jeremy.mercer@nortonrosefulbright.com
Amy L. Barrette, Esq. (PA 87318)
amy.barrette@nortonrosefulbright.com
NORTON ROSE FULBRIGHT US LLP
Southpointe Energy Complex
370 Southpointe Boulevard, Suite 300
Canonsburg, Pennsylvania 15317
Tel: 724-416-0400
Fax: 724-416-0404

and

Stephen C. Dillard, Esq. (TX 05868000)
steve.dillard@nortonrosefulbright.com

[4] Defendant recognizes that Local Rules 5.1(g) and 7.1 require submission of a proposed order. However, Defendant has left space after each paragraph for the Court to indicate its ruling. To prevent any ambiguity, Defendant believes that its Motion *in Limine* should be granted as to each of the foregoing items.

pro hac vice
Richard Wilson, Esq. (TX 21713200)
richard.wilson@nortonrosefulbright.com
pro hac vice
NORTON ROSE FULBRIGHT US LLP
Fulbright Tower
1301 McKinney
Suite 5100
Houston, TX 77010-3095
Telephone: (713) 651-5151
Facsimile: (713) 651-5246

Counsel for Defendant *Cabot Oil & Gas Corporation*

TABLE OF CONTENTS - EXHIBITS