

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

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

**AMENDED PLAINTIFFS' NOLEN SCOTT ELY ET AL.'S BRIEF IN  
OPPOSITION TO DEFENDANT CABOT OIL & GAS  
CORPORATION'S BRIEF IN SUPPORT OF ITS MOTION UNDER  
RULES 50 AND 59 OF THE FEDERAL RULES OF CIVIL  
PROCEDURE FOR JUDGMENT AS A MATTER OF LAW, NEW  
TRIAL, OR REMITTITUR**

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## WORD COUNT CERTIFICATE

I certify that **AMENDED PLAINTIFFS' NOLEN SCOTT ELY ET AL.'S BRIEF IN OPPOSITION DEFENDANT CABOT OIL & GAS CORPORATION'S BRIEF IN SUPPORT OF ITS MOTION UNDER RULES 50 AND 59 OF THE FEDERAL RULES OF CIVIL PROCEDURE FOR JUDGMENT AS A MATTER OF LAW, NEW TRIAL, OR REMITTITUR** word count excluding the cover page, Table of Contents, Table of Authorities, the signature block, and the Certificate of Service is 42,875 words long, according to Microsoft Word's word-count feature. With this Certification Plaintiffs' make the instant application for the approval by this Court and the Defendant for approval to expand the word count to 42,875 words.

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Plaintiffs,	)	Chief Magistrate Judge Martin C.
	)	Carlson
v.	)	
	)	
CABOT OIL & GAS	)	
CORPORATION,	)	
	)	
Defendant.	)	

**AMENDED PLAINTIFFS’ OPPOSITION TO DEFENDANT’S  
MOTION FOR JUDGMENT AS A MATTER OF LAW, NEW  
TRIAL, OR REMITTITUR<sup>1</sup>**

**I. INTRODUCTION**

Smarting from a humiliating defeat after prematurely concluding its defense, Cabot Oil & Gas Corporation (“Cabot”) seeks to wipe out the reasoned decision of a unanimous eight-person jury of the Ely and Hubert peers by bombarding this Court with every fusillade it can muster. To accept Defendant’s voluminous brief on its face is to believe that the verdict was predicated on pandemonium in the Courtroom. Yet, over 13 eventful days, from the start of *voir dire* to the jury’s final escorted exit from the

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<sup>1</sup> Plaintiffs’ appreciate the acceptance of this Amended Brief by the Court and Defendant, which Amended Brief is substantively unchanged from the original (Doc. 787) and has been edited only to include Table of Contents, Table of Authorities, and sub headings and to correct clerical errors.

courtroom, including the 11 days of trial testimony, this Court ran a tight ship that distinctly disallowed any undue prejudice or unfairness to be visited upon Cabot.

The fact that a party may be surprised by a verdict does not make it “aberrant,” as asserted by Cabot attorney Mercer in Defendant’s brief. Just like Plaintiffs, Cabot put on the case it put on. After 12 painstaking hours of deliberation, a jury of eight of the Ely and Hubert peers reached a unanimous decision.<sup>2</sup> There is absolutely no evidence on the record to suggest that the verdict in this case was the result of anything other than the logical and reasonable decision of a prudent jury, guided by the Court’s instructions, and having open-mindedly received, analyzed, weighed and deliberated upon the totality of the evidence presented by both sides. The record clearly demonstrates the trial was closely monitored and controlled by the Court. The record clearly demonstrates the Court was diligent at all times in its efforts to prevent any unfairness or prejudice to Cabot. It was a regular refrain from the Bench to the jury to the effect that: this case was critically important to *both* parties. The jury found that based on the evidence it is more likely than not that Cabot was negligent in conducting its

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<sup>2</sup> Originally, the jury was to have been comprised of six members, but at the suggestion of Cabot, the Court, at its discretion, increased the number to eight.

activities on the Gesford pad, and that the negligent conduct was a substantial factor in causing the deteriorated condition of the Ely and Hubert plaintiffs' drinking water. The unanimous jury awarded the Plaintiffs a sizable compensatory verdict, but not an excessive or punitive one. Cabot presents no evidence whatsoever that the jury misapplied the law to the facts or behaved in any way in dereliction of their duty. This Court met with the jurors minutes after the verdict was announced. This Court surely observed for itself the reasonable comportment of the jurors, their maturity, respectfulness, solemnity, level-headedness, and lack of bias. Indeed, during the course of trial the Court made repeated reference to the jury's attentiveness, and its faith in them and the system. Surely this Court observed not an inkling from these jurors that they were unfairly swayed toward a verdict in favor of Plaintiffs as a result of confusion or one action or another, one statement or another by Plaintiffs' counsel. Though voluminous, Cabot's brief is not a full, fair or, in some instances, accurate reflection of the trial.

Cabot's asserts that the unanimous result "can be explained only as a product of an overzealous advocate." Their systematic pillorying of that advocate should be offensive to the bar, the jury and the process. It is a rank and spiteful speculation from a corporate defendant who apparently felt so

confident in the anticipated outcome that it cut short its defense by 17 witnesses, thus excluding the testimony of Defendant's toxicology and treatment system experts whose opinions Cabot counsel promised, during opening statement, would be heard by the jury.

Cabot's sweeping assertion that the jury's decision "defies logic, science, temporality and the evidence" is melodramatic fiction aimed at recasting *ad nauseum* selective aspects of the trial, and retrying a case the Court has already heard. In its brief, as it did throughout trial, Cabot demonstrates a disregard for the evidentiary context of this case, and a disdain for Plaintiffs' attorney. No move or utterance is so small as to escape Cabot's critique or to be used in its effort to prejudice the Court against Ms. Lewis.<sup>3</sup> Furthermore, in his scattershot attempts to inflame the Court through relentless derision of Ms. Lewis, Mr. Mercer details events on this docket which have absolutely no relevance to the merits of granting or

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<sup>3</sup> Emblematic of the petty depths to which Cabot will delve in its attempt to prejudice this Court against Plaintiffs' counsel, Mr. Mercer tosses into footnote 28 of his brief the baseless, gratuitous and unverified assertion that at some unspecified time, observed by some unspecified person(s) Ms. Lewis "smirked" at the Court's expense. Specifically, counsel baldly alleges that Ms. Lewis intentionally "turned her head away from the Court but so that the jury and gallery could see and smirked." (*See* Doc. 765, page 51, fn. 28.)

denying a Rule 50 or Rule 59 motion in this case.<sup>4</sup> Yet, Cabot counsel does not put itself under the same scrutinizing lens, which would reveal engagement by Cabot's counsel in the same type of conduct of which it accuses Plaintiffs' counsel. Cabot's elaborately redundant cataloging of Plaintiffs' counsel's every question and statement belies the fact that, a cold review of the record indicates that neither individually nor cumulatively, in consolidation nor in the aggregate, do any utterances by Plaintiffs' counsel rise to the level of "manifest injustice" warranting a new trial. Cabot attacks Plaintiffs' attorney regarding a single newspaper interview. However, in contrast throughout the trial, Cabot, via its "media" surrogates was putting out daily bulletins from the Courthouse in real time that belittled Plaintiffs' counsel's skills, as well as the integrity and honesty of Plaintiffs and their experts. While painting Plaintiffs' counsel as an incompetent in the media during trial, once the negative verdict was rendered, attorney Lewis was

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<sup>4</sup> Before and during trial, Cabot pressed the Court on the necessity to separate prior *Fiorentino, et al.* litigation from the *Ely, et al.* case. Yet, in a single-spaced "footnote" extending across two pages of his brief, Mr. Mercer goes to elaborate lengths to fold into his argument long-winded and totally irrelevant narrative of alleged prior bad acts, so to speak, of Ms. Lewis, that occurred and were resolved under the *Fiorentino, et al.* litigation. Mr. Mercer reverts to settled matters occurring in 2009. Mr. Mercer does not highlight the fact that, these allegations, having been fully aired, and so sufficiently put to rest, that in February 2015 Plaintiffs' attorney became admitted to the District Court of the Middle District of Pennsylvania by the Chief Judge of the Middle District in order to try this case.

transformed into a Machiavellian puppeteer, so calculating and omniscient that she could anticipate Defendant's every move, every witnesses' statement.

Cabot complains of Plaintiffs' counsel as the instrumentality requiring sidebars, knowing full well that the Court invited sidebars, out of necessity to the excisions of swaths of evidence as a result of the Court's *in limine* decisions, largely having to do with regulatory evidence, relevant factual evidence, that was an inextricable part of this highly complicated and publicized civil case. The interrelated involvement of the common facts which joined the administrative and civil matters made navigation by Plaintiffs' counsel, particularly as to questioning and cross examination of trial witnesses extraordinarily difficult. As the trial record demonstrates, Cabot counsel themselves encountered some difficulties in navigating exclusion of controversial material, albeit, information they successfully sought to suppress. Cabot counsel themselves requested sidebars, and, despite the fact that the Court required parties to appear every morning, robbing Plaintiffs of valuable time necessary to prepare for the ensuing day, Cabot counsel were rarely the cooperative colleagues they appeared to be before this Court. This created an unwelcome tension for Plaintiffs' counsel, and no small degree of surprise on several trial days.

It is simply not reasonable to conclude that any individual conduct or conduct in combination by Plaintiffs' counsel had the effect of prejudicing each and every one of the eight jurors against Cabot, and to do so in such a comprehensive and methodical way as to cause each and every one of the jurors to disregard the evidence, disregard the law, abandon their common sense, and the instructions including corrective instructions from the Court, basically descending into chaos.

Rather than engaging in the type of knowing and orchestrated misconduct that Cabot ascribes to Plaintiffs' counsel, the record demonstrates the actions of a lone attorney who, during an 11 day trial, at times struggled to present a linear and coherent case on behalf of her clients, while navigating the discretionary restrictions imposed by the Court and difficulties examining inexperienced witnesses, and experienced corporate witnesses. Cabot strains to link its unfounded supposition, that the jury reached the conclusion that Defendant was hiding something, to Plaintiffs' counsel's conduct during trial. There is absolutely no proof of this. Furthermore, if the jury arrived at the impression that there was something missing from the trial or hidden from them, it was by way of inferences that cannot be laid at the feet of Plaintiffs' counsel. To use an apt metaphorical idiom, there was an elephant in the room during the trial. There was an

obvious truth that went unaddressed. It is the fact that Cabot had previously been found, to certainty, to have contaminated Plaintiffs' water supplies by drilling activities on the Gesford pad, necessitating, among other things, the delivery of drinking water and offers of treatment systems, partial payment for which Cabot now illegitimately seeks to recover.

The intertwined nature of the administrative/regulatory and civil matters made avoiding certain excluded evidence exceedingly difficult for Plaintiffs. Cabot's own Security and Exchange Commission (SEC) filings clearly demonstrate the interconnectedness of the two matters. The two matters are so closely related that Cabot does not separately refer to this civil case, or its predecessor, under the litigation section of its annual 10K filings. In each of its mandatory 10K filings, between 2008 and 2015, over the six-plus year duration of this litigation, Cabot's executive management made absolutely no reference to its shareholders of the very existence and pendency of an ongoing federal civil litigation of *Fiorentino, et al.* or *Ely, et al.* proportions. Instead Cabot wraps all matters "Dimock", all matters "*Fiorentino*" and "*Ely*" under "administrative" *aka* the Environmental Section, where Cabot makes disclosures of annual issuance of serial violations and consent orders, including those involving the Gesford wells at issue in this case, and the hotly contested December 15, 2010 consent order,

all matters of public record.

Cabot's instant motion for judgment as a matter of law, new trial or remittitur, should be denied in its entirety. Taken as a whole, or individually, no matter discussed in Defendant's Brief demonstrates an inability on Cabot's part to receive a fair trial warranting a new trial under Rule 59 of the Federal Rules of Civil Procedure. This Court tightly managed and monitored the course of the trial, and closely controlled the activities of Plaintiffs' attorney. In no instance did Plaintiffs' attorney engage in behavior that violated Cabot's constitutional rights or visited actual prejudice upon the company.

Plaintiffs made their case. The jury, after hearing and seeing the evidence from both sides, found for Plaintiffs, apparently rejecting Defendants' version of the facts. As mentioned previously, immediately following delivery of the verdict, this Court had the opportunity to meet privately with the individual jurors. Plaintiffs are confident that during that meeting, the Court satisfied itself that the jurors were a serious and reasonable group who arrived at their unanimous opinion after engaging in a methodical and deliberative evaluation of the evidence.

Plaintiffs strenuously deny the allegations contained in Defendant's introductory remarks of its instant motion, as well as each allegation

contained in all subsections thereunder. Specifically, Plaintiffs' deny that their counsel intentionally engaged in any episode of misconduct that contributed to or caused an unfair trial result; deny that there was an unfair trial result; deny that they failed to sufficiently prove the elements of private nuisance; deny that the jury verdict was excessive; deny that the Huberts' claims should be excluded; deny that the Ely and Hubert children's claims should be excluded; deny that the testimony of neighbors should have been excluded; deny that the jury verdict should be set aside and judgment rendered as a matter of law; deny that the jury verdict should be vacated and a new trial ordered; deny that the jury verdict should be in any way reduced or "molded."

## **II. FACTUAL BACKGROUND**

The Parties have been through a trial on this matter preceded by a lengthy factual and procedural history. For general background purposes, Plaintiffs Nolen Scott Ely, Monica Marta-Ely, Jared Ely, Jessica Ely, Justin Ely, Ray Hubert, Victoria Hubert, and Hope Hubert (the "Plaintiffs") reside on 8.28 acres of land located in Dimock Township, Susquehanna County, Pennsylvania, which land has been in the Nolen Scott Ely family since the 1800's (the "Ely land"). The Huberts have resided on a section of the Ely land for decades. Plaintiff Victoria Hubert is the stepdaughter of Nolen

Scott Ely's deceased father. The Ely land sits atop one of the earth's most abundant natural gas reserves.

Defendant Cabot is an independent oil and gas company engaged in "the development, exploitation and exploration of oil and gas properties."<sup>5</sup> Over the years, Cabot has expanded its operations in Susquehanna County in order to extract and profit from the natural gas embedded in the shale plays situated at various depths below the land surface, including below the surface of the Ely land. Cabot drilled its first gas well in Susquehanna County in 2006, its second gas well in 2007, and at least 23 additional gas wells in 2008. As of, on or about September 25, 2008, there were a total of 11 Cabot gas wells located within a radius of 2500 feet of Plaintiffs' drinking water supplies, nine of which were within 1000 feet of Plaintiffs' water supplies.

The instant matter concerns multiple claims brought by Plaintiffs against the named Defendant gas company in connection with contamination of their drinking water as a result of its operations. Private nuisance is the only claim that was not dismissed either before or during trial. Defendant denied liability arguing, *inter alia*, that it was not negligent in its operations, that the condition of Plaintiffs' water was a naturally-occurring and pre-

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<sup>5</sup> Quoting Cabot Oil & Gas Corporation in its 10-K for fiscal year ending December 31, 2015 at page 7.

existing phenomenon, and that Plaintiffs failed to mitigate their damages.

After 11 days of trial testimony, the jury found Cabot liable, and awarded Plaintiffs \$4,240,000 in compensatory damages. The jury deliberated for over 12 hours before rendering its verdict. Previous to commencing their deliberation, the jury had received instructions on the law as to the tort of private nuisance, negligent conduct and damages. The Court invited and obtained the Parties' full participation and comment as to the instructions on the law prior to reading them to the jury.

Cabot filed its written motion pursuant to Rule 50 and Rule 59 of the Federal Rules of Civil Procedure on April 7, 2016 (Doc. 756), and its supporting brief on April 25, 2016 (Doc. 765). In separate motions filed on May 4, 2016, Defendant requested an order of the Court granting a stay of execution on the judgment by the Plaintiffs (Docs. 776); and an order granting a *supersedeas* bond (Doc. 778). On May 8, 2016, the Court granted both motions, on consent. (Docs. 779 and 780).

Defendant has requested oral argument of the instant motion. Plaintiffs object, and propose that the more appropriate and historically consistent approach would be for this Court to decide the motion based on the complete certified trial record, and full submissions of both sides. Plaintiffs request that this Court deny Cabot's request for argument of the

motion.

Plaintiffs will cite relevant additional facts as appropriate in the argument section below.

### **III. ANSWERS TO QUESTIONS PRESENTED**

**Question #1:** Should the Court enter judgment as a matter of law in favor of Cabot on Plaintiffs' nuisance claim?

**Answer:** Respectfully, No.

**Question #2:** Conditionally, or in the alternative, should the Court grant a new trial on Plaintiffs' nuisance claim?

**Answer:** Respectfully, No.

**Question #3:** In the alternative, should the Court enter a remittitur of the damages and/or mold the verdict?

**Answer:** Respectfully, No.

### **IV. ARGUMENT**

#### **A. The Court Should Uphold Unanimous Verdict of Eight-Member Jury in Favor of Plaintiffs, Deny Cabot's Motion as Matter of Law**

Judgment notwithstanding the verdict is to be granted "sparingly." *Todd v. Luzerne County Children, MDPA*, March 8, 2011 (quoting *Walter v. Holiday Inns, Inc.*, 985 F.2d 1232, 1238 (3d Cir. 1993)). Such relief will be granted "only if, viewing the evidence in the light most favorable to the

nonmovant and giving [the nonmovant] the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability.” *Lightning Lube v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir.1993). Courts have determined legal evidentiary sufficiency to be “the minimum quantum of evidence from which a jury might reasonably afford relief.” *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 691-92 (3d Cir. 1993), abrogation on other grounds recognized by *United Artists Theatre Circuit, Inc. v. Twp. of Warrington, Pa.*, 316 F.3d 392 (3d Cir. 2003) (citations omitted).

The moving party “must show that the jury's findings, presumed or express, are not supported by substantial evidence or, if they were, that the legal conclusion(s) implied [by] the jury's verdict cannot in law be supported by those findings.”<sup>6</sup> *Grape Technology Group, Inc. v. Jingle Networks*, 841 F. Supp. 2d 845 (D. Del. 2012), *Pannu v. Iolab Corp.*, 155 F.3d 1344, 1348 (Fed.Cir.1998) (quoting *Perkin-Elmer Corp. v. Computervision Corp.*, 732 F.2d 888, 893 (Fed. Cir.1984)).

The “advantage of every fair and reasonable inference” shall be given

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<sup>6</sup> “Substantial evidence” has been defined as “such **relevant evidence from the record taken as a whole** as might be accepted by a reasonable mind as adequate to support the finding under review.” (emphasis added) *Elmer Corp. v. Computervision Corp.*, 732 F.2d 893 - Court of Appeals, Federal Circuit (1984).

by a court in determining the evidentiary sufficiency from which a jury reasonably could find liability.” *Grape Technology v. Jingle Networks, supra; Lightning Lube, Inc. v. Witco Corp., supra* (citing *Wittekamp v. Gulf Western Inc.*, 991 F.2d 1137, 1141 (3d Cir.1993)). A court may not “substitute its version of the facts for the jury's version.” *Lightning Lube*, 4 F.3d at 1166 (citing *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 190 (3d Cir.1992)). Any conflicts of evidence must be decided in favor of the non-movant. *Williamson v. Consol. Rail Corp.*, 926 F.2d 1344, 1348 (3d Cir.1991); *Perkin-Elmer Corp.*, 732 F.2d at 893. See also *Syngenta Seeds, Inc. v. Monsanto Co.*, 409 F.Supp.2d 536, 539 (D.Del.2005).

“[I]n entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record.” *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000). The issue of liability becomes one of law for the court only where “the relevant facts are not in dispute and the remoteness of the causal connection between defendant's negligence and plaintiff's injury clearly appears from the evidence.” *Listino v. Union Paving Company*, 386 Pa. 32, 124 A.2d 83, 86 (1956); *Bohner v. Eastern Express, Inc.*, 405 Pa. 463 (1961). The evidence in the instant case could not possibly warrant the application of this rule.

Pennsylvania law has adopted Section 822 of Restatement (Second) of Torts for determining the existence of a private nuisance. See *Waschak v. Moffat*, 379 Pa. 441, 109 A.2d 310 (1954); *Kembel v. Schlengel*, 329 Pa. Super. 159, 166, 478 A.2d 11, 15 (1984). Section 822 defines a private nuisance as “conduct [that] is a legal cause of an invasion of another’s interest in the private use and enjoyment of land.” The jury instructions were agreed upon in advance between the Parties and the Court, and were properly in accordance with Pennsylvania law. Apparently, the jury made its determination based on the evidence developed during trial and application of the law according to the Court’s instructions governing private nuisance. Although Cabot claimed in its instant motion that “[t]he Court erred in failing to adopt Cabot’s proposed supplemental jury instruction regarding the fact that property damage is not a compensable element of damages under nuisance law,” Defendant does not appear to have developed that argument in its brief.

**1. Plaintiffs proved negligent conduct sufficient to support private nuisance claim**

It is not necessary, under Pennsylvania law, that “every fact or circumstance point unerringly to liability.” It is adequate that there be “sufficient facts for the jury to say reasonably that the preponderance favors liability.” The facts are for the jury in any case whether based upon direct or

circumstantial evidence where a reasonable conclusion can be arrived at which would place liability on the defendant. The right of a litigant to have the jury pass upon the facts is not to be foreclosed just because the judge believes that a reasonable man might properly find either way. A substantial part of the right to trial by jury is taken away when judges withdraw close cases from the jury." *Smith v. Bell Telephone Company of Pennsylvania*, 397 Pa. 134, 138-139, 153 A.2d 477, 480 (1959).

Contrary to the Cabot's assertions, Plaintiffs provided sufficient evidence, directly, circumstantially and inferentially, during trial to allow a jury of eight members to unanimously conclude that Cabot negligently constructed and operated the Gesford wells. Prior to opening statements and deliberation, the Court accurately instructed the jury on the third element of nuisance, negligent conduct, using language to which all Parties had previously agreed. N.T. 2/23 21:23-22:11, 3/9:3-16.

**a. Cabot's law distinguishable**

While Cabot asserts there is a "well-established" record of district courts granting a motion for judgment as a matter of law where a plaintiff has not presented sufficient evidence to support a *negligence theory*, it cites to a single case involving maritime law where the court found: "It is clear that the focus of the trial evidence was on plaintiffs' *strict liability* claims."

Plaintiffs in this case provided far more than the “scant evidence” against which the Third Circuit decided the District Court had erred in delivering a negligence question to the jury. *Calhoun v. Yamaha Motor Corp., U.S.A.*, 350 F.3d 316, 324-25 (3<sup>rd</sup> Cir. 2003). The District Court explained that, while the negligence claims were “there in the complaint,” they “ha[d] not ... survived in any real sense” during the course of the trial. As such, the District Court held that the negligence claims “ha[d] not been made out” and could not be submitted to the jury. This is hardly the circumstance in the instant case where the Ely and Hubert Plaintiffs’ negligence claims had “been made out,” had “survived in [a] real sense,” and were “submitted to the jury.”

**b. Negligence may be established by circumstantial evidence**

Negligence may be established by circumstantial evidence. *Phelps v. Paul L. Britton, Inc.*, 412 Pa. 55, 58, 192 A.2d 689, 691 (1963); C. Morris, Torts 166-167 (1953). See also *Smith v. Bell Telephone Co. of Pa.*, *supra*, 480 (discussion of requisite quantum of circumstantial evidence to support a verdict.) (*Reynolds v. Stambaugh*, No. 1889 MDA 2013, 2015 QL 6742933)

Restatement (Second) of Torts § 288C provides: “Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional

precautions." See also *id.* at comment a (“Where . . . [an] ordinance . . . is found to define a standard of conduct for the purposes of negligence actions, as stated in §§ 285 and 286, the standard defined is normally a minimum standard. . . . This . . . administrative minimum does not prevent a finding that a reasonable man would have taken additional precautions[.]”). Pennsylvania law is in accord with these precepts. *Berkebile v. Brantly Helicopter Corp.*, 281 A.2d 707, 710 (Pa. Super. 1971) (en banc) (holding “[c]ompliance with a law or administrative regulation relieves the actor of negligence *per se*, but it does not establish as a matter of law that due care was exercised.”); *McKenzie v. Cost Brothers, Inc. v. Dickerson Structural Concrete Corp.*, 409 A.2d 362 (Pa. 1979) (industry standards are not conclusive factors in determining negligence, but merely provide some evidence of the appropriate standard of care).

**c. Not a negligence *per se* case**

Citing *Berkebile v. Brantly Helicopter Corp.*, *supra*, p. 710, Cabot asserts that, “[g]iven that the gas venting to the atmosphere in either the Gesford 3S or the Gesford 3/9DD wells was permitted by PA DEP, longstanding Pennsylvania law holds that such compliance with regulations is evidence of an exercise of due care.” What Cabot omits in its reference to the court’s finding in *Berkebile*, is that the Superior Court held there that:

“[c]ompliance with a law or administrative regulation relieves the actor of *negligence per se*, but it does not establish as a matter of law that due care was exercised.” *Berkebile v. Brantly Helicopter Corp.*, *supra*, 710. See also, *Grand Trunk Ry. Co. v. Ives*, 144 U.S. 408 (1892); *Maize v. Atlantic Refining Co.* 352 Pa. 51, 41 A.2d 850 (1945); *Hubbard-Hall Chemical Co. v. Silverman*, 340 F.2d 402 (1<sup>st</sup> Cir. 1965). It is hypocritical to the extreme, and should not be countenanced by this Court, that Cabot be allowed to assert that its compliance with selected PA DEP administrative regulations demonstrates some evidence of due care when Plaintiffs were absolutely barred from asserting the converse during trial, namely that documented violations of PA DEP administrative regulations constitutes some evidence of negligence. Also, Plaintiffs trust that another point as to the legal finding in these cases will not be lost, and that is that implicitly in making its determination and referencing negligence per se, the courts were conceding that violation of administrative regulations in Pennsylvania is negligence per se.

**d. Testimony of Plaintiffs, witnesses supported negligence finding**

Contrary to Cabot’s assertions, Plaintiffs produced during trial sufficient direct and circumstantial evidence to allow a unanimous jury of eight members to conclude that it is more likely than not that there was a

causative connection between Cabot's operations and contamination of Plaintiffs' drinking water. Plaintiffs' highly educated and extremely experienced expert, Dr. Ingraffea, described to the jury, in an accessible manner, the myriad of technical defects he observed from the records as to Cabot's construction of the Gesford wells. Dr. Ingraffea also provided a context for the negligence: a rush to drill, in other words, as a result of Cabot's frantic pace of development, negligent acts ensued at the earlier wells, such as the Gesford 3S and 9DD gas wells that were constructed early in Cabot's learning curve. Dr. Ingraffea's observations on this issue corroborated testimony of Mr. Ely regarding the time demands associated with the tasks at hand and the work ethic he observed among the crew when he was working at drilling locations, including the Gesford 3 and 9 pad in 2008, as an employee of GasSearch Drilling Service, Inc. ("GDS"), Cabot's drilling company subsidiary.

**e. Ingraffea, rush to drill, defective well construction**

First, on the frantic pace of development, Dr. Ingraffea testified to rushed jobs and mistakes. Dr. Ingraffea testified:

Q. What did you review to determine -- what, if anything, did you review to determine the timing and the rate of developments of wells in -- in the area that the plaintiffs live?

A. I used the records -- public records of the -- the Pennsylvania Department of Environmental Protection. They are called spud

records. Spud is the term used by the oil and gas industry for the day that the drilling of the well begins, so those spud dates are publically available. And I have reviewed them and determined that in 2008 Cabot drilled 28 wells in Susquehanna County, and in 2009 they drilled 61 wells in Susquehanna County. And 2010 they drilled 60 wells in Susquehanna County all but a few of these are in Dimock Township. And I have a map which shows all those. If I can show that map, it would indicate all of the pads and wells that are in proximity to the Hubert and Ely residences. N.T. 2/29 43:23–44:12.

Q. Now, you're here to testify with respect to offer opinions to the jury with respect to negligence on Cabot's part; is that correct?

A. That is correct.

Q. And what -- what wells in particular have you investigated to the extent that you may comment and offer opinions as to negligence on Cabot's part as it affects in your opinion the Ely and Hubert water supplies?

A. The two wells that I am showing on this diagram, the Gesford 9DD well -- what is currently called the Gesford 9DD well and what is currently called the Gesford 3S well. N.T. 2/29 48:22–49:7.

Dr. Ingraffea, therefore, has asserted negligence on the part of Cabot.

Next, he testified as to the scientific and experiential basis for the negligence, loss of wellbore integrity, which he defined:

Q. What ... [is] well bore integrity?

A. Well bore integrity is a phrase used by the oil and gas industry to describe whether a well -- in this case a gas well has been designed, constructed and operated in a manner of integrity, meaning that it does not leak any -- in this case gas -- outside of the well into the surrounding media. So flip it

around, it is said in the industry that a well lacks integrity if during the process of designing it, drilling it, operating it, the basic elements of the well, the hole in the ground which you drill, the casing, which is a steel pipe which is inserted into the well at various depths and various diameters and the cementing that is done between the various layers of casing and between the casing and the surrounding rock to act as a gasket such that the well does not leak into the surrounding medium, has somehow failed. So a well has integrity when the gas that's being sought is coming out of the well only through the intended pipe. If the gas is coming out of the well and into drinking water underground or into the atmosphere outside of that production pipe, then the well has lacked -- it lacks integrity. N.T. 2/29 59:10–60:5.

Having described well bore integrity, Dr. Ingraffea demonstrated and described the crucial importance of adequate cementing in order to maintain wellbore integrity:

Q. Then was there a part two to your demonstration, Doctor?

A. Yes, there's a part two.

Q. Okay. And that relates to again the process of creating, constructing an -- a well with integrity, a well with bore integrity, correct?

A. Yes.

Q. And is that step the cementing step -- sealing, gasketing those annuli?

A. Yes.

Q. Okay. And would you like to create a demonstration for the jury?

A. Yes, I would. Recognizing I don't have real cement, I have gap filler, great stuff, the expanding kind. So you have to imagine this is cement, and I have got two other pieces of casing. I'm not going to try to cement those big pieces. So imagine that this is a layer of casing, whether it's the surface casing or the conductor casing or whatever, and here's an inner one. So when casing is first installed, there's an annulus, a space. And if we are not careful, the operator is not careful, whatever is down the hole can come up through the surface and get into either the atmosphere or into ground water through that space, so we are now going to gasket it. N.T. 2/29 71:11-72:7.

**f. Ingraffea, faulty cementing**

Having demonstrated and described the crucial importance of adequate cementing in order to maintain wellbore integrity, Dr. Ingraffea makes the connection between loss of wellbore integrity and the many negligent actions that more likely than not led to such loss in the two gas wells in question:

Q. What, if anything, does this have to do with the issues at hand in this particular case and with the particular wells about which you are testifying today?

A. It has everything to do with the particular gas wells in question because what I just described in a very simple model way appears to be straightforward except it's all being done underground where you can't see it happening. And Mother Nature provides surprises. You can't ever know -- no one can ever know exactly what one is going to drill through in terms of the rock type, the rock quality. One can never know exactly when during the drilling process one might encounter fresh water -- what we call fresh water shows which will try to invade the hole that is being drilled. One can never know until one starts to drill when you might encounter what is called shallow gas. It is high-pressure gas that is above the level that

you were drilling to. You run into a shallow pocket or layer of gas, high pressure, high-volume. And what can happen when these things happen and other things is that the intended process that I just showed you fails.

You can't get the casing down where you want it to. The drill bit gets stuck while it's drilling. The hole collapses while you're drilling it. The cement doesn't get where it's supposed to go. The cement locks up because now it's a liquid obviously and hardens and becomes a solid after some hours. It locks up. It becomes a solid too soon. The cement after it starts to solidify naturally wants to shrink. That's the nature of cement. Cement is a brittle material after it becomes hardened, so it can crack.

The cement is supposed to bond to the steel casing and bond to the rock walls. It doesn't do any good to have all the cement in there if there's a gap. No matter how small a gap might be, if there's any kind of gap between the cement and the casing or between the cement and the rock, then molecules of methane, which are extremely small -- methane can flow along the outside of the cement. The cement can also be invaded.

It's called channelization. If you're injecting liquid cement, as I just did, while it's still liquid, if high-pressure gas comes in contact with that cement, high-pressure gas, in this case methane, naturally wants to rise. Gas is lighter than water, lighter than air. It wants to go up. High-pressure gas can invade the still liquid cement and create channels all the way to the surface. So what I am describing are some, certainly not all of the problems that the industry knows, has known for a hundred years can and do occur during the process of constructing a well. That's why there are literally a dozen conferences every year somewhere around the world on well bore integrity. I have attended two of them in the last two years. At those conferences engineers from the oil and gas industry come and talk about the problems they have seen wherever they are drilling and designing wells and constructing wells and operating the wells such that they maintain well bore integrity and describe the problems they encounter when they don't. They propose methods of redesign or repair to try to mitigate those problems

or reduce the risk of those problems occurring. N.T. 2/29 74:14–76:18.

Q. So with respect to your having attended conferences and other activities that you may have engaged in with respect to this staying up to date should I say with respect to well bore -- the well bore integrity issue in the industry, what, if any, information do you have with respect to any type of incidents of these failures in well bore integrity occurring due to some of the issues you have just described?

A. With respect to the two wells that I am talking about, the Gesford 9 D. D. and Gesford 3 S., I have extensive information coming from Cabot. So every morning there's what is called a morning report on that well pad during the whole process of developing those two wells. There's what is called the company man, Cabot employee whose job it is among many every morning to write a diary entry. That's the way I refer to it. It's a morning report, summarize everything that happened in the previous 24 hours on that pad, the good, the bad and the ugly, describe it in sufficient detail that you're literally creating what is called a well history.

It's literally called a well history. That well history is assembled from all these morning reports and maintained by Cabot and all exploration and production companies so they can figure out what happened, when it happened, what materials they used, what subcontractors they used, how much money they spent every day, what problems they have encountered, how they have addressed those problems. And this goes on a day-to-day basis.

So I was provided with the complete well histories of both of these wells. And so in reading those well histories, I can construct on paper and in my mind what happened so I know the problems they encountered. I know what they did to try to fix the problems, and I know what the effect of those attempts are. N.T. 2/29 76:19–97:23.

**g. Ingraffea, well laws describe Cabot videotape**

Dr. Ingraffea goes on to testify that he observed videotapes that demonstrated evidence of a loss of wellbore integrity in both Cabot wells. During a lengthy conference at sidebar pertaining to Dr. Ingraffea's testimony about the videos, Mr. Dillard and Ms. Barrette intensely filibustered, and unfortunately convincing this Court to agree to unknowingly provide to the jury, causing the jury to be misled on the issue of the existence of that videos produced by Cabot:

MR. DILLARD: They were not taken by Cabot. N.T. 2/29 82:24.

MR. DILLARD: That's not a Cabot video. N.T. 2/29 85:18.

MR. DILLARD: [T]here's no evidence those videos were created by Cabot or are from Cabot itself. No indications of that." N.T. 2/29 88:17-19.

The fact that Cabot *did* in fact create the video is revealed later in Dr. Ingraffea's testimony as he continued to read into the record from the daily well history for the Gesford 3 and Gesford 9 gas wells, produced by Cabot personal, or its subsidiary company employees:

A. So this is on May 28th, 2009. *I'm reading directly from the well record*, arrived on location with video camera and Susquehanna Resources vacuum truck, the well cellar had approximately five feet of fresh water and some gas venting from the cellar floor. *Videotaped the cellar as truck vacuumed out the water demonstrating only a small amount of gas was actually being vented.* One cellar was dry. It became clear the majority of the gas was coming up hole outside the 20 inch conductor and a smaller amount was venting between the 20 inch conductor and the

13 and three eighths surface casing, no additional vents were found following an exhaustive search of location. Scott Ely's property below the location was also examined. Some additional wet areas were found, but there was no evidence of any venting gas. ***The videotape was dropped off at Cabot's P. A. production office and will be overnighted to the Charleston office.*** (emphasis added) N.T. 2/29 133:2-17.

Q. Dr. Ingraffea, you have drawn a schematic there. We have a cellar of -- is that -- let's -- is that -- can that be a representative -- the cellar of any particular well that's at issue in this case?

A. Yes, both the Gesford 3 S. and Gesford 9 D. D. were constructed with cellars.

Q. You have described there's that cellar and, you know, as to the season or weather, there could be accumulation of water in the cellar, correct?

A. Yes.

Q. Okay. And as a result of -- so you have testified that you were privy to or did in the preparation of your opinions here and report in this case you did review some videos; is that correct?

A. Yes, I did.

Q. And what videos were those? And I am not asking you -- we have established that they are not from -- they are not Cabot generated necessarily. But you reviewed some videos that had some value to you in forming your opinions; is that correct?

A. That's correct.

Q. And what is it about any video you looked at that contributed to your forming your opinions?

A. What I observed in the videos that I was provided is what is referred to in the industry as bubbling in the cellar, and the

reason it gets that name is because you can imagine this is full of water. If gas is leaking outside of the production casing into the cellar, it's going to create bubbles in the water.

And so when I see videos with water that looks like it's boiling, rapidly boiling, clearly there's high-pressure gas that's escaping through one or more of those annuli that I demonstrated with the cement. Gas must be coming up outside of the well and getting all of the way to the surface and, therefore, creating bubbles in the cellar.

Q. Okay. Thank you. That was something you had observed with respect to the -- the videographic capturing of this event of both of the wells; is that correct?

A. That's correct, both of the wells. N.T. 2/29 89:3-90:15.

And later, there is the following testimony:

Q. Earlier you described that there were notations that videotapes were taken of at least one of the wells; is that correct?

A. That is correct.

Q. That's by Cabot; is that correct?

A. That's what the notation says. N.T. 2/29 175:3-8

**h. Ingraffea, continuing gas leaking outside casing**

Next, Dr. Ingraffea testified on the negligence of Cabot in allowing the **9DD well** to continue to leak outside its conductor casing all the way to the surface over a long period of time even after its initial plugging and abandonment:

Q. When you mentioned before that the original 3 became 9 D. 9 D. was abandoned, what is -- in your experience is and according to these -- this well history is the procedure for

abandonment of a well? I mean, they just move the rig and that's it or something else?

A. Plugging is a regulated process.

Q. So abandonment equals plugging?

A. No. In the State of Pennsylvania if you're going to abandon a well, it has to be plugged in modern terms for modern regulations. And so Cabot did plug that well by doing what is normally done in a plugging operation which is to pour cement down the well. So what they have here was a well that had a conductor casing only and it had an open hole for a few hundred feet and had a collapsed hole, so they filled what was left of that well with cement plugging it.

Q. And did the cement go all the way up and above the cellar or up into the cellar?

A. No.

Q. So how complete was the cementing of the well?

A. Well, the interior cementing of the well was as complete as one would expect by pouring cement a few hundred feet down a hole that's roughly 12 inches in diameter. But that did nothing to hinder or mitigate the fact that the well was already leaking gas from outside of the conductor casing. There was no attempt to -- made I can find in the record that Gesford (sic) tried to repair a well they knew to be leaking.

Q. It's your testimony that gas was leaking outside -- around and outside of the outer casing to surface from 2008 until they went back in 2009?

A. And later.

Q. Later, okay. So -- and this again is your determination based on documentation; is that correct?

A. Yes, I am reporting what I have read in the well history.  
N.T. 2/29 102:8–103:16.

**i. Ingraffea, negligence in failing to control gas escape**

Later in his testimony concerning the “3[A]/9DD well and negligence by Cabot in failing to control the methane escape and migration from this well, Dr. Ingraffea testifies:

Q. Okay. So prior to leaving 3 A. for a while now, what did Cabot -- what did the records show Cabot did, if anything, to contain the methane that was going up the outside of the –

A. I detected nothing in the record to indicate that there was any effort made at this point to stop the methane migration from outside the well.

Q. Again, the -- the methane was migrating or passed through these shows?

A. Same –

Q. Water shows?

A. Methane was seen to be getting to the surface bubbling in the cellar outside of the outer most conductor casing, which means they have to pass through those levels of water.

Q. Are there -- what indications, if any, are there in the -- the well history for 3 A. that indicates that there was any effort to control the gas?

A. There is no indication at this point in time up until the time we are talking about. These wells were still under construction. They have not yet gone into production. They have not been plugged and abandoned. This is mid -- early to mid 2009 they were still under construction. N.T. 2/29 150:25 – 151:20.

**j. Ingraffea, negligent “squeeze” job**

And again, later Dr. Ingraffea testifies concerning the **3[A]/9DD well** and negligence by Cabot in not stopping methane migration from this well:

Q. So with respect -- understanding you do have a lot of experience in the petroleum industry, but what -- with respect to your subspecialty of rock mechanics and fracture mechanics, and with respect to your -- you know, the research you have done, the readings you have done, the observations you have made with the documents that you have been provided and relied upon, what, if any, opinion do you have with respect to the reason why this well Gesford 3 D. D. was abandoned?

MR. DILLARD: That's the same question repackaged and the same objection.

THE COURT: Do you have an opinion, Dr. Ingraffea, regarding the -- the status of the well in terms of its well bore integrity at the time that production ceased at the well?

THE WITNESS: Yes, I do.

BY MS. LEWIS:

Q. What is that opinion?

A. It's not my opinion. It's an observation of the record that the well was leaking outside of its -- of its 13 and three eighths diameter conductor casing and had been leaking for quite a long time, and the leak had not been stopped. And so the well lacked well bore integrity, and the gas coming up to the surface outside of the conductor casing for reasons I have already explained had to have been passing through water shows. N.T. 2/29 173:25–174:22.

Next, Dr. Ingraffea testified on problems of negligence on the **3S well**, when a squeeze job was attempted but failed:

Q. Okay. And what other observations did you make from the well history with respect to the drilling of this particular well?

A. Okay. In early November they had reached the 280 foot level.

Q. November of what 2008?

A. 2008. So they drilled down to the 280 foot level. They tried to install a surface casing. That would be this level. And after they installed that surface casing, the idea was to cement the annulus -- pointing to it -- between the surface casing and the conductor casing. That would be this gray stripe right here.

Q. Is that strictly routine?

A. It is strictly routine, and it's supposed to be strictly routine, but it wasn't routine in this case.

Q. Okay.

A. As I demonstrated when I used the foam, the idea is you pump cement down here and it's supposed to return up here so you see it at the surface because that's a signal that the cement filled that annulus.

Q. Cement as you go type thing.

A. Well, yeah, each layer of casing carries with it its own cement job. But in this case the surface casing was installed but no cement returned to the surface. I am quoting from the well history. So the cement didn't get back to the surface which is a signal there's a problem.

Q. What do you mean there's a problem?

A. Could be any number of things. The cement doesn't return to the surface, that means it could have -- using industry terminology -- remember the pumping this cement down here, and it's supposed to go here. But that means it has to travel

through about 250 feet of rock. An annulus is only about an inch and a half wide. The cement probably -- using terminology -- instead of going up, it leaked off into the formation -- I'm sorry -- using jargon the formation. The formation is the layers of rock that here so there are cracks and voids and 5 holes. Instead of the cement continuing up, it took a turn and probably went into the formation. That's called loss of formation, loss of circulation. That's a problem.

Q. Why?

A. Because you are relying on that cement to be a gasket.

Q. A seal?

A. A seal. You're hoping that cement is never going to allow any gasses to escape up that annulus, but now there's no cement in part of that annulus.

Q. So was it just soil and rock that was drilled through in this first phase of 3S?

A. Well, certainly in the upper region it is what's called unconsolidated soil or rock. It's also called glacial till.

By the time you're at this level, you would be in what you and I would call solid rock, siltstone and shale, which are in this region of Dimock, Pennsylvania. Solid rock isn't necessarily solid rock. It can have voids, cracks, joints, faults.

Q. And what next did you detect with respect to the construction of this well?

A. They tried to repair that faulty cement job by doing what is called a squeeze job, squeeze as in squeeze. This is commonly done when an operator detects that a cement job has failed, the original cement job has not been done correctly. So they tried to correct it. So a squeeze job in this case would have been -- they would have dropped a device down the hole to about this level, and they would have shot perforations, holes through the casing.

Q. How was that done?

A. With a perforating gun.

Q. Okay.

A. Now they that have holes in the steel casing, they would begin to inject cement hoping the cement would go up through the holes in the casing and fill the void that had not been filled on the original cement job. That's basically what a squeeze job is supposed to do. It's supposed to make up for previous problems in the cement job.

Q. At this point in the well records, you're at what depth?

A. About 280 feet.

Q. Okay. Did this remedial effort work?

A. In my opinion, no.

Q. And how did you reach your opinion?

A. Because later in the life of the well, gas was seen to be propagating out of that annulus at the surface.

Q. Propagating means?

A. Emanating, exuding, emitting, bubbling. N.T. 2/29 123:19 – 126:25.

**k. Gas escape from three annuli**

Next, still on the 3S well, that gas was escaping through three annuli according to Dr. Ingraffea:

Q. For accuracy do you know for a fact that the gas was emanating through any particular annuli?

A. I know from reading of the records and as shown in this diagram the gas was seen at the surface from three different annuli.

Q. And can you point to the particular recordation that demonstrated that to you? Do you have the ability to find in the record that -- that particular entry?

A. Yes.

Q. Can you --

A. All three of those entries.

Q. Can you point into the record -- point within the well history where it is stated that gas is escaping through three annuli?

A. That's at various locations in the record, and in my summary I have two of them distinctly here that I can quickly see. I will read those.

Q. Yes. Please read them into the record.

A. On or about November 14th, 2008, after the well had been drilled to this level, 1673 feet, there was encountered a high volume, high pressure gas show. That's what this red arrow is supposed to show. So they were drilling. As they passed about the 1500 foot level at the surface, a large volume of gas became to come up out of the well uncontrollably. That's called a kick.

Q. A kick?

A. A kick. So that's bad. If you lose control of the well, can have what is called a blow out. They didn't have a blow out, but they had a very serious kick.

Q. What is a blow out? Doesn't sound good.

A. Blow out is a complete loss of control of the well allowing emission of whatever is down here to get into the atmosphere uncontrollably. A blow out did not happen here, but a very serious kick happened when they hit this high-pressure gas. The implication of that for the integrity of this well is the gas that they hit was at about 1500 feet. They only then had about 170 feet between where the gas was coming in and the bottom of this casing. So when they cemented this casing, that's this layer of cement right here that goes all the way from the 1670 feet level all the way up to the surface, you had high-pressure gas entering the location where the cement was being injected.

I described earlier this morning a process or phenomenon, a problem known as channeling. So you have liquid cement coming down here turning this corner and trying to go all the way back up the surface but it's encountering literally a jet of very high-pressure gas. So you have high-pressure gas hitting cement. The gas wins. So the gas can just propagate through the liquid cement. And I am quoting here, cement pumped into the seven inch by nine and five eighths inch annulus but quote, cement hydrostatic did not kill the zone at 1500 feet unquote. What that means is the pressure of the cement itself liquid still was not sufficient to overcome the pressure of the gas entering at this point, so the gas was seen coming out of the surface.

Q. Okay.

A. The other location that I have readily available, on May 28th, 2009 -- I am quoting -- majority of gas seen at the surface coming up hole outside of the 20 inch conductor, a much smaller amount was venting between the 20 inch conductor and the 13 and -- thirteen and three eighth inch surface casing. N.T. 2/29 127:1 – 129:12.

**I. Ingraffea, departure from standard of care**

Finally, regarding departures from standard of care, Dr. Ingraffea testifies:

BY MS. LEWIS:

Q. What, Doctor, is your opinion, if any, with respect to deviation by Cabot at any point from the standard of care in drilling -- drilling these two wells in question here and their efforts to exploit gas?

A. With reasonable scientific certainty it is my expert opinion that there were a number of departures from a reasonable level of care in Cabot developing these two wells.

Q. Can you enumerate those opinions or those departures?

A. Yes, I can.

Q. Thank you.

A. A standard of care in this location at this time in Dimock in 2008, 2009 would require that the developer be extremely diligent in drilling casing and cementing their wells in such a way that they did not leak methane into an underground source of drinking water so the principle –

MR. DILLARD: Your Honor, he does this over and over again.

THE COURT: What I am going to do is just ask the jury to disregard the last portion of that which goes to hydrology, a field where Dr. Ingraffea hasn't been certified as an expert. You heard testimony from a hydrologist. But go ahead, Doctor. Moving on, were there other areas where you determined deviation from the standard of care generally --

THE WITNESS: Standard of care generally accepted in the industry in drilling a gas well, the gas well does not lose its drill bore integrity. These wells lost their drill bore integrity. Therefore, they are both a departure from the standard of care accepted by the industry.

BY MS. LEWIS:

Q. And in closing -- you know, in winding down now, what, if any -- if you wish to -- can you articulate are these -- you know, specific deviations? Specifically what did Cabot do wrong?

A. They cased and cemented both these wells in a way that allowed a loss of well bore integrity at various times and at various locations on both wells and not do proper standard of care in attempting to repair the wells so that they would be restored with well bore integrity. N.T. 2/29 183:4–184:16.

And finally, during re-cross by Plaintiffs’ attorney, Dr. Ingraffea testifies:

QUESTION: What is your opinion, having responded to cross examination and sitting here today, what is your opinion, if any, with respect to the loss of integrity of any or all of the cementing?"

THE WITNESS: I state with reasonable engineering certainty that neither of these wells was operating when they were in production with well bore integrity, and that the now defunct, abandoned and plugged wells are still lacking well bore integrity. N.T. 3/1 101:21–102:4.

Other attempts to discredit and undermine the scientific opinions of Dr. Ingraffea are equally ineffective. For example, Cabot raises a “red herring” in asserting that Dr. Ingraffea failed to “review[] documents produced by Cabot that would be the *most contemporaneous* documents or that would contain the most detailed description of the facts upon which he allegedly relied. *See, e.g.*, N.T. 3/1 15:11-22 (did not review the Appalachia Morning Reports, which are “the *most contemporaneous* of the reports”).” *See* Doc. 765, fn. 13.

Contemporaneous to when? Is Cabot asserting that well records produced by Cabot are incorrect or contain omissions? Dr. Ingraffea, indeed all Parties' experts are making arguments in 2016 based on records made between 2008-2010. It does not matter if the documents were daily handwritten notes or more formally summarized records prepared at the completion of drilling, they are still six to eight years old. The Well Histories are typed transcriptions, prepared by Cabot, of the "Appalachian Morning Reports," handwritten notes created while over morning coffee, into an official corporate record. "Most detailed?" These well record transcriptions are "corporate confidential;" there would be no reason to exclude any element of a hand-written morning report from the official typed corporate record.

**m. Ingraffea, helical or "corkscrew" attempts to by-pass bore obstruction**

Further, Cabot is incorrect when counsel asserts that, "[f]or example, Ingraffea opined that the Gesford 3/9DD well was in the shape of a corkscrew (N.T. 2/29 146:19-148:13) but admitted that he did not review the records that showed the geological data sheets or Directional Survey Reports (N.T. 3/1 16:2-8, 36:23-39:25) for that well." Dr. Ingraffea did not "opine." He read from the Well History that one of the three sidetracking attempts on this well resulted in the down hole drilling motor (DHM) changing its

orientation [azimuth, the direction the drill bit is heading relative to North when looking down on the well from above] from 183.5 degrees to 193.3 degrees, to 201 degrees, to 202 degrees, to 275 degrees, to 295 degrees, to 327 degrees, in other words from almost due south to nearly due north, while drilling downwards from 221 feet to 475 feet. That is a portion of a “corkscrew” motion. Dr. Ingraffea did not have to review the “geological data sheets or Directional Survey Reports” to derive this information: it is in the official, corporate Well History of this well.

Additionally, Cabot distorts and dissembles the record in asserting that Dr. Ingraffea “testified to the existence of two water shows on each of the Gesford wells, even drawing them onto demonstrative exhibits after the Court directed that they be removed, only to admit that the documentation does not support such a claim. N.T. 3/1 18:10-19:15, 111:23-112:2.”

**n. Ingraffea, fresh water shows**

Dr. Ingraffea testified that there were at least two water shows on each of 9DD and 3S indicated in the Cabot documents on which he based his testimony. The Well History for 9DD states there were water shows at 100 and 350 feet. Furthermore, the expert report of Defendant’s expert witness, Dr. Hilbert, which Dr. Ingraffea reviewed and considered contains on page 31 for the 3S well:

**Freshwater shows [ft.]: 100, 200, 350.**<sup>35</sup>

<sup>35</sup> 100 and 200 ft. water shows from the geologic data, Cabot\_Oil\_0077840. 350 ft. water show from Wellbore sketch, CABOT\_OIL\_0018882.

Based on the foregoing, and the entirety of the testimony of Dr. Ingraffea's testimony, Plaintiffs respectfully propose that they have propounded legally sufficient evidence upon which a jury could unanimously find that Cabot was negligent in its drilling and/or completion of the Gesford wells. Accordingly, this Court should, respectfully, deny Defendant's application for an entry of judgement as a matter of law on this issue.

2. **Plaintiffs sufficiently proved causation to sustain private nuisance claim**

Where a plaintiff demonstrates that a defendant's negligent conduct was a "substantial factor" in bringing about plaintiff's harm, the causation element of private nuisance is sufficiently established. *Flickinger Estate v. Ritsky*, 305 A.2d 40 (Pa. 1973); *Whitner v. Lojeski*, 437 Pa. 448, 263 A.2d 889 (1970) (plurality opinion); *Majors v. Brodhead Hotel*, 416 Pa. 265, 205 A.2d 873 (1965); *Diakolios v. Sears, Roebuck & Co.*, 387 Pa. 184, 127 A.2d 603 (1956); *Simon v. Hudson Coal Co.*, 350 Pa. 82, 38 A.2d 259 (1944); *Frangis v. Duquesne Light Co.*, 232 Pa.Super., 420, 335 A.2d 796 (1975).

The question of determining causation is to be removed from the jury's consideration only where it is clear that reasonable minds could not differ on the issue. *Topelski v. Universal South Side Autos, Inc.*, 407 Pa. 339, 180 A.2d 414 (1962); Restatement, § 434; W. Prosser, *Law of Torts*, § 45 (4th ed. 1971); F. Harper and F. James, *The Law of Torts*, Vol. 2, § 20.2 (1956). Furthermore, the right of a plaintiff to have the issue of causation submitted to the jury is not automatically foreclosed by the fact that a plaintiff's case rests largely on circumstantial evidence. *Smith v. Bell Telephone Company of Pennsylvania, supra*; *Gash v. Lautzenheizer*, 405 Pa. 312 (1961).

**a. Testimony of non-experts independently relevant**

It is fundamental that elements of private nuisance, including causation, may be established through a combination of proofs, including expert and lay testimony. Indeed, testimony by witnesses other than an expert may be “independently relevant to the issue of causation, since negligence may be established by circumstantial evidence.” *Hussey v. May Department Stores, Inc.*, 238 Pa.Super. 431, 437, 357 A.2d 635, 638 (1976) (citing *Phelps v. Paul L. Britton, Inc., supra*, p. 691 (1963)); C. Morris, *Torts* 166-167 (1953); *Smith v. Bell Telephone Co. of Pa., supra*.

Cabot in its brief cites *Maresca* when it asserts that Plaintiffs' expert hydrogeology witness, Paul Rubin, failed to establish causation to a reasonable degree of scientific certainty. *Maresca v. Mancall*, Civ. A. No. 01-5355, 2004 WL 1058148, at \*3 (E.D. Pa. May 11, 2004) (quoting *Kravinsky v. Glover*, 396 A.2d 1349, 1356 (Pa. Super. Ct. 1979)). However, the court in *Kravinsky* also found that the Pennsylvania Supreme Court had decided that "the qualification of an expert witness is a matter which is within the discretion of the trial court . . ." See *Kravinsky v. Glover*, *id.* at 20. *Abbott v. Onopiuk*, 437 Pa. 412, 421, 263 A.2d 881, 885 (1970). *Duffy v. National Janitorial Services, Inc.*, 429 Pa. 334, 337, 240 A.2d 527, 529 (1968). And the *Kravinsky* court went on to hold that "[i]f a witness has any reasonable pretension to specialized knowledge on the subject under investigation he or she is qualified as an expert." *Kravinsky v. Glover*, *supra*, p. 20. *Ragan v. Steen*, 229 Pa.Super. 515, 331 A.2d 724 (1974). See *Steele v. Shepperd*, 411 Pa. 481, 483, 192 A.2d 397, 398 (1963).

**b. Expert testimony admissible when taken in entirety, reasonable certainty**

However, to make an admissible statement on causation, an expert need not testify with absolute certainty or rule out all possible causes of a condition. *Bialek v. Pittsburgh Brewing Company*, 430 Pa. 176, 242 A.2d 231 (1968); *Ritson v. Don Allen Chevrolet*, 233 Pa.Super. 112, 336 A.2d 359

(1975). Expert testimony is admissible when, taken in its entirety, it expresses reasonable certainty that the accident was a substantial factor in bringing about the injury. *Kravinsky v. Glover, supra*, p. 22. *Hussey v. May Department Stores, Inc., supra*. There is no requirement that an expert witness expressly conform the language of his opinion to a particular legal standard. See *In re Jones*, 432 Pa. 44, 246 A.2d 356 (1968) (medical testimony need not conform to precise statutory definitions). That an expert may, at some point during his testimony, qualify his assertion does not necessarily render his opinion inadmissibly speculative. *Woods v. Pleasant Hills Motor Company*, 454 Pa. 224, 309 A.2d 698 (1973); *Commonwealth v. Joseph*, 451 Pa. 440, 304 A.2d 163 (1973). The mere fact that an expert witness, at some point during his testimony, “qualifies his assertion does not necessarily render his opinion inadmissibly speculative.” *Woods v. Pleasant Hills Motor Company, supra; Commonwealth v. Joseph, supra*.

**c. Legitimate inference has evidentiary value**

Where based on an adequate factual foundation, an expert witness’ opinion is neither speculative nor conjectural, but a legitimate inference and as such has evidentiary value in determining disputed questions of fact. It is the intrinsic quality of the conclusion that matters, and not the label or characterization. Words mean what they manifest. Their meaning may vary.

As Justice Oliver Wendell Holmes once stated: “A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used [citations omitted].” *Marrazzo v. Scranton Nehi Bottling Co.*, 422 Pa. 518, 530-531, 223 A.2d 17, 23-24 (1966). “The word ‘speculative’ has a varied meaning. Sometimes it is used as meaning a conclusion reached by the faculty or process of intellectual examination, search, and reasoning.” *Marrazzo v. Scranton Nehi Bottling Co., id.*

Where an expert witness is “unable to give a positive opinion on the cause of (an accident)[,] [t]his is not inconsistent with his ability to form an opinion based on less than certain evidence.” *Bialek v. Pittsburgh Brewing Co.*, 430 Pa. 176, 181 (1968). An expert can seldom offer an opinion with absolute certainty. The failure of an expert to rule out all possible causes of a condition is not a basis for excluding the testimony, since to require such a high degree of certainty would deny the jury copious relevant evidence. “A precise scientist who bases his opinion on an appraisal of probabilities is nonetheless an expert. In our view his opinion deserves jury consideration.” *Ritson v. Don Allen Chevrolet, et al., supra; Bialek v. Pittsburgh 181 Brewing Co., supra.*

“Opinions of any kind are derived from individual pieces of evidence, each of which by itself might not be conclusive, but when viewed in their entirety are the building blocks of a perfectly reasonable conclusion, one reliable enough to be submitted to a jury along with the tests and criticisms cross-examination and contrary evidence would supply.” U.S. Supreme Court, Judge Stevens at fn. 5 of *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) (quoting *General Electric Co., v. Joiner*, 78 F. 3d 524, 532 (CA11 1996), fn. 5).

Once a threshold showing is made that an expert has some basis in fact for his opinion, the evidence is admissible; the weight of the evidence is then a matter for the jury. *Griffith v. Clearfield Truck Rentals, Inc.*, 427 Pa. 30, 233 A.2d 896 (1967); *Flavin v. Aldrich*, 213 Pa. Superior Ct. 420, 250 A.2d 185 (1968).

**d. Court denied motion previously, found sufficient causation proof**

This Court found there to be sufficient proof on the element of causation, “a threshold showing” adduced through expert testimony and other evidence during trial, to justify denial of Cabot’s oral motion for a directed verdict at the conclusion of Plaintiffs’ case-in-chief; and its renewed motion prior to release of the case to the jury. Cabot offers the same

arguments now, except for the added insinuation that the Court's refraining from providing the jury with the statutory presumption instruction was somehow *per se* proof of lack of causation. This was in the context of the Court also specifically declining Defendant's request that a "cause and effect" instruction be added to the jury instructions in favor of "relying upon the general instructions in terms of both issues of causation and causal relationship," and articulating its assumption that counsel would "probably [adequately] cover that issue at closing." 3/8 N.T. 125:15-18.

**e. Substantial witness testimony offered**

In support of their claim for private nuisance during trial, the totality of evidence presented by Plaintiffs included the testimony of each Ely and Hubert plaintiff; Plaintiffs' expert hydrogeologist, Paul Rubin; Plaintiffs' expert rock mechanics engineer, Dr. Anthony Ingraffea, PhD, Cornell University, Professor Emeritus; Pennsylvania Department of Environmental Protection (PA DEP) water specialist, Michael O'Donnell; pre-drill hydrologist, Daniel Farnham; Plaintiffs' neighbors, Erik Roos and Victoria Switzer; and Cabot employees, Richard Mullins and Phil Stalnaker.<sup>7</sup> In its

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<sup>7</sup> There were a number of other witnesses with special knowledge relevant to the issues in this case whom Plaintiffs had intended to have appear at trial, but who were unable to do so, due to a variety of

defense, Cabot produced two engineers, Dr. Tarek Saba, PhD and Dr. L. Brun Hilbert, PhD; two neighbors, Mildred Green and Martha Locey; and a previously undesignated witness, former Cabot employee and current Gas Drilling Services (“GDS”) employee, Shelly Williams. Plaintiffs also relied upon Cabot gas well histories; results of water sampling and isotopic testing; relevant provisions of the Restatement (Second) of Torts; and, initially, the existence of a statutory presumption.<sup>8</sup> Taken together, Plaintiffs’ witnesses provided sufficient factual, scientific, temporal, direct and circumstantial evidence to allow the jury to “logically and reasonably” conclude that Cabot activities, on the Gesford 3 and 9 pad, were a substantial factor in causing the methane migration and contamination of Plaintiffs’ water. While Plaintiffs cannot possibly re-try their case in this brief, they will attempt to recapitulate the sufficient highlights of the testimony and evidence that

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circumstances including discretionary exclusion by the Court, illness, and subpoena service defects. These witnesses included the former Secretary of the PA DEP, Cabot’s past and present spokespersons, Cabot’s water delivery subcontractor, Cabot’s permitting specialist, and Plaintiff Nolen Scott Ely’s paternal uncle.

<sup>8</sup> The statute in question is 58 Pa. Const. Stat. § 3218(c)(1) which presumes that “a well operator is responsible for pollution of a water supply if...(i) the water supply is within 1,000 feet of an oil or gas well; and (ii) the pollution occurred within six months after completion of drilling or alteration of the oil or gas well[.]” While the presumption survived pretrial *in limine* exclusion, this Court, without explanation on the record, omitted an instruction to the jury on the presumption.

supports denial of Defendant's request for judgment as a matter of law for insufficient proof of causation and negligent conduct.

**f. Testimony of PA DEP specialist significant**

It its furor to cast aside a unanimous jury verdict, Cabot completely disregards legitimate direct and circumstantial evidence which the jury was allowed to see, hear and contemplate on the issue of causation, including, but not limited to: i.) the testimony of a PA DEP water specialist familiar with the Ely and Hubert water problems who linked Cabot conduct on the Gesford 3 and 9 pad with confirmation by the Department of explosive levels of methane in the Plaintiffs' drinking water supplies in January 2009; ii.) testimonial and documentary evidence that Cabot vented the Hubert's water well and the Elys' water well was plugged because of the documented hazardous methane buildup correlated in time and place to Cabot's drilling activities; iii.) testimonial and documentary evidence that Cabot delivered replacement water and installed water buffaloes because of a methane build up in Plaintiffs' water supplies correlated in time and place to Cabot drilling activities; and iv.) documentation that the Gesford 3S and 9DD gas wells, far from existing in isolation, were two of 11 Cabot gas wells surrounding

Plaintiffs' homes and located within 2500 feet of their drinking water supplies.<sup>9</sup>

**g. Full review of all the evidence required**

As this Court well knows, in its determination of Defendant's request for judgment as a matter of law on the sufficiency of proof of causation, Plaintiffs are to be accorded a full review by the Court of all of the relevant evidence on the record, in the light most favorable to the Plaintiffs with the advantage of every fair and reasonable inference. Plaintiffs are confident that the Court, having fastidiously presided over the trial, and upon a review of the full record, will find that the Plaintiffs have propounded at least "the minimum quantum of evidence from which a jury might reasonably afford relief," and will not clearly find in the evidence the kind of "remoteness of the causal connection between defendant's negligence and plaintiff's injury" necessary to decide in favor the Defendant.

**h. Cause-effect**

Cabot placed an extraordinary investment in the anticipated acceptance by the jury and the Court of a fatal cause-effect infirmity for Plaintiffs. Plaintiffs are hopeful that the Court will reasonably and fairly

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<sup>9</sup> Contrary to Cabot's assertion, at no time during the trial did Ms. Lewis hold up a demonstrative exhibit "depicting 11 Cabot gas wells within a **2.5 mile radius** of Plaintiffs' water wells[.]" (emphasis added) *See* Doc. 765, p 9, Cabot's brief.

contextualize this narrow argument. Put in context, respectfully, the fact that Cabot uncovered and placed into evidence certain partial written notations that indicate Plaintiffs noticed changes to their water quality or quantity as of July-August of 2008 where party counsel stipulated to a first spud date on the Gesford 3 and 9 pad of on or about September 25, 2008, are, not necessarily inconsistent with the facts and evidence in this case, and should not represent sufficient grounds, in and of itself to overturn the jury verdict. Otherwise, why was there a trial at all? The jury apparently understood, what hopefully, upon review, the Court will reinforce: the situation was not so clear-cut or simplistic.

**i. Water loss first disruption of water supply**

The jury heard testimony from the Huberts: Ray, Victoria and Hope, that their water well “went dry” in the summer of 2008. The event correlated with their observations of Cabot gas operations in the immediate vicinity and behind their house. Ray Hubert testified to losing water toward the end of July 2008. N.T. 2/24 171:17. Mr. Hubert testified to operations on the Gesford pad: “There was a lot of racket going on and I can see the lights.” N.T. 2/24 179:22-180:1, 180:15-17. Mr. Hubert also testified that he did not write down dates. N.T. 2/24 180:18-19. Victoria Hubert testified

that in July and August 2008 there was a lot of traffic on [Carter] [R]oad: “there was a lot of traffic and a lot of noise back behind my house.... I remember noise and lights and things like that.” N.T. 2/25 34:6-10. Following the loss of water level n or about late July 2008, Mrs. Hubert testified that she called Cabot Oil & Gas to report the situation, and that without involving the PA DEP, a Cabot representative came to the house and hooked up a “water buffalo.” N.T. 2/24 104: 6-12, N.T. 2/25 28:17-29:1.

Ray Hubert testified that Rick Mullins, a Cabot employee, told him “that sometimes during the drilling process the water level in certain wells will drop but they will eventually come back.” N.T. 2/24 186:14-16. This conversation implies Defendant was drilling within the 1000-foot statutory distance to the Hubert water well.<sup>10</sup> The fact of this sudden water loss, and Cabot’s contemporaneous response is not a matter of dispute. Cabot’s response to this emergency water loss at the Hubert home resulted in regular deliveries of replacement drinking water, placement of a water buffalo, and

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<sup>10</sup> Pursuant to Chapter 2 of The Pennsylvania Oil and Gas Act (“Oil and Gas Act”), Section 208: Protection of Water Supplies (58 P.S. § 601.208) provides, if, during the drilling and extraction process, a well operator pollutes or diminishes a public or private water supply, the operator is obligated to restore or replace that water supply. There is a rebuttable presumption that a polluted water supply located within 1000 feet of a well is caused by the well.

regular deliveries of bulk water to the water buffalo for household use for a period of months.

**j. Not just a matter of geological “tightness”**

For the purposes of defending during the civil trial, Cabot attempted to persuade the jury that this loss of water was due to geological “tightness” in the vicinity of the Huberts’ well, which had in the past caused the Hubert well to “run dry” in previous summer seasons. The jury apparently rejected Defendant’s theory, likely concluding, as the preponderance of credible evidence demonstrated, that Cabot activities caused the degradation, by reduction in quantity, of the Huberts’ water.<sup>11</sup> Whether the entire family could recall in a seamless and orchestrated fashion the exact date the well went dry, the fact of this occurrence and responsive actions by Cabot are facts wholly supported by the evidence. Water delivery to the Huberts in the summer of 2008 was not the result of a settlement agreement. It was a requirement by law.<sup>12</sup> Cabot attempted during trial to confuse, conflate and

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<sup>11</sup> The Court will recall that Cabot’s expert engineer, Dr. Saba attempted to persuade the jury that Mr. Hubert’s water well periodically “went dry” because the geology at the depth of his well was “tight”, reducing the volume of water that could penetrate the well during summer, or other “dry” months of the year.

<sup>12</sup> Mr. Dillard further attempted to obscure the issue of quantity-quality and deter the jury from an accurate recollection by asserting, to the effect that in both instances where the Huberts received replacement water from

universalize distinctly separate events that the jury could reasonably link to Cabot gas drilling activities on and around the Gesford pad to Plaintiffs' water problems.<sup>13</sup> Defendant's experts provided nothing more than hearsay and conjecture in testifying otherwise. Furthermore, the jury heard direct testimony from the Hubert plaintiffs that there was activity that they observed behind their house at the Gesford 3 and 9 pad and other indications of drilling operations in the immediate vicinity around the time that their water well went dry. This activity was confirmed by the testimony of Mr. Ely and the Plaintiffs' neighbor, Victoria Switzer who testified that she toured the area on or about Memorial Day weekend of 2008, and personally witnessed the activity:

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Cabot, as the operator was required to do, it was the result of a reduction in water quantity, due to naturally-occurring, dry summer conditions. The fact is that, on the second occasion that Cabot was required to provide replacement drinking and bulk water to the Huberts, the requirement was triggered by the fact that the PA DEP confirmed in January 2009 that the Huberts' water was contaminated with explosive levels of methane gas, and that the cause was Cabot's gas operations within 1000 feet of the Hubert home. In short, the second occasion involved a water quality problem, not a water quantity problem.

<sup>13</sup> As referenced in footnote 11, by Commonwealth of Pennsylvania statutory language and design, a gas operator is required to provide replacement drinking and bulk water in the event that it has been determined that gas operations caused reduction in the quality and/or quantity of a resident's water supply.

Q. Okay. So you don't have any gas wells on your property, but you have some gas wells in the vicinity of your home; is that correct?

A. Many.

Q. And when approximately did Cabot, if you recall, commence drilling in your particular -- the area of your home?

A. Well, it's not a very big area. The first gas well went in 2007, and then there was nothing for a while. We thought that was it. Then in 2008 they started drilling non-stop behind us, multiple wells, down from us. In March '08 the wells started going in one after another. The closest one that went in across from our house was May '08, and that was memorial weekend. They started -- after the weekend started to drill there.

Q. You have that fixed point in time of May, memorial weekend 2008; is that correct?

A. Well, it's very -- I remember it because I -- I needed to get a water -- a predrill water test, you know.... N.T. 3/2 36:1-18.

Cabot was engaged in operations within 1000 feet of the Hubert water well and the Ely water well in the summer of 2008; however, it is critical that this Court take note, though Cabot attempted through conflating facts to imply otherwise, that the Hubert's loss of water *quantity* is not included with the Hubert's claim in this litigation and predates the claim at issue in this litigation which relates to methane migration and other constituents in the Hubert's water well affecting the water *quality*, an impact that fully manifested in late 2008 and with certainty, in January 2009. Mrs. Hubert testified that in late 2008:

We had thought there was air in the lines because we hadn't had water for a while. We tried to fix the way the water was coming out of the pump or out of the faucet...I—we eventually called Cabot to see if they could---knew why it was like that. N.T. 2/25 35:13-21.

Mr. Hubert testified that the Huberts used the water buffalo until approximately November 2008, then went back on the well water for a period of between one and two months when the “[w]ater started to spurt as if there was air in it. When you fill the glass up with it was cloudy, and it looked like a lot of air,” N.T. 2/24 189: 23-25; “Out of the tap... foam up like ‘Alka Seltzer,’” N.T. 2/24 190:3-5; “That was closer to January when we noticed that.” N.T. 2/24 191:15. Thereafter, Mr. Hubert called and they sent someone from Quantum and Cabot to the Hubert residence and a wand was used around the well house to measure the gas. N.T. 2/24 192:11.

**k. Ely plaintiffs’ testimony**

During direct examination, Plaintiff Nolen Scott Ely testified on matters that were temporally and topically related to the incidents in this case. The Court also granted limited license to Mr. Ely to testify on the “rush to drill” issue. In connection with Mr. Ely’s work at Gas Drilling Services (“GDS”) involving setting up the well pads for gas drilling, he testified:

We would have things going on all over the place. We would have trees being cut in one property. We would have equipment

that would be putting in service roads at another property. We would be digging the side of a field down to make it a pad. They would be compacting it in layers as they were bringing it up. And then we would have a drilling rig that was on another location that would be drilling, and then we would be constantly -- it was just a vicious cycle. We would just take one down, move it to the next location, set it up, and they'd start drilling. N.T. 2/23 112:25-113:5.

Mr. Ely went on to testify about the gas wells he worked on:

Q: But Mr. Ely, in a very short period of time, okay, I want you to describe to the jury the exact wells that you did work on, all of them.

A. All of them?

Q. Yes. Starting in 2008 when you were employed and when you ceased employment with GDS.

A. I worked on Teel 7. I worked on a lot of wells. Teel 7, Teel 2, Teel 6, Teel 8, Costello 1 and 2, Lewis 1 and 2, Ely 2, Ely 1, Ely 5, Ely 7, Gesford 3, Gesford 9, Gesford 2, Gesford 7. I mean, there's ones that are further out. N.T. 2/23 114: 10-18.

A. All right. I was on the Gesford 3 and 9 location.

Q. Yes.

A. I don't know what exactly was taking place on the other location. But I know that we would try to go as quickly as we could to depth. Now, I wasn't on the job sites every day. I was in and out. I was on all the locations moving equipment around. So I was -- I would be on two, three locations a day doing set-ups, removals. So it was a quick, fast process. You were just in and out, in and out, you had to get moving to the next one. N.T. 2/23 118:10-19.

The Court accompanied this limited opportunity with an invitation to Defendant's counsel to object, and request cautionary instructions and amplification of a cautionary instruction that the Defendant may have construed as an insufficient limiting instruction. N.T. 2/23 104:12-25.

With respect to personal matters relating to concerns about Cabot's gas drilling operations near his home, on or about late 2008, Mr. Ely testified to seeking out Rick Mullins to have the Elys' residential well water tested. N.T. 2/23 127:18-20. Mr. Ely went on to testify that during a visit from a relative in January 2009, "[w]e determined after looking at the water that there was methane in the water. Tested my water -- not tested it, but just sat there and lit my water on fire." N.T. 2/23 133:8-10. This complaint did, or should, have triggered relevant provisions of the Pennsylvania Oil and Gas Act and relevant Rules and Regulations. According to the testimony of Mr. Ely, "The water in the beginning wasn't brown like it is today. This water is getting worse and worse as time goes on. This water was creamy in the beginning, which is hardly unnoticeable. And as the years go by, it's getting worse." N.T. 2/24 47:16-19.

**I. Corroborating testimony of PA DEP Water Specialist**

The jury heard PA DEP agent, Michael O'Donnell, testify that he had observed gas bubbling at the Gesford well heads, and that in January 2009

the PA DEP **conclusively** determined that drilling activity on the Gesford 3 and 9 pad was a cause of contamination of the water supplies of the Elys and the Huberts. Mr. O'Donnell testified to first meeting Mr. Hubert and Mr. Ely at their respective residences in January 2009. N.T. 3/2 76:17. Mr. O'Donnell testified to personally observing the strong effervescent quality of the Ely water and to a somewhat lesser degree, the effervescence of the Hubert water. N.T. 3/2 78:21-79:9, 79:10-14. Mr. O'Donnell testified to monitoring the head space of the wells:

[t]he Hubert well in particular because of the setup and the way things were oriented there we had concerns with free methane in that well pit and having a pressure tank and pressure switch there so you got a potentially flammable gas and an ignition source.— So we asked that [well] be taken off-line. N.T. 3/2 83:19-25.

Mr. O'Donnell testified to having observed bubbling in the Gesford 3 well, and explained that “bubbling” is gas escaping from the well. N.T. 3/2 44:10-13. Mr. O'Donnell testified that live-footage of this activity at the Gesford pad was captured by a PA DEP agent identified as Herb Karlinsey. N.T. 3/2 85:21-25-86:1-10. Mr. O'Donnell testified to air sampling conducted at the Hubert water well N.T. 3/2 87:15-16. He testified to detecting a level of methane over 20 milligrams per liter at the Hubert well and methane concentrations for the Elys that were “probably a little higher, maybe 30” milligrams

per liter. N.T. 3/2 96:6-10. Mr. O'Donnell further testified: "I specifically recall Mr. Ely's dissolved methane was somewhere around 64 milligrams per liter at some point." N.T. 3/2 96:14-15.

**m. Testimony of Plaintiffs' neighbors**

After hearing from the Parties, the Court decided to allow the limited testimony of Dimock residents Erik Roos and Victoria Switzer, former plaintiffs in this matter and neighbors of the Plaintiffs to potentially shed light on matters relating to temporality and causation. N.T. 3/1 219:15-25. How many neighbors, which neighbors, and the extent of testimony were matters relating to the Court's *in limine* ruling that required a "give and take at trial." N.T. 2/23 104:12-18. Prior to the Court making this determination, there were multiple offers of proof, and discourse regarding the sufficiency of subpoena service regarding these two witnesses. Indeed, the decision of the Court to allow this testimony arose only after an extraordinarily full and repeated airing by Defendant's counsel as to their objections. N.T. 2/23 103:11-15, 3/1 10:5-14, 22:5-23:9, 3/3 223:6-225:23. Once allowed by this Court, two examples of a temporal connection to the cause and effect between Defendant's negligent drilling operations and methane migration into the well water of area residents were offered into testimony by Mr. Roos and Ms. Switzer, both of whom optimistically signed gas leases with

Cabot, observed the industrialization of their community, and experienced the impacts of methane migration into their respective water wells. At the direction of the PA DEP, Mr. Roos and Ms. Switzer each began to vent their respective wells after January 1, 2009 and at about the same time the PA DEP directed Mr. Hubert to do the same; all of these parties continue to vent their water wells to this day at the continued direction of the PA DEP.

Mr. Roos testified to faucet water “spurting more, more often, after they started drilling [in his area].” N.T. 3/1 231:17-19. Mr. Roos testified that he was contacted by a gentleman from Cabot and that the vent that was subsequently placed on his well pipe was, according to Mr. Roos’ understanding, meant to deal with “a lot of extra methane.” N.T. 3/1 233:3-234:3. He testified that there is an opening on the vent where the methane continues to be monitored. N.T. 3/1 234:12-22. Mr. Roos went on to testify that he had been offered a water treatment system by Cabot, and that he rejected the system because, in his opinion, “It doesn’t seem like they work.” N.T. 3/1 237:15-17. According to Mr. Roos’ testimony, he and his wife have not consumed the water from their water well since 2008, and the problem continues today, as his water continues to be tested every two weeks, with varying methane level results, recently as high as “20,000.” N.T. 3/1 237:23-238:8. Mr. Roos was also prepared to answer a question regarding the

presence or absence of barium in his water, but was interrupted and then not allowed to answer the question, N.T. 3/1 248:13-249:14. The issue of the quality of Mr. Roos' water was introduced and raised by Mr. Mercer in such a way as to invoke a response about barium and other possible constituents that could have left the jury free-associating. N.T. 3/1 248:7-13. This was due to Mr. Mercer, not the Court, and certainly not as a result of Ms. Lewis's direct examination. Furthermore, the latitude the Court granted Mr. Mercer to attempt to impeach Mr. Roos during cross-examination based on hearsay seemed confusing and improper, and Plaintiffs' neighbor, Ms. Switzer testified:

A. I remember they started drilling on Memorial Day and they were everywhere. A lot of drilling was taking place in 08. The end of the fall of 08 there was some blackish water in my washing machine. I just thought it was because everything was being stirred up. I am a plumber's daughter so many holes being punched in the aquifer. I was not surprised but I thought it was something that would go away and clear up the more changes occurred.... N.T. 3/2 40:4-10.

Q: Did you at any time prior observe such black water coming out of your...out of your faucet?

A: That was the first time I had black water in the washing machine. N.T. 3/2 40:19-22.

**n. Local Cabot witnesses**

A glaring inconsistency, it seems, in Cabot's substantive argument that the Court erred in admitting the testimony of Mr. Roos and Ms. Switzer,

is the fact that Cabot turned right around and put other neighbors of the Plaintiffs on the stand to testify as to an assumption they wished the jury to hear; namely, that methane was a naturally-occurring phenomena in the region. Cabot did so in order to provide testimony to counter the Plaintiffs' proofs on causation. One of those neighbors, Mrs. Martha Locey, actually provided additional testimony in support of the rush to drill and corroboration of the temporality and causation of Plaintiffs' water problems. Mrs. Locey, the elderly lady who lives in a town called Hop Bottom, testified that her whole life she lived on 217 acres of family land, and that her daughters had entered into a gas lease pursuant to which her daughters receive royalties. N.T. 3/7: 41 10-16.<sup>14</sup>

When questioned by Plaintiffs' counsel as to how many wells were within 1000 feet of her property, Mrs. Locey responded:

I don't know. I don't think we have any because we are in a moratorium. That's a nine-mile moratorium where there was...”, **whereupon Cabot attorney Barrette objected cutting off her own witness mid-statement.** (emphasis added)  
N.T. 3/7 41:19-20.

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<sup>14</sup> It is interesting to note that this large property owner, who stepped up to testify on behalf of Cabot, was able to testify as to the irrelevant fact that her family held a gas lease with Cabot and received royalties from Cabot, while Plaintiffs were barred from making any reference to their gas leases or royalties during trial.

The Court neither sustained nor overruled the objection, but directed Plaintiffs' counsel to ask the next question while commenting, "those issues aren't really in front of this jury." Nevertheless, Defendant's own witness offered this testimony unprompted by Plaintiffs' counsel. It is an indication of how Defendant's rushed to industrialize the region linked Plaintiffs to nearby Dimock resident, Mrs. Locey, in ways that have nothing to do with the purported pre-existing biogenic methane in Mrs. Locey's water well. Mrs. Locey also testified that the PA DEP told her to vent her water pipes and that her water well continues to be vented for methane to this day. N.T. 3/7 58:8-10, 65:21-23.

Mrs. Locey described encounters with Cabot's representative, George Stark:

We used to have meetings when they was trying to get water through, and that's when they was trying to get the pipeline down to Dimock. And I was on -- one of the groups that was fighting that because I could not see paying for water being shipped from Montrose to Dimock when I felt the water was good. N.T. 3/7 63:3-7.

Mrs. Locey testified as follows:

Q: "Have you ever participated in protests against my clients, the plaintiffs in this case?"

A: "The only time I know of is for the water well. I protested about that." N.T. 3/7 66:21-24

To sum up, in January 2009, PA DEP mandated delivery of water to Plaintiffs pursuant to the Oil and Gas Act, not as a result of a settlement agreement. In January 2009 PA DEP mandated the installation of vents on the water wells for each of the Hubert family, the Roos family and the Switzer family. The Ely family plugged its outdoor water well. Michael O'Donnell from PA DEP testified to visiting the Gesford 3 and 9 pad regularly commencing in 2009. In addition, the PA DEP mandated the plugging of the Gesford 3 gas well and the plugging of the Gesford 9 gas well; a fact that was mischaracterized as a business decision to the jury by Cabot counsel, Stephen Dillard, during his open statement and later by Cabot employee, Philip Stalnaker, in sworn testimony.

**o. Sufficient transport testimony elicited from Plaintiffs' Experts**

Notwithstanding Defendant's derision of Plaintiffs' expert witnesses on paper now, as its counsel did during cross examination and closing argument during trial (N.T. 3/9 73:12-19, 79:9-14, for example) the jurors apparently found the testimony and opinions of Plaintiffs' experienced local hydrogeologist, Mr. Paul Rubin, and respected rock mechanics engineer, Dr. Anthony Ingraffea, on the issue of causation to be inherently credible,

comprehensible, and scientifically based.<sup>15</sup> It is equally plausible that the jurors found the opposite to be true of Defendant's witnesses, particularly Dr. Tarek Saba and Dr. Lawrence Brun Hilbert, Jr. The unpretentious testimony of Plaintiffs' expert witnesses on the issue of causation apparently bore such indicia of reliability and honesty, as to persuade the jury to believe their opinions and version of the facts over that of Defendant's witnesses.

**p. Rubin testimony**

The jury heard from Mr. Rubin that the geology of the region was rife with a below ground interplay of geological fractures, fissures and joints. The jury heard experts from both sides acknowledge that the *raison d'etre* for drilling for gas in the shale beneath Dimock was extraction of gas from the shale through those fractures, fissures and joints that already existed.

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<sup>15</sup> It is noted for the Court that Cabot's counsel, during trial, as in their brief, refused to use the appellation of "Dr." in addressing or referring to Dr. Anthony Ingraffea, PhD. The record is replete with barbs lobbed at Plaintiffs, their witnesses, and counsel herself on a rotational basis by Cabot's four attorneys. By way of example only, Cabot's attorney, Amy Barrette refused to address Plaintiffs' attorney, as "Ms. Lewis" before the jury as was her expressed desire, until Ms. Barrette was instructed to do otherwise by the Court out of respect for Plaintiffs' counsel's wishes. N.T. 3/4 42:10-12, 44:12-25. The Court might also note that at no time during conference at sidebar or in chambers and with few exceptions before the jury on the first day of trial, did Mr. Dillard refer to Ms. Lewis by name. Ms. Lewis to Mr. Dillard was always rudely referred to as "she" or "her." While these could be viewed as petty impunities, cumulatively such conduct tended to provoke a certain unwelcome tenor between counsel in the courtroom, which may not have been lost on the jury, or necessarily have worked to Defendant's advantage.

The jury saw a photograph produced by Mr. Rubin demonstrating exposed fractures in a nearby quarry. The jury heard from Defendant's counsel that: "[O]bviously no one can see underground." N.T. 2/23 52:23.

**q. Stipulated spud date**

Plaintiffs acknowledge that at a time prior to trial the parties freely entered into a binding stipulation ascribing the official spud date for the Gesford 3 gas well, purportedly the first well drilled on the subject Gesford pad, as September 25, 2008. After entering the stipulation, Plaintiffs' counsel discovered a discrepancy in the PA DEP's spud data report, indicating that Cabot provided to the DEP a spud date for the Gesford 3 gas well of May 28, 2008. Plaintiffs' counsel's subsequent overture to withdraw her agreement to this stipulation was rebuked by Defendant's counsel, and was clearly forecasted by the Court as being something that would be unduly prejudicial to Defendant were it to be withdrawn. Accordingly, Plaintiffs made the decision to avoid wasting the Court's and the jury's time by pursuing a predictably fruitless hearing.

Nonetheless, it would seem relevant to note that two and a half months after the trial concluded with a jury verdict in this matter, the contradictory May 28, 2008 spud date for the Gesford 3 well remains on the

PA DEP website.<sup>16</sup> Further, the PA DEP website indicates that it was the Gesford 9 gas well, not the Gesford 3 gas well, that was spudded on September 25, 2008.

**r. Gesford pad work tickets**

In addition, on the last day of trial testimony, Defendant produced a Shelly Williams, an Cabot employee who had previously worked in an office capacity for many years for GDS, Cabot's well drilling company. Ms. Williams produced "work tickets" for part of the month of September 2008.<sup>17</sup> It is not entirely clear to Plaintiffs why Cabot chose to put this surprise witness on the stand, what they believed the relevance of the work tickets to be, or why she was allowed to testify in areas that were not part of her expertise or her responsibilities:

Q. They installed a permanent site sign. You've been in the business for a while. What does that connote to you, suggest to you as to what they're doing on the well pad?

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<sup>16</sup> See "DEP Office of Oil and Gas Management Spud Data" annexed as Exhibit "1."

<sup>17</sup> Plaintiffs learned of the existence of Ms. Williams, and Cabot's intention to call her as a witness, literally minutes before she was called to the stand, even though, as Ms. Williams testified, she learned on the previous Friday, March 4th that she would appearing to testify at this trial on Tuesday, March 8<sup>th</sup>. N.T. 3/8 89:17-21. Respectfully, this single example is emblematic of the level of cooperation and responsiveness Plaintiffs' counsel received from Defendant's counsel throughout the trial with respect to forecasting their witness list and order of appearance (from a list of 22).

MS. LEWIS: Objection. She's a financial person about to testify about what goes on a well pad?

THE COURT: Well, do you know what that represents in terms of activity on a well pad, ma'am.

THE WITNESS: For the installed permit site sign, that's the sign before that you go into the entry to the pad.

THE COURT: Do you know what that means? What's actually going on out at the site.

THE WITNESS: I believe so, yes.

THE COURT: I'm going to permit her to testify to that, but I do appreciate you asking to make sure we made a foundation for that. Go ahead, ma'am. N.T. 3/8 77:25-78:14.

Neither testimony of Ms. Williams nor the substance of the work tickets rebutted or contradicted any testimony offered by former GDS employee, Plaintiff Scott Ely. However, what did emerge from the testimony of Ms. Williams and the examination of the work tickets introduced through her was the inference that there had actually been work performed on the Gesford pad prior to September 25, 2008. Furthermore, the fact that this records keeper notably omitted to produce any work tickets that indicated conclusively that any drilling work occurred on September 25, 2008, may have raised a question in the jurors' minds as to whether the Gesford 3 well was actually spudded on the stipulated date.

**s. Omission of the presumption language**

In its brief, Cabot attempts to reinforce its argument with what

appears to be the assumption that because the Court had omitted inclusion of statutory presumption language in its instructions to the jury, that the Court had reached a determination that Plaintiffs had definitively failed to sufficiently demonstrate causation for purposes of Plaintiffs' private civil nuisance claim. The record indicates that the Court on one occasion raised "concerns regarding the cause and effect issues," and on another made reference to what it believed to be "temporal challenges for the Plaintiffs in their case." There is no mention in the record that Plaintiffs can find of an explanation by the Court for its omission of the statutory presumption language. An alternative assumption, which Plaintiffs believe is equally plausible, is that in parsing the operative language of the statute, the Court could have decided that because complaints of contamination had not arisen within six months of "**completion of drilling**" at the Gesford 3 and 9 pad, that the presumption could not apply. It seems inconsistent that, on the one hand, Cabot can use the absence of instruction on the presumption in this private litigation to argue that private litigants have failed to prove causation, while on the other hand "contend that the presumption is inapplicable in private litigation anyway."<sup>18</sup> See Doc. 765, p 76, N.T. 3/3

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<sup>18</sup> Of course, with all of this said, the Court and the Parties are well aware that the very administrative body that wrote the Pennsylvania Oil and Gas Act, drafted the 1000 foot presumption language, and went on to expand

112:1-5.

As Mr. Rubin stated, there are certain tests that may have some utility in assessing methane migration patterns. Mr. Rubin also testified he did not have budgetary access to those methodologies, nor would they in and of themselves have necessarily isolated with any scientific certainty a single documented “pathway” between the Gesford wells, or any individual gas well, and Plaintiffs’ water supplies. Nonetheless, Mr. Rubin was able to testify to a reasonable degree of hydrogeological certainty that, based on his decades of experience in assessing situations such as this, it is more likely than not that the migratory gas that escaped from the Gesford 3 and Gesford 9 wells was transported through an underground network of faults and fractures to the Plaintiffs water supplies as he thoroughly described during direct examination. Accordingly, some degree of professional inference and deduction is necessarily involved in Plaintiffs’ experts reaching their conclusions regarding causation.

**t. *Crowley*: causation may rest on inferences**

As described in *Crowley*, a case cited by Defendant, “proof of causation may rest upon legitimate inferences, so long as the proofs will justify **reasonable and logical inferences** as distinguished from mere

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the presumption language to 2500 feet, applied the presumption when considering exactly the facts and temporal issues that underpin this case.

speculation.” (emphasis added) *Crowley v. Chait*, Civ. A. No. 85-2441, 2005 U.S. Dist. LEXIS 40831, at \*5 (D.N.J. July 19, 2005). Mr. Rubin provided reasonable proofs that justified “reasonable and logical inferences” with respect to the underground transfer of migratory gas and fluids from the Gesford pad to the Ely and Hubert water supplies.

**u. Reasonable degree of certainty local quarry faults, joints representative of under Gesford pad geology**

Mr. Rubin testified that he observed and measured complex faults and joints in the quarry located within a half a mile of the Ely property. Mr. Rubin also testified that he observed complex joints and faults exposed on the Ely property. Mr. Rubin opined with reasonable professional certainty that these conditions were typical of what was under the Gesford pad between these two locations. Mr. Rubin testified that the Ely property is situated downhill from the Gesford pad. Mr. Rubin testified that the stream flow through the Ely property ran in a direction from the Gesford pad towards the Ely property, and the water shows in the Gesford wells were consistent in depth with the depths of the Ely and Hubert water wells. This evidence provided a plausible platform to allow the jury, and this Court, to make the allowable “reasonable and logical inference” that leakage of gas and fluids from the Gesford wells would find their way into the ground waters tapped by the Ely and Hubert drinking wells. In short, there is

sufficient evidence adduced through Mr. Rubin's trial testimony to, as additionally discussed below, deduce that if Gesford wells leaked fluids into the water shows they encountered, it is a "reasonable and logical inference" that those fluids would contaminate the Ely and Hubert water wells.

Cabot's skepticism regarding the likelihood that faults from the quarry extended to the Plaintiffs' water supplies, because Mr. Rubin had never observed a fault longer the 2000 feet, is misplaced and a logical fallacy. (*Doc.* 765, Page 18). Mr. Rubin did not have to show that any single fault extended from the quarry all the way under the Gesford pad and into the Ely Property. Indeed, a fault extending from the rock mass beneath the Gesford pad and the Ely and Hubert water wells need only be 600 to 700 feet long to form a flow connection. N.T 2/29 47:14-25, 48:1-20.

**v. Extensive geological measurements by Plaintiffs' hydrogeology expert**

Cabot attempts to disparage Mr. Rubin for omitting to measure and map the geology on the Ely property. (*Doc.* 765, Page 18). Yet, it was Mr. Rubin's professional determination that such measurements were unnecessary given his extensive measuring and mapping of the joints and faults exposed in the large exposed rock quarry located one-half mile from the Ely property. It is a "reasonable and logical inference" based on sound proof that these exposed joints and faults seen one-half mile away and

literally adjacent to the Elys' water well head are geographically related, that the Gesford wells had to pass through such geological features, and that such geological features were and are pathways for groundwater flow.

**w. Expensive testing helpful but not crucial**

Cabot attempts to discredit Mr. Rubin's testimony and opinions for failure to perform various time-consuming and costly testing, including seismic testing, pump-down tests, draw-down tests, installation of monitoring wells, or dye tests. Yet, it may not have been lost on the jury that the good neighbor company, as Mr. Dillard attempted to portray the Defendant in his opening statement ("We recognize our responsibility to the ground water environment, and that we have to be stewards of that. And we accept that responsibility." N.T. 2/23 69:20-23), did not think enough of the Elys' and Huberts' water complaints to undertake any of those same tests in order to get to the bottom, so to speak, of what the water problems were and how to resolve them. This is not meant to "burden-shift," but to point to a potential question that may have entered the jurors' minds.

**x. Fault connection logically deducible**

Though Defendant asserts that "no logical or rational connection" exists between Mr. Rubin's testimony that faults and fractures existing at the quarry are similar to the faults and fractures existing on the Ely property and

under the Gesford pad, the jury apparently did deduce that there was a logical and rational connection, as did this Court having conducted a *Daubert* hearing. Based on the totality of Mr. Rubin's testimony and his assertion that based on his expert research "[t]here is no question that the same joints and bedding planes exist" (N.T. 2/25 153:7-8) in the subsurface of the earth in the region of the quarry and the area where the Ely property and Gesford pad are located, the jury concluded that it is a "reasonable and logical inference" that the many complex faults and joints seen by Mr. Rubin in a quarry one-half mile away and also seen by Mr. Rubin exposed on the Ely property more likely than not were typical of what lay beneath the Gesford pad between these two locations.

Although Defendant asserts that because their expert, Dr. Saba testified that there is "no pathway from a single source impacting both Plaintiffs water wells" that no pathway exists, the jury apparently chose to accept Mr. Rubin's testimony and drew a "reasonable and logical inference" that pathways existed from multiple sources rather than one single source and that, in fact, the Ely and Hubert wells need not be in communication with one another in order for each to have been impacted by drilling activities occurring at the Gesford 3 and 9 well pad.

After intently observing and listening to Dr. Saba's testimony, during direct examination, and, perhaps more importantly, cross examination, it likewise follows that the jury rejected Dr. Saba's position that there is no single pathway from a single source impacting both of Plaintiffs' water wells, or that there even needed to be one single, isolated pathway. Apparently, the jurors also discounted Dr. Saba's opinion regarding pre-existing background conditions, based largely on his reliance on antiquated anecdotal stories from a book he never produced and a couple of old newspaper articles. N.T. 3/3 202:21-203:18, 203:23-204:18.

Furthermore, it could not have been lost on the jury that after reviewing the record of Mr. Rubin's testimony, knowing how attorney Barrette attempted to "hammer" Plaintiffs' hydrogeologist for the non-performance of certain testing to allegedly "prove" the existence or absence of a particular pathway, Cabot's own expert, Dr. Saba whose services were retained in 2012, performed none of those tests for his client. Dr. Saba *did not inject any dye* into the water shows at the Gesford pad to show that it could not arrive in the Hubert or Ely water wells. Neither did Dr. Saba perform *any other test* to rule out the possibility that there was a hydraulic connection between the Plaintiffs' water wells. Nor did Dr. Saba do anything to determine the **actual flow rate of ground water in the area between the**

**Gesford pad and the Ely and Hubert water wells** to which he undoubtedly had open-ended access, not to mention availability to perform any testing Dr. Saba wished, irrespective of cost. It came down to the credibility of one expert over the other, where Defendant's expert himself invited "speculation and conjecture," and the jury believed "reasonable and logical inferences" associated with the testimony of Mr. Rubin, in combination with other evidence offered. Dr. Saba's authoritarian style in his assertion that there are "no pathways," apparently did not make it so in the minds of the jurors.

**y. Rubin survived *Daubert***

Once he observed and took measurements of the fractures and faults as aforesaid, Mr. Rubin testified that he extensively mapped the fractures and faults of the proximate and contemporaneous geology of a nearby quarry. Mr. Rubin assisted in creating the valid scientific platform from which the jury could properly determine that Cabot's actions on the Gesford 3 and 9 pad did result in migratory gas and other constituents ending up in the Plaintiffs' drinking water. He accomplished this through simple, logical, accessible testimony. That is not to say that he didn't have scientific basis for his opinions. This Court had already ruled on that issue after conducting

a *Daubert* hearing and being presented with essentially the same testimony, evidence and opinions. N.T. 2/25 140:17-141:2.

Mr. Rubin testified that there are a number of key factors that hydrologists look at in terms of determining ground water flow direction. One factor to consider would be actual openings in soil or bedrock, such that water and any contaminants that might be with it could move from one place to another. Another factor would be whether there is a slope or gradient from the contaminant location down to the potential receptor location of concern, and whether those pathways are likely to be open. N.T. 2/25 141:12-23.

Mr. Rubin explained that in a world where financing was not an issue, the ideal method of determining pathways would be to place numerous monitoring wells where an investigator could look at the water level underground, and compare that water level from one location to another, and follow flow direction and contaminant movement N.T. 2/25 142:2-14, 142:23-143:13.

Mr. Rubin, in plain language, explained that as a part of his trade, determining whether there is a potential contaminant pathway is really about investigating “where the ground water flow goes.” He explained that geologists look to a bedrock area, where there are “cracks or vertical

fractures in the rock that are called joints.” He explained how he walked the property with Mr. Ely and examined bedrock outcrops. N.T. 2/25 143:16-144:2. He explained that as a geologist and a hydrogeologist, this is a surface expression. You can actually go out, look at, make measurements, and determine what's there. Is there anything there? And if there is, what is there? And then are those possible avenues that groundwater would follow. N.T. 2/25 144:4-10.

Mr. Rubin explained “there was a quarry nearby with a vast area” of exposed bedrock. Mr. Rubin examined the geology and made measurements. Mr. Rubin provided a mental visual, of bedrock (fudge) and pathways for water (cuts in the fudge) and placement of the well relative to the bedrock and pathways. Mr. Rubin created an image of bedrock, water well, vertical fracture and water flow.

Mr. Rubin explained how he measured “63 different joints with [a] compass” to demonstrate the dominant joint direction. “You have a hill slope someplace, and water is in your well, and it's in another well, and it's not at exactly the same level, saying this is a slope, and groundwater is going to move.” N.T. 2/25 146:12-15.

Mr. Rubin explained that through careful measurement “there are two prominent directions of fracturing,” north-south, and east-west. Mr. Rubin

further explained that he observed a “dense number of fractures...lots of pathways that are open,” and through which groundwater can move.

**z. Rubin testimony**

Mr. Rubin explained through his evaluation of quarry rock, the presence of faults and their relationship to vertical fractures, their geological origins, tectonic movement and sandstone bed and the significance to groundwater movement.

Mr. Rubin testified:

Faults are important, because they can actually cut through these vertical fractures and provide more ground water flow paths, depending on the nature and extent, how far do they go. But the fact is they're present there, and they're another possible pathway by which contaminants can migrate, because they interconnect a lot of the fractures. N.T. 2/25 147:11-16.

But the third important component in terms of both ground water movement and in terms of gas movement because gas will follow any open pathway, are bedding planes. When rock layers are deposited in sort of a sedimentary sequence, like a cake, one layer after the other. Okay, you can imagine that a stream event comes in, it deposits a nice sandy layer. And then a big storm comes in and it deposits another layer with rocks and sand mixed up. There's a transition zone between those two levels, or different layers in your cake. And sometimes they're pre-opened.

In this case, these are nearly horizontal beds in the rock which you can follow along in different places here. And these are places where preferentially groundwater can move. In fact, in this photo, you see all these seeps coming out of the quarry here? These demonstrate groundwater flow is moving through bedding planes. So here we have the three primary pathways for ground water flow in the region. That would be joints, this face

of the joint, others and perpendicular to that, bedding planes and fault planes. So the quarry was very instructive. Oh. I should say the quarry is about 2700 feet north of [Scott Ely's well.] N.T. 2/25 145:15-148:12, 149:9.

"[This quarry] could have been anywhere in the area, because geographically...these fracture patterns are well documented by geologists." N.T. 2/25 149:12-14.

"My assessment was based on my own evaluation of fractures, and geologists accept the fact that in an area geographically fracture patterns are extensive." N.T. 2/25 161:18-20.

"I did walk alongside his house. And the geology, based on geology maps of the area, is the Catskill formation. It's not varied from point to point in short distances." N.T. 2/25 170:14-16.

Much is made by Cabot regarding the testimony of Plaintiffs' rock mechanics expert, Dr. Anthony Ingraffea, PhD. Dr. Ingraffea's primary relevance and contribution to the trial was to demonstrate to a reasonable degree of scientific certainty that the Gesford 3 and Gesford 9 gas wells were negligently constructed and operated and that Cabot's negligence rested in part on the rush to drill in the Dimock area.

**aa. Ingraffea testimony**

Dr. Ingraffea testified to a lesser scientific certainty that there was a connection between negligence at the Gesford well pad, and contamination of Plaintiffs' water. His admission to "speculation" was an honest answer, and logically based on his scientific experience and knowledge that there

exists a web of subterranean pathways beneath the Gesford pad and the Plaintiffs' water sources, and identifying a single subterranean path by which methane migrated from the Gesford 3 and Gesford 9 wells involved a degree of speculation. Dr. Ingraffea's scientific contribution in demonstrating causation was his testimony, proofs, and opinion to a reasonable degree of scientific certainty that methane gas leaked from either or both of Defendant's Gesford 3S and Gesford 9DD wells; that the gas leaked to the surface outside of the outermost conductor casings; that the gas leaked all the way to the surface, and that during this documented passage, methane gas must pass through the water shows. None of this is speculation.

With respect to the Gesford 3S well, Dr. Ingraffea testified:

Q. Dr. Ingraffea, again, with respect to what you have learned from the records that you have in your hand as to this well, okay, was there -- what, if any, other material, you know, soil, rock, did this well bore and cement and gas pass through?

A. For me to answer that question completely, I have -- I have to finish the quote that I started before we went to sidebar. It would be best if I read the whole thing directly from the well history.

Q. Okay.

A. So this is on May 28th, 2009. I'm reading directly from the well record, *arrived on location with video camera* and Susquehanna Resources vacuum truck, the well cellar had approximately five feet of fresh water and some *gas venting from the cellar floor. Videotaped the cellar* as truck vacuumed out the water demonstrating only a small amount of gas was

actually being vented. One cellar was dry. It became clear the majority of the gas was coming up hole outside the 20 inch conductor and a smaller amount was venting between the 20 inch conductor and the 13 and three eighths surface casing, no additional vents were found following an exhaustive search of location. Scott Ely's property below the location was also examined. Some additional wet areas were found, but there was no evidence of any venting gas. ***The videotape was dropped off at Cabot's P. A. production office and will be overnighted to the Charleston office.*** N.T. 2/29 133:2-17.

To summarize, this is direct evidence in the form of an admission in an official well record prepared and produced by Cabot regarding its Gesford 3S well that: (i) the well was leaking at that time; and ii) the leak was observed and videotaped by Cabot personnel to have been coming to the surface outside the conductor casing. The Court will recall that at sidebar prior to Dr. Ingraffea resuming testimony and quoting from Cabot's well records regarding the presence of a videotape documenting gas leaking around the conductor casing at the surface, Cabot attorneys Dillard and Barrette asserted to this Court that Cabot made no videotape. Indeed Cabot implicitly denied the existence of the film to its own witness, Dr. Hilbert, as he testified he had never seen or heard of it.

With respect to the Gesford 9DD well, confusingly, the original Gesford 3 well, Dr. Ingraffea testified with respect to leaking outside of the conductor casing on that well:

Q. And according to the well history had Cabot hit -- achieved a depth where there was any opportunity to exploit, produce or extract gas or any other mineral?

A. Not by intention but by observation gas was already leaking out of that well by that point.

Q. Okay. Let's be clear. What well was gas leaking out of?

A. The original Gesford 3.

Q. And how do you know that?

A. Because of an interoffice memo between Cabot employees.

Q. And documenting -- what was the date?

A. Of the memo?

Q. Yes.

A. I believe it was August 2009.

Q. August of 2009?

A. Yes.

Q. You're sure about that date?

A. I am not sure of the day in August, but I am reasonably sure that the month was August.

Q. We're clear on the year?

A. Yes. N.T. 2/29 97:23-98-17

This testimony is corroborated by the testimony of Cabot employee, Stalnaker regarding the contents of an August 11, 2009 interoffice memo to

him from Abshire and Gosnell. N.T. 3/1 196:8. The memo indicates that Gesford 9DD was leaking outside the 13 3/8 inch **conductor** casing:

“Due to shallow gas the well began leaking around the 13” surface casing.” That memo incorrectly called the actual 13 3/8 inch conductor casing “13 inch surface casing.”

This piece of evidence is particularly significant as it constitutes an admission by Cabot that 9DD was already leaking outside its conductor casing before the well was ever re-entered and deepened, and before it ever reached the high pressure gas show at 1500 feet, but after the 3S well had hit that show.

The jury and the Court clearly understood the point of Dr. Ingraffea’s testimony as to the significance of the leaking at Gesford 9DD, as demonstrated by this testimony and interaction with the Court:

Q. As a factual matter, do you have, you know, some information that you can share with the jury with -- based on your experience and the records as to how the gas migrated in this case?

MR. DILLARD: Same objection, Your Honor.

THE COURT: I am going to -- I'm going to overrule that objection and permit Dr. Ingraffea to describe what the path of migration of natural gas would have been having placed these water shows where he has from the records and have him place the natural gas where he has from these records. So if you can just describe for us generally, Doctor, how that natural gas would have migrated. N.T. 2/29 137:13-24.

THE WITNESS: I will answer both parts of your question, the particular part with respect to this well and more general from what I know from reading and observations and other places about gas migration and well bore integrity. So with respect to this well, **I just read into the record that Cabot itself observed and videoed gas coming out outside of the conductor casing.**

It is physically impossible for gas to get from this location to this location without passing through both levels of water. That's what this drawing shows. The gas can't get to the water and say I am going around you. It has to go through. So the gas was coming from this location. There's no doubt about that. **The gas was coming out at this location. It- it's in the record. It says so. It was videotaped.**

And so I'm repeating myself. To get from point A. to point B., that gas had to pass through both levels of observed fresh water. I am asserting from my own experience and general experience the reason why I spend – (emphasis added) N.T. 2/29 137:25-138:17.

MR. DILLARD: Your Honor, objection.

THE COURT: What we will do is await the next question, Doctor. But thank you for the factual information. You may pose your next question, Ms. Lewis.

BY MS. LEWIS:

Q. With respect to your experience and research, you know, as to migration of stray gas, what -- what information or – do you have to bring to your analysis with respect to the migration of the gas through the water?

MR. DILLARD: Objection, Your Honor.

THE COURT: Yeah, I am not exactly sure where that question was going. If I understood you correctly, Dr. Ingraffea, you said that the gas would have gone through these two water shows in order to emerge at the top of the well.

THE WITNESS: That's what I said, yes.

THE COURT: Okay.

BY MS. LEWIS:

Q. As far as you know, based on your experience and observations here, would all of the gas have passed through the water and gone to the surface?

MR. DILLARD: Objection, Your Honor. This is clearly outside the area of his expertise and for which he's been proffered in this case.

THE COURT: Given the -- some of his expertise is in fracture mechanics and engineering, I will permit this question.

BY MS. LEWIS:

Q. Careful in your answer.

A. I began to answer your two-part question. I am now answering the second part of your question. The reason why I study the issue of well bore integrity, which by its very nature points to methane migration, that's why we study well bore integrity to make sure wells have integrity so that methane migration doesn't occur. The reason I study it is to understand exactly the phenomenon we are talking about, how does methane that supposed to be coming up that narrow pipe wind up outside that pipe having to pass through underground sources of drinking water. That is exactly the topic of over 2000 papers in the archive of Society of Petroleum Engineers. I checked that number recently. If I do a key word search on methane migration, well bore integrity, loss of integrity, methane migration, loss of zonal isolation, these are all terminology used by the oil and gas industry to describe exactly the problem I am trying to describe to you today in this particular case. This is not uncommon.

It is so common that there have been 2000 papers written about it just in the S. P. E. archive alone. As I said before, there are workshops all around the world continuously on the issue of well bore integrity, methane migration and contamination of underground sources of drinking water from methane migration. It's well known. It's common. N.T. 2/29 138:18-140:18

The jury must have understood this. It is then a “reasonable and logical inference” on the part of the jury that those water shows were contaminated by methane from these wells; it is then a “reasonable and logical inference” on the part of the jury that these water shows are not just stagnant pools of water surrounding these gas wells, that there is flow of water within these water shows; a “reasonable and logical inference” on the part of the jury is that these water shows were at about the same depth and uphill from the aquifers accessed by the Ely and Hubert water wells. Respectfully, this scenario is precisely what the jury reasoned.

**bb. Cabot employee, Mullins’ testimony**

Rick Mullins testified that his role at Cabot in 2008 was to funnel to his direct supervisor, Whitney Johnson in Cabot’s office in West Virginia, complaints from residents in Dimock with respect to disruption of water quantity or quality. N.T. 3/1 127: 5-14, 140:16-141:3. Mr. Mullins testified that the Elys and Huberts’ water wells were being “monitored,” explaining that if there was a complaint for methane, Cabot would “keep an eye on the well” to see if there was any problem. N.T. 3/1 141:8-21, 141:24-25, 142:1-3. Mr. Mullins also testified that he recalled Scott Ely was concerned about Gesford 3. N.T. 3/1 143:16-17. Mr. Mullins recalled being on the Ely property between 2008 and approximately September 2010: “I think they set

up a water buffalo. I remember there being one, but I don't recall what for.” N.T. 3/1 147:19-21. “The water buffalo was being offered by Cabot to either replace the Ely or Hubert or both water supplies.” N.T. 3/1 148:9-12.

**cc. Cabot employee, Stalnaker testimony**

Phil Stalnaker testified that after assuming his new role in 2009 as Vice-President Regional Manager of the Northeast, he learned that some folks in Dimock, including the Plaintiffs, had expressed concerns about their water, inferentially in connection with Cabot's gas drilling operations, and the concerns were investigated. Mr. Stalnaker testified that, together with Cabot's then public spokesperson, Ken Komoroski, in 2009, he met with some of those folks, though he did not specifically recall the Plaintiffs being at that meeting. Mr. Stalnaker confirmed he learned that the stray gas was thermogenic, upper Devonian. N.T. 3/1 191:14-15. Mr. Stalnaker discussed the contents of an August 11, 2009 intra office memo that corroborates Dr. Ingraffea's professional findings and opinions about negligent construction, defective casings and migration of methane from the Gesford 9DD well.

To briefly summarize, there was evidence adduced during trial from party and non-party witnesses regarding proximity and temporality that supported a logical and reasonable inference that, in part, on these grounds, Cabot's operations at the Gesford pad substantially contributed to the

development of Plaintiffs' water problems. Specifically, evidence from the Huberts, Mr. Roos, Ms. Switzer, and Mrs. Locey regarding the need to vent their water wells in order to release elevated levels of combustible methane and Mr. O'Donnell corroborating testimony on that issue; testimony of evidence of natural gas escaping from around the well casings of Gesford 3 and Gesford 9 wells to the cellar surfaces; agreement between the Parties that the gas found in elevated levels in Plaintiffs' drinking water was of thermogenic origin, specifically, originating in the deep, Devonian-level strata, just like the gas that leaked to the surface of the Gesford 3 and Gesford 9 wells. N.T. 3/1 191:11-15.

This Court on two previous occasions has denied Defendant's Rule 50 motion on cause and effect grounds, first upon a finding of "sufficient evidence for that claim to move forward" at the conclusion of Plaintiffs' case in chief, and again, at the conclusion of trial, upon the expressed position that the case could "go to the jury on a private nuisance theory of liability with a prayer for compensatory damages." N.T. 3/3 112:16-17, 3/8 134:1-

Notwithstanding Cabot's refusal to accept that the jury reasonably and legitimately reached a determination of causation in favor of Plaintiffs, the Court has sufficient basis to deny Defendant's renewed motion now despite

Cabot's arguments with respect to: i) the "on or about September 25, 2008 stipulation" entered between party counsel; ii) the notations recording the recollections of Mr. Ely and Mr. Hubert regarding the timing of the onset of observed quantitative and qualitative changes to their water; iii) the asserted absence of identification of a single "pathway", and iv) the asserted inconclusive nature of Dr. Ingraffea's opinions. Furthermore, the Court should rebuke Cabot's presumptuous argument that because the Court omitted providing the jury with the 1000 foot presumption instruction pursuant to the Pennsylvania Oil & Gas Act, that Plaintiffs' causation proofs necessarily fail, *in toto*. Doc 765, p 3, fn 23; p 43, fn 43; p 76.

**dd. The presumption**

As the Court instructed the jury on Day 11 of the trial regarding stipulations: "[T]hose are facts the parties have stipulated to, and you *may* accept those facts as true **as part** of your consideration of this case." (emphasis added). N.T. 3/8 112:17-19. The jury may, but need not, accept a stipulated fact as true as part of its consideration of this case. There is no indication that the jurors misunderstood the meaning of the words of that instruction.

In arguing against the jury's determination on the element of causation, Cabot ignores the totality of evidence in favor of an excessive

reliance on certain select evidence. Cabot focuses heavily on the inconsistency between a stipulated “drill” date of **on or about** September 25, 2008, and the approximate times that Plaintiffs first detected changes to their water supplies. This is some evidence that the jury may weigh, and probably did. In and of itself, this evidence could not conclusively disprove Plaintiffs’ case. Otherwise, why was there a trial at all?

It seems inconsistent and unfair that, after arguing before trial that the administrative presumption had no place in this civil litigation, Cabot should now, after trial and an unfavorable verdict from a civil jury, be allowed to use the Court’s omission of the instruction as grounds to render judgment for Cabot under Rule 50, or to grant a new trial under Rule 59.<sup>19</sup>

Cabot minimizes or completely ignores other express and circumstantial evidence, which the jury was allowed to hear and contemplate on the issue of causation. The jury heard that Cabot was the only gas company conducting drilling operations in the vicinity of the Ely and Hubert water supplies during the time in question. The jury was allowed to see and hear that there were Cabot gas operations, other than at the Gesford pad,

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<sup>19</sup> Pennsylvania law presumes that “a well operator is responsible for pollution of a water supply if ... (i) the water supply is within 1,000 feet of an oil or gas well; and (ii) the pollution occurred within six months **after completion of drilling** or alteration of the oil or gas well.” (emphasis added) 58 Pa. Cons. Stat. § 3218(c)(1).

underway in the immediate vicinity of the Ely and Hubert water supplies during the time at issue, eleven in all within 1000 feet of the Ely and Hubert drinking water supplies.<sup>20</sup> The jury heard PA DEP agent, Michael O'Donnell testify that he had observed gas bubbling at the Gesford well heads, and that in January 2009 the PA DEP conclusively determined that drilling activity on the Gesford pad caused contamination of the water supplies of the Elys and the Huberts.

**ee. The Ely notations**

Cabot points to the existence of two written documents, one a rough and redacted notation, part of which was established to have been in Mr. Ely's hand, extracted from a larger document that was never produced during trial, the second a doctor's entry, both of which were objected to, and neither of which, respectfully, should have been admitted into evidence at all

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<sup>20</sup> Contrary to Cabot's assertion (at page 9, paragraph 2 of its brief), at no time during presentation of her clients' case or at any other time during trial did Plaintiffs' counsel present to the jury a demonstrative exhibit "depicting 11 Cabot gas wells within a **2.5 mile radius** of Plaintiffs' water wells[.]" (emphasis added). Having engaged in lengthy and vigorous objection to Plaintiffs' use of the subject exhibit, Defendant's counsel knows quite well that the exhibit in question depicts 11 of Cabot's gas wells within a circumference whose outer limits is **2,500 feet**. Slipping a reference to **2.5 miles** in his voluminous brief, on the off chance that Plaintiffs might miss this reference and the Court might miscall, reflects slick practice by Mr. Mercer.

as they referenced medical complaints which were not a part of this case and about which Plaintiffs' counsel was not allowed to inquire. Both "notes" suggest that Mr. Ely and his family noticed physical symptoms as well as changes to their water in approximately August of 2008. Cabot also points to testimony of the Hubert Plaintiffs to the effect that in approximately somewhere between May and July of 2008, the family experienced the loss of their well water supply as well as physical symptoms. Cabot asserts that on these findings alone the jury's finding of causation was incorrect.

Yet these events are not to be viewed in isolation. The context of this evidence is the fact that Plaintiffs were living in an industrialized zone, with drilling activity all around them, activity that predated and postdated the stipulated Gesford 3 drill date of on or about September 25, 2008. Taken in this context, not in isolation, there is no disharmony or conflict between these particular items of evidence.

**ff. "Obviously, no one can see underground"**

Attorney Dillard in his opening statement, after admitting that "[o]bviously, nobody can see underground" goes on to assert that it is "Plaintiffs' burden to establish an underground pathway." Yet, there is no body of law to look to in analyzing that aspect of shale gas extraction litigation. There is no case law that establishes that Plaintiff must identify a single pathway as a direct

cause of degradation of water by migratory gas originating from a shale gas well. This is first the trial of its kind in the Third Circuit.<sup>21</sup> In no instance before trial, during trial or after trial does Defendant even attempt to demonstrate, as a matter of law, that in a case alleging water contamination from migratory gas associated with gas drilling activities and operation that a single, isolated, particular pathway need be conclusively proven in order for Plaintiffs to demonstrate causation. N.T. 2/23 52:14-20. Defendant did not because it could not. Cabot points to no common law or statutory precedent which requires a civil plaintiff to expose **a single direct migratory pathway** between a defendant's gas well and a plaintiff's water supply in order to prove that it is more likely than not that it was the defendant's gas well that was a substantial factor in causing the methane contamination of plaintiff's water. That is because there is no such standard, nor could there be.

Plaintiffs' rock mechanic's expert, Dr. Ingraffea and expert hydrogeologist, Paul Rubin provided testimony as to potential pathways by which methane gas migrated into the Plaintiffs' drinking water supplies.

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<sup>21</sup> Plaintiffs are aware of only one other case involving private nuisance allegedly caused by gas drilling that was tried to verdict. That case dealt with air contamination. The jury returned a plaintiffs' verdict in the amount of \$3,000,000 to one family. An appeal on that Texas case is pending. *See Parr v. Aruba Petroleum, Inc.*, No. 11-1650 (Dallas Co. Ct. at Law, filed Mar. 2011).

Plaintiffs' experts did not arrive at their conclusions out of thin air. They utilized their experience, training and established scientific, hydrogeological and rock mechanics principles to underpin their professional conclusions. Drs. Saba and Hilbert on the other hand used anecdotal hearsay and speculation to arrive at their opposing opinions. Accordingly, the testimony of all witnesses and expert witnesses required inferences by the jury.

Therefore, based on the foregoing, as well as this Court's review of the entirety of the evidence, direct, circumstantial and inferential, propounded by Plaintiffs and their witnesses on the issue of causation, it is respectfully submitted that this Court should find that Plaintiffs have demonstrated sufficient legal proof justifying this jury's unanimous finding that it is more likely than not that Cabot's conduct on the Gesford pad, at the Gesford 3 and 9 wells, was a substantial factor in causing the contamination Plaintiffs' water supply. Accordingly, Defendant's motion as a matter of, on this issue, should be denied.

**3. Hubert standing correctly decided by Court, ought not be reversed**

It is undisputed that the Hubert plaintiffs have a possessory interest in the land on which they reside. They are not occasional visitors, or licensees. They have lived on the affected property for decades. They have standing to sue for damages under private nuisance.

In its brief in support, Cabot volunteers that the “particular fact pattern [of the instant case] has not been adjudicated in Pennsylvania courts.” Having said that, Cabot goes on to assert that there is “ample precedent” to support “the conclusion that persons who *merely occupy land*-such as mere licensees-do not have standing to assert a nuisance claim. The “ample precedent” Cabot refers to contains a single Pennsylvania case. *Owen v. Henman*, 1 Watts & Serg. 548, 550-551 (Pa. 1841) (no action can be maintained by religious congregant claiming to be disturbed in his spiritual endeavors by loud singing, reading and talking of fellow congregant). According to Plaintiffs’ research, *Owen* has been cited as precedent a total of one time. *See Sparhawk v. The Union Passenger Ry. Co.*, 54 Pa. 401 (Pa. 1867) (owner of “dwelling house” and church pew not entitled to relief from railroad for nuisance based on “bill and proof”).

Having presumably scoured for “ample precedent,” Cabot finds case law from Wyoming, West Virginia, and Connecticut state courts, all of which are decisively distinguishable from the Hubert situation.<sup>22</sup> The

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<sup>22</sup> *See, e.g., Owen v. Henman*, 1 Watts & Serg. 548, 550-51 (Pa. 1841) (licensee lacked sufficient “rights and privileges” in property to sustain private nuisance claim); *Ortega v. Flaim*, 902 P.2d 199, 204-05 (Wyo. 1995) (“social guest” licensee did not have standing to assert a nuisance claim); *Arnoldt v. Ashland Oil, Inc.*, 412 S.E.2d 795, 804 (W.Va. 1991) (trial court erred in finding that plaintiffs who were “mere occupants in the homes of relatives” with “no ownership or possessory interest in property” had

Huberts are not present on the Ely property to give some sort of material benefit to the property owners, as in the nature of invitees, nor are they the occasional social guests of the owners, as in the nature of licensees. The Huberts are tenants of the Elys. They have lived on the property for decades, in a trailer that they have owned and on which they have paid property taxes for decades. Their interest on the Ely land has a tax assessed value, as Cabot will confirm was referenced in calculating the amount of an escrow allotment that would be dedicated to the Huberts in public settlement of their administrative appeal for water replacement costs and services.

This Court having reviewed all filings in connection with Defendant's motion for summary judgment to dismiss the claims of the Hubert plaintiffs and having considering relevant law and full argument on the issue, inter alia, of the Huberts' standing, determined the Huberts' claim for private nuisance should not be dismissed. Having thoroughly reviewed the entire record on the issue, and having found that "[this Court's] analysis to be extremely thorough, well-reasoned, and fully supported by the record, and

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standing to bring private nuisance claim); *Mulcahey v. Int'l Tel. & Tel. Corp.*, 318 A.2d 804, 805 (Conn. Super. Ct. 1974) (plaintiff invitee lacked sufficient property interest to sustain private nuisance claim because "[t]here is no merit to the plaintiff's claim that because he was a licensee he came under the classification of an owner of an interest in land"); *Conlon v. Town of Farmington*, 280 A.2d 896, 897-88 (Conn. Super. Ct. 1971) (like licensees, minor children did not have standing to bring nuisance claim).

... the objections to be without merit and squarely addressed by the Magistrate Judge within his report,” District Court Judge John E. Jones III adopted, in its entirety, the Report and Recommendation of this Court (Doc. 497), and granted Defendant’s Motion for Summary Judgment on Hubert family’s claims *with the exception of their claim private nuisance claim*. The recommendations of this Court, and the decision and order of the District Court with respect to the Hubert family retaining the right to pursue their claims was not error and should not be disturbed based on Defendant’s rehashed arguments in its brief.

A “tenant” is a person who occupies real property owned by another based upon an agreement between the person and the landlord/owner. <http://dictionary.law.com/Default.aspx?selected=2104#ixzz48aaJcwyX>. By definition, and the evidence weighed by this Court, the Huberts are tenants under the law, invested with legally-cognizable rights to sue for damages and recover under the state theory of private nuisance.

According to the court in *One Meridian*, “[t]he official comments to Restatement §821E indicate that an individual with **any possessory estate** can recover in private nuisance (Comment (c), [and] that occupancy is a sufficient interest (Comment (d)[.]” By definition, the Huberts are occupants

of land with sufficient possessory interest to sue for damages and recover under the theory of private nuisance.

In reviewing this Court's Report and Recommendations on the issue of the Huberts' standing (Doc. 497 at p 24: "[W]e note, ante, this longstanding but informal possessory interest in the enjoyment of this property may only give rise to a nuisance claim under Pennsylvania law."); the Defendant's Objections to those Recommendations (*See* Doc. 508, generally); and Defendant's current argument on the issue (Doc. 765, pp 35-40), it is Plaintiffs' position that this Court has thoroughly analyzed the Hubert-standing issue, and the District Court correctly confirmed this Court's well-reasoned determination that the Huberts have legal standing to sue Cabot for recovery of damage under the theory of private nuisance. The Huberts are Ely tenants, are possessors of land within the Restatement definition, and, accordingly, have an interest in the private use and enjoyment of that land.

Appropriately citing sections 821E and 328E of the Restatement (Second) of Torts in denying dismissal of the Huberts' private nuisance claim (*see* Doc. 497), this Court specifically found the Huberts to be legal "possessors of the land," and, as such, having evinced sufficient legal standing to bring their private nuisance claim against Cabot. Furthermore,

the Court goes on to confirm that the Huberts had demonstrated sufficient evidence to support their allegation that Cabot's drilling operations "caused their domestic water supply to become contaminated, and, therefore, to have interfered significantly with [the Huberts'] **use and enjoyment of the property where they make their home.**" (emphasis added) (Doc. 497, p. 42.) Nothing resurrected by Defendant in its instant brief would seem to erase the logic and fairness of this Court's prior determination on the issue as to whether the Huberts had legal standing, as "possessors of land," to bring an action for private nuisance against Cabot.

Accordingly, this Court, respectfully, having fully and repeatedly considered Cabot's full arguments on the matter, should not reverse itself in its previous determination that the Hubert plaintiffs have standing to pursue their nuisance claim, and collection on the verdict. Defendant's motion as a matter of law on the issue of Hubert plaintiffs' standing should be denied.

Furthermore, based on all of the foregoing, and in consideration of the totality of direct and circumstantial evidence propounded by Plaintiffs' comprising and demonstrating the legal sufficiency of their negligence and causation, this Court should, respectfully, once again, deny *in toto*, on each ground argued, Defendant's application under Rule 50 to set aside the verdict as a matter of law.

**B. Court Should Uphold Unanimous Verdict of Eight-Person Jury, Deny Defendant New Trial**

**1. Verdict comports with clear weight of evidence**

Circuit courts have set a bright line for a moving party who seeks a new trial based on a “clear weight of the evidence” argument. According to settled law, such drastic relief is appropriate “only when the record shows that the jury's verdict resulted in a miscarriage of justice or ‘where the verdict, on the record, cries out to be overturned or shocks our conscience’.” *Marra v. Phila. Hous. Auth.*, 497 F.3d 286, 309 n. 18 (3d Cir. 2007) (quoting *Williamson v. Consolidated Rail Corp.*, *supra*. See *Delaware Dep't of Health*, 865 F.2d at 1413. *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 211 (3d Cir.1992).

This standard and limitation on the district court's power to grant a new trial is meant to guarantee that “a district court does not substitute its judgment of the facts and the credibility of the witnesses for that of the jury.” *Delli Santi v. CNA Ins. Companies*, 88 F.3d 192 (3d Cir. 1996). *Lind v. Schenley Indus., Inc.*, 278 F.2d 79 (3d Cir. 1960) (in banc) *cert. denied*, 364 U.S. 835, 81 S.Ct. 58, 5 L.Ed.2d 60 (1960). *Williamson v. Consolidated Rail Corp.*, *supra*. Accordingly, there the verdict is based upon credibility determinations made by the jury, the Court should not find a miscarriage of justice or a shocking of the Court’s conscience.

“Absent a showing of substantial injustice or prejudicial error, a new trial is not warranted, and it is the court's duty to respect a plausible jury verdict.” *Montgomery County v. MicroVote Corp.*, 152 F. Supp.2d 784, 795 (E.D. Pa. 2001).

**a. All favor inferences**

While the legal foundation for a jury’s verdict is reviewed *de novo*, factual findings are reviewed to determine whether the evidence and justifiable inferences most favorable to the prevailing party afford any rational basis for the verdict. *Intermilo, Inc. v. I.P. Enterprises, Inc.*, 19 F.3d 890, 892 (3d Cir. 1994). *Jeckell v Crestwood Area School District*, Dist. Court, M.D. Pennsylvania (2008). See *Lucent Technologies, Inc., et al. v. Gateway, Inc., et al.*, 580 F.3d 1301 (Fed. Cir. 2009).

**b. “Overwhelming effect”**

The judge is to test the body of evidence not for its insufficiency to support a finding, but rather for its “overwhelming effect.” *Id.* (internal quotation marks and citations omitted). “[C]onflicting evidence which could reasonably lead to inconsistent conclusions will not justify a judgment notwithstanding the verdict...It is the function of the trier of fact alone, the jury in this instance, to evaluate contradictory evidence and to draw inferences therefrom.” *Id.* at 1178 (citations omitted).

The district court is cautioned not to “substitute its ‘judgment of the facts and the credibility of the witnesses for that of the jury.’” *Fineman v. Armstrong World Indus., Inc., supra, cert. denied*, 507 U.S. 921 (1993) (quoting *Lind v. Schenley Indus. Inc.*, 278 F.2d 79, 90 (3d Cir. 1960) (en banc), *cert. denied*, 364 U.S. 835 (1960)). Since a determination that a jury's verdict was against the weight of the evidence "effects a denigration of the jury system," a court may grant such motion "only when the record shows that the jury's verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks our conscience." *Williamson v. Consol. Rail Corp., supra*.

In making this determination, the trial judge should consider the overall setting of the trial, the character of the evidence, and the complexity or simplicity of the legal principles, which the jury had to apply to the facts. Appellate courts rarely find that the trial court abused its discretion. *Lind v. Schenley Indus. Inc., supra*. A verdict may not be set aside when there is a plausible or rational basis for the decision. *Moussa v. Commonwealth Penn. Dept. Dep't of Pub. Welfare*, 280 F.Supp. 2d 639, 648 (W.D. Pa. 2003).

**c. Totality of evidence, credibility weighed**

On these legal bases, and a thorough review of the totality of evidence, it must, respectfully, be concluded that the weight of the evidence tips in favor of sustaining the verdict in favor Plaintiffs.

Nolen Scott Ely testified to observing first-hand, as a GDS employee, the rush to drill in Dimock. N.T. 2/23 112: 20-25, 113: 1-5, 118:10-19.

Plaintiffs' expert, Dr. Anthony Ingraffea testified to cement failures and casing collapse at the Gesford pad resulting in uncontrolled flow of methane gas in the fall of 2008. This occurred contemporaneously with changes in the quality of Plaintiffs' well water. For the full testimony of Dr. Ingraffea together with objections, rulings, side bar conferences and the Court's instructions, please see: N.T. 2/29 21:7-103:19, 109:14-231:3. N.T. 3/1

During his testimony, Cabot employee Phillip Stalnaker, Defendant's business executive responsible for the north region, testified that Defendant plugged the Gesford wells *for business reasons*. Plaintiffs' were not permitted to elicit testimony of the fact the Cabot was to plug the wells in order to prevent additional methane migration and potential explosions/flammable events. Nonetheless, the jury could reasonably infer that the business reason to plug the Gesford wells was not driven by a profit motive since gas was selling at a premium in 2008-2009. Mr. Stalnaker

testified with reference to an internal Cabot memo, dated August 11, 2009, called an AFE or so-called Approval for Authority that summarized the status of the Gesford 3/9 pad; referred to leaking from the Gesford well; a plan to produce from the shallow Devonian shale zones; a reference to the economics on the total cost of the job and the expected rate of return of 17.4%. N.T. 3/1 203:2-9-208:7. Mr. Stalnaker also testified that the origin of the migrating gas from the Gesford wells was thermogenic gas, Upper Devonian gas, shallow gas. N.T. 3/1 191:11-15. Further testimony by Mr. Stalnaker regarding the \$1.2 Million price tag over a six-week period to re-drill the well, remove the drill bit and collar and restore the collapsing well infrastructure likewise added to economic considerations that would logically support a decision to drill, not plug the gas well. It is conceivable that this illogical explanation undermined Mr. Stalnaker's credibility for the jury.

As previously described, Plaintiffs' expert Dr. Ingraffea testified to the presence bubbling in the cellar of the Gesford 3 and Gesford 9 gas wells. Dr. Ingraffea, as previously described, provided this testimonial evidence based on undisputed well record documents originating from Cabot which described the gas escape has been captured on video by Cabot and the PA DEP.

As previously described, PA DEP agent, Mr. O'Donnell provided testimonial evidence of observing gas bubbling at the Gesford 3 well and the Gesford wells heads and explained that "bubbling" is gas escaping from the well. Mr. O'Donnell also testified that in January 2009 the PA DEP conclusively determined that drilling activity on the Gesford 3 and 9 pad was a cause of contamination of the water supplies of the Elys and the Huberts. Mr. O'Donnell testified to first meeting Mr. Hubert and Mr. Ely at their respective residences in January 2009. N.T. 3/2 44:10-13; N.T. 3/2 76:17. Mr. O'Donnell also testified to personally observing the strong effervescent quality of the Ely water and to a somewhat lesser degree, the effervescence of the Hubert water. N.T. 3/2 78:21-79:1-9, 79:10-14

Mr. Ely testified that during a visit from a relative in January 2009, "We determined after looking at the water that there was methane in the water. Tested my water -- not tested it, but just sat there and lit my water on fire." N.T. 2/23 133:8-10. Mr. Hubert testified to changes in his water quality in January 2009 where it foamed up like "Alka Seltzer," prompting him to call Cabot. Thereafter, Cabot sent someone from Quantum and Cabot to the Hubert residence who used a wand around the well house to measure the gas. N.T. 2/24 190:3-5, 191:15, 192:11.

Installation of methane vents in the water wells of the Huberts (N.T. 90:25-91:1-9), Roos (N.T. 3/1 233:3-234:3), Switzer (N.T. 3/2 41:21-24; 42:17-43:4) and Locey (N.T. 3/7 58:8-10; 65:21-23) residences mandated by the PA DEP in January 2009 occurred contemporaneously with Cabot's failed drilling operations. For example, Ms. Switzer testified that after changes to her water quality she spoke with PA DEP water specialist, Mr. O'Donnell, and subsequent to that conversation PA DEP put a vent on her well pipe to keep the methane from exploding. N.T. 3/2 41:21-24; 42:17-43:4.

Cabot's expert Tarek Saba addressed the issue of methane during cross-examination by Plaintiffs' counsel:

Q. Okay. So how is it -- how is it that there is -- at what point does the presence of methane become concerning with respect to explosion?

A. Well, certainly 28 that means it's bubbling out. But there are different concentrations for Pennsylvania DE P., for example, call an action level. And by action I mean you notify the D. E. P. of the presence of gas. And I believe there was another level -- there's a description in the Pennsylvania D. E. P. guidelines where they say if it's seven, notify, consider doing something, if it's ten, you know, kind of like take more actions until it becomes 28 where you definitely need to vent your well. N.T. 3/4 116:9-20

Following the changes in water quality to the Plaintiffs' well water, Cabot offered the Ely Plaintiffs a water treatment system, or in the

alternative, a new water well (N.T. 2/23 218:16-221:1); and the Hubert Plaintiffs a methane separator (2/25 85:19-25). Cabot's counsel questioned Plaintiffs on this point and the fact that the Plaintiffs declined Cabot's offer. It is reasonable to conclude that jurors may have questioned in their minds the possible reasons why Cabot would have gone to the expense of offering treatment systems to the Plaintiffs.

Defendant's engineering expert L. Brun Hilbert works at a company called Exponent/Failure Analysis Associates. Even though this company has the word "failure" in its title, and even though Defendant went to the extreme measure of plugging the prolific Gesford wells, Dr. Hilbert refused to admit that "mistakes happen." Dr. Hilbert refused to depart from his script. N.T. 3/8 33:4-25-34:1-14. Nevertheless, Dr. Hilbert's testimony provided an opportunity for the jury to infer that lack of a perfect seal in the well bore during Cabot's drilling operations made possible the migration of methane into water sources.

Q: ...And you've admitted that there were water shows -- with respect to the Gesford 3 well, you have admitted that there were water shows or, you know -- water shows documented at 100 and 250 feet?

A. I read in the Appalachian Morning Reports that there were water shows at 100 and 350 feet.

Q. 350?

A. That's correct.

Q. And you agree that there was no casing or cement barriers in place during drilling of the Gesford 3 that would isolate those two water shows or pockets of, you know, paths of water or streams, that there was no casing or cement barriers in place to isolate that water from the effects of drilling, potential effects of drilling operations?

A. When the wells are drilled at that surface location, as they're drilled during that time period there was no casing in the well. N.T. 3/8 27:3-19.

Dr. Hilbert testified there may have been filter cake, a thin layer of clay, along the sides of the well bore, but admitted that filter cake is not a universally successful sealant or gasket. N.T. 3/8 27:24- 25, 28:10-20. Dr. Hilbert admitted under cross examination that there was roughly 700 feet of open-uncemented, un-reinforced-bore hole when Defendant was drilling the Gesford 3S well. N.T. 3/8 29:20-25-30: 1-6. Dr. Hilbert further admitted that to this day there are still hundreds of feet of open annuli in the Gesford 3S well (N.T. 3/8 34:15-18-35:1-7); and that the purpose of one Gesford well is to act as a conduit for Marcellus gas, and the other Gesford well is to act as a conduit for Catskill, Upper Devonian gas N.T. 3/8 35: 9-12.

The failure of Cabot to perform any pre-drilling water testing for the Huberts, any pre-drilling testing for methane for the Elys and the subsequent spike in methane migration into Plaintiffs' water wells after drilling commenced required Defendant to explain how it was not responsible.

Defendant's hydrology expert Dr. Saba was compelled to "retrofit" the background data since no predrilling background data was available.

Q. Doctor, can we agree sitting here today that a--a basic fundamental accurate way of determining what was in water prior to drilling is the obtaining of predrilling tests?

A. No, we are not going to agree to that. N.T. 3/4 80:10-13.

To buttress his testimony, Dr. Saba presented numerous graphic exhibits of secondary maximum contaminant levels, which bunched naturally-occurring chemical constituents along the vertical axis of the bar graph visually minimizing the actual quantity of each such constituent across a randomized timeline. This complex yet carefully crafted misleading visual imagery may have undermined Dr. Saba's credibility as an expert as it unnecessarily complicated the jury's ability, as fact-finders, to decipher the data.

Dr. Saba's testimony during questioning by Plaintiffs' counsel about these graphic exhibits reinforces the foregoing conclusion.

Q. You have a date there, but there's no data for that date?

A. Right.

Q. Why is that date there?

A. It's a graphic thing. I was trying to put the scale, and that date showed up. I was trying to control the scale. It's graphics. There's no material reason for it. N.T. 3/4 94:18-23.

Q: So these are just random dates that you put in to fill up the horizontal axis?

A: This is how the computer program that generates these data work. N.T. 3/4 95:11-14.

A: I select a range. For example, I said 150 days, something like that. It would generate the dates.

Q: Well, is the jury supposed to take any -- have -- is the jury supposed to weigh that -- the fact that there are dates in between that have no testing or no data, is there any purpose -- is there any -- is any information that the jury should derive from the fact that you have, you know, a horizontal axis with dates that have no data points?

A: I believe I was very clear yesterday when I presented this. I said that the horizontal axis has dates. The vertical axis has concentrations. The dots represent when the sample was taken and what the concentration was. N.T. 3/4 95:18-25-96:1-4.

THE COURT: I just want to ask the doctor because there was some questions about those intervals. Are they set at standard intervals of 75 days each?

THE WITNESS: No, Your Honor.

THE COURT: The intervals between the two dates --and I tell you why I asked that. I checked two of the intervals. They were each 75 days. So I was just trying to figure out is that what this represents, each of those dates is 75 days after the preceding date?

THE WITNESS: Right. The -- N.T. 3/4 97:24-25-98:1-8

Q. And can you tell from looking at this chart what any individual data point is precisely?

A. You mean date and concentration?

Q. Well, there's a -- there's a data point. Isn't every star or diamond on this chart a data point?

A. Correct.

Q. Okay. So you can't tell the jury what -- whether or not -- withdrawn. You can't tell the jury with any certainty what any individual data point is on this chart, correct?

A. Beyond eyeballing it, correct. N.T. 3/4 111:6-15

The foregoing reflects a sample cross-section of the voluminous testimony presented during the 11 days of trial testimony. While only a review of complete trial record can provide this Court with the full picture of the evidence, Plaintiffs assert this Court correctly determined at the close of trial that there was sufficient evidence to present the case to the jury for its verdict, and further, that Defendant has presented no legal authority to reverse that correct decision by the Court.

**d. Exclusion of Hanger**

Plaintiffs sought to have former PA DEP Secretary John Hanger and current DEP environmental water specialist Michael O'Donnell testify at trial. PA DEP interposed a Motion to Quash Plaintiffs' subpoena with respect to both parties, which Motion was supported by the Defendant. This Court denied the Motion, in part, allowing Mr. O'Donnell to testify and granted the Motion, in part, as it related to John Hanger. Public records researched following trial reflect that Mr. John Hanger actually resigned

from this post as a special assistant to Governor Wolf and government employee on or about February 16, 2016; before the trial began, with a termination date effective February 26, 2016 which itself coincided with the end of the first week of the 11 day trial.

Accordingly, PA DEP potentially exceeded its authority to bring the Motion to Quash as it related to Mr. John Hanger. Following the conclusion of the trial, John Hanger authored an op-ed piece published April 2, 2016 in the Times-Tribune, titled *Arrogance Imperiling Natural Gas Industry* in which the former PA DEP Secretary implicitly implicated Defendant in the latter part of the following sentence when he stated, “If the gas industry wants to stop the erosion of public support that ultimately will destroy it, then it must accept a reasonable drilling tax and stop shortchanging royalty owners, end disposal of drilling wastewater underground, embrace strong rules to reduce methane leaks and *gas drilling mistakes, and own its mistakes like those in Dimock, Susquehanna County, instead of denying or minimizing them.*” (emphasis supplied)<sup>23</sup>

In a second op-ed, published April 6, 2016 in *Penn Live* titled, *The Gas Industry is in the Doldrums - Will it be Nimble Enough to Adjust?*, John Hanger again indirectly refers to Defendant when he states: “*And it must*

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<sup>23</sup> See <http://m.thetimestribune.com/opinion/arrogance-imperiling-natural-gas-industry-1.2026172> .

*own its mistakes like those in Dimock, Susquehanna County, instead of denying or minimizing them.*” (emphasis supplied).<sup>24</sup> This information is presented to demonstrate that the jury reached a verdict consistent with the statements of former PA DEP Secretary, John Hanger.

Before the jurors commenced their deliberations, the Court provided comprehensive instructions, which included the following, among other things:

In addition, evidence includes any facts that are stipulated, that is, formally agreed to by the parties. And you have heard about stipulations in the course of these proceedings. And any facts that I may have judicially noticed would be evidence. That is, facts I told you that you must accept as true even without other evidence. N.T. 3/9 95:22-96:2.

The law makes no distinction in the weight to be given to either direct or circumstantial evidence. You are to decide how much weight to give any evidence. And if your experience tells you that certain evidence reasonably leads to a conclusion, you are free to reach that conclusion.

In your consideration of the evidence you are not limited to the bald statements of witnesses or exhibits. You are not limited solely to what you saw and heard as the witnesses testified. You are permitted to draw from facts which you find to have been proven, such reasonable inferences as you feel are justified in light of your experience. N.T. 3/9 98:13-23.

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<sup>24</sup> See [http://www.pennlive.com/opinion/2016/04/the\\_gas\\_industry\\_is\\_in\\_the\\_dol.html](http://www.pennlive.com/opinion/2016/04/the_gas_industry_is_in_the_dol.html).

In addition, evidence includes any facts that are stipulated, that is, formally agreed to by the parties. *And you have heard about stipulations in the course of these proceedings.* N.T. 3/9 95:22-25. (Court's prior statements, e.g., I'll remind the ladies and gentlemen of the jury that the parties in litigation can stipulate, that is, they can agree that certain facts are undisputed, and that those facts are stipulated to, agreed upon by the parties as undisputed and *may* be accepted by the jury as undisputed in this case. (emphasis added) N.T. 3/1 33:20-25; The parties have reached that agreement, prior to trial, as I had mentioned to you, previously, and you *may* accept that fact as given. (emphasis added) N.T. 3/1 78:11-13.)

You should use your commonsense in weighing the evidence you heard and were presented. Consider it in light of your everyday experience with people and events, and give it whatever weight you believe it deserves. If your experience tells you that certain evidence reasonably leads to a conclusion, you are free to reach that conclusion. N.T. 3/9 96:12-18.

The opinion of the expert witnesses should receive whatever weight and credit, if any, you think appropriate given all the other evidence in the case. N.T. 3/9 101:5-7.

If you find after considering all the evidence that a claim or fact is more likely than not so, than the claim or fact has been proved by a preponderance of the evidence. N.T. 3/9 102:4-6.

In deciding whether to accept or rely upon the opinions of the expert witnesses you may consider any biases the expert witnesses may have, including any bias that may arise from evidence that the expert witness have been or will be paid for reviewing the case and testifying. N.T. 3/9 101:8-12.

**e. Jury followed Instructions**

There is absolutely no reason to conclude that the jury did not follow the Court's instructions on the law, as they were sworn to do. Respectfully,

based on the foregoing, and all evidence and testimony elicited and described in the Negligent Conduct and Causation portions of this brief, and because the record shows that the jury's verdict was not the result of a “miscarriage of justice” nor does the verdict on the record, “cr[y] out to be overturned or shock[] [the] conscience,” this Court should allow this unanimous jury’s verdict to remain undisturbed and Defendant’s application for a new trial should be denied.

## **2. Plaintiffs' counsel's conduct does not warrant a new trial**

Cabot accuses Plaintiffs' counsel of a litany of statements that prevented the gas company from obtaining a fair trial, and influenced the jury into unfairly arriving at a verdict in favor of Plaintiffs.<sup>25</sup>

### **a. Closing argument misconduct rarely justifies new trial.**

Rarely will improper comments made by trial counsel in a civil case rise to the level of reversible error. *Dunn v. Hovic*, 1 F.3d 1371, 1377. The trial judge has "considerable discretion in determining whether conduct by counsel is so prejudicial as to require a new trial." *Lightning Lube, Inc. v. Witco Corp.*, *supra* (quoting *Draper v. Airco, Inc.*, 580 F.2d 91, 94 (3d Cir.1978)); *Fineman*, *supra*, p. 207. The Third Circuit confirmed the District Court's decision. *Olefins Trading, Inc. v. Han Yang Chem Corp.*, 9 F.3d 282 (3rd Cir. 1993).

Deference is given to the trial court's assessment of the prejudicial impact of trial counsel's statements to the jury, as it is the trial judge who

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<sup>25</sup> Defendant attaches to its brief nine tables, totaling 129 pages, of examples of alleged misconduct by Plaintiffs' counsel that Cabot would assert corrupted the jury process. Aside from the fact that the tables are redundant, repetitive, petty and padded, they take out of context what actually transpired during the trial of a "very complicated case," which this Court oversaw with a firm, guiding hand. Respectfully, these tables should be viewed as a distortion of the trial and the degree of control and intervention, when necessary, exercised by this Court during the proceedings.

was present and observed the trial and is “in a far better position to appraise the effect of [any] improper argument[.]” *Fineman v. Armstrong World Industries, Inc., supra*, p. 207.

On the principle that the trial judge is in a better position to appraise the effect and impact of counsel's remarks, the Third Circuit generally defers to the trial court's assessment. *Reed v. Philadelphia Bethlehem & New England R.R Co.*, 939 F.2d 128, 133 (3d Cir.1991). An abuse of discretion will be found by an appellate court only where it has been determined that “no reasonable person would adopt the district court's view,” and that it is “reasonably probable” that the verdict was influenced by trial counsel's misconduct, viewed as a whole. *Oddi v. Ford Motor Co.*, 234 F.3d 136, 146 (3d Cir. 2000); *Greenleaf v. Garlock, Inc.*, 174 F.3d 352 (3d Cir. 1999); *Draper v. Airco Inc.*, 580 F.2d 91, 94, 97 (3d Cir. 1978).

**b. Parameters to be considered, closing argument**

The factors to be examined in determining prejudice are: “the scope of the comments and relationship to the proceeding, the extent of any curative instructions, and the strength of the evidence against the defendants.” *United States v. Dispoz-O-Plastics, Inc.*, 172 F.3d at 286 (citing *United States v Zehrbach*, 47 F.3d 1252, 1265 (3r Cir. 1995)).

The type of conduct that has been found to rise to the level of prejudice requiring a new trial trends toward combined behavior that has included intentional, *ad hominem*, and/or starkly unethical behavior. *Draper v. Airco, Inc.*, *supra*, p. 94 (the attorney, referencing defense counsel's personal wealth, violation of discovery rules, and criminal conduct repeated inappropriate references to defendants' wealth and vituperative and insulting references to opposing counsel, coupled with a one-day delay of a curative instruction, was grounds for a new trial, corporate manipulation, of corporate suppression, and a word that I hate to use, of corporate lies); *Fineman v. Armstrong World Industries, Inc.*, *supra*, p. 171 (improper conduct warranting new trial found where, *inter alia*, during summation, plaintiffs' counsel accused defendant's witnesses of being liars and perjurers, levied an unadorned, disparaging attack upon defense counsel, testified to his own truthfulness and trustworthiness, and attempted to supplement witness credibility with facts not in evidence.) *Guyer v. Beard*, 907 F.2d 1424, 1429 (3d Cir. 1990) (even conduct found to be contumacious and sanctionable by trial judge did not warrant new trial).

In evaluating the likely effect of improper comments, a court may consider whether the improper comments were invited by the particular circumstances of the trial. *Darden v. Wainright*, 477 U.S. 168, 181 (1986)

(witness questioning not so improperly prejudicial as to warrant a new trial, where prosecutor cast doubt on credibility of witness). *Lightning Lube, Inc. v. Witco Corp.*, *supra*, p. 1179 (district court's refusal to grant a mistrial did not constitute an abuse of discretion where plaintiffs' attorney engaged in repeated instance of witness tampering).

**c. Swift intervention of court nullifies potential prejudice**

Where a trial court responds swiftly to an attorney's misstep with a curative instruction, an appellate court is reluctant to find that the potential prejudicial impact to the opposing party has not been sufficiently addressed to avoid a new trial. It is settled that, where the jury has been instructed that the arguments of counsel do not constitute evidence, it is to be presumed that the jurors followed the Court's instructions. *Richardson v. Marsh*, 482 U.S. 200, 211 (1987). *In re Bayside Prison Litigation*, 331 Fed.Appx. 987 (3rd Cir. 2009) (where curative instructions were promptly directed the jury to disregard counsel's statements, a new trial is not compelled). The sufficiency of curative instructions to expunge any prejudicial impact of trial counsel's remarks, likewise, is left to the district court's discretion. *Fineman*, *supra*, p. 207 (citing "J.A. at 6988").

**d. Not objected to by Defendant**

As an initial matter, it is not at all clear from a review of the entire trial transcript that Defendant's counsel had any real ongoing concern that Plaintiffs' counsel's conduct risked their client obtaining a fair trial. It is respectfully requested that the Court recall the sidebar on March 9<sup>th</sup>, at the conclusion of Plaintiffs' summation, at which time Mr. Dillard, referring to Plaintiffs' counsel, made the following statement to the Court: "She's toying with us, trying to get us to move for a mistrial. *We're not intending to do that.*"<sup>26</sup> (emphasis added) N.T. 3/9 50:4-5. Mr. Dillard went on to make it clear that he would have been quite satisfied with an additional instruction from the Court to the jury regarding a number of summation remarks by Plaintiffs' counsel, which the Court had observed, in his opinion, "*began* to tread into areas that were inappropriate[.]" (emphasis added) (N.T. 3/9 48:18-19).

Implicit in Mr. Dillard's remarks during this March 9<sup>th</sup> sidebar is that, at the point where all trial testimony, objections, sidebars, Court instructions and closing argument by Plaintiffs' counsel had been completed, Cabot counsel had no serious concern that it had received an unfair trial as a result

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<sup>26</sup> The record shows that Mr. Dillard, lead counsel for Cabot, rarely if ever referred to Plaintiffs' counsel by name before the Court or the jury, instead regularly identifying Ms. Lewis as "she."

of opposing counsel's misconduct or an insufficient response from the Court. Rather, Mr. Dillard telegraphs a certain confidence that his client was on the verge of victory, and that he had no intention of going down a mistrial road.<sup>27</sup>

It was only after receiving an unanticipated Plaintiffs' verdict that Cabot revisited attorney Lewis' conduct in order to retrofit an additional, after-the-fact argument for a new trial. Regrettably, Plaintiffs' counsel has been called upon to engage in a punishing written exercise in order to defend her every trial action, as well as the very verdict she fairly, if not flawlessly, obtained on behalf of her clients.

**e. "Very complicated case," novel problems**

The record reflects a hard fought trial of a "very complicated case," an observation made by this Court. *See* N.T. 3/2 232:5-23. The record also shows the actions of a court that vigilantly and consistently supervised trial proceedings with a distinctly seasoned and steady hand in order to assure, to the best of its ability, that each party "had its day," and that neither party was prejudiced before the jury. The record shows a bench that, as required:

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<sup>27</sup> This deduction is given added weight by the fact that when Cabot's counsel wants a mistrial, they are quick to request one. That was the case on the first day, during *voir dire* when Mr. Dillard argued most vigorously, as does Mr. Mercer's brief, for a mistrial based on the remark by a single panelist.

[U]sed his authority, whenever it [became] necessary, in such a way that the proceedings in the courtroom remain[ed] devoted to a reasoned and reasonable search for justice between the parties.

*Brown v. Walter*, 62 F.2d 798 (2d Cir. 1933).

It would be a miscarriage of justice to view Plaintiffs' conduct in the vacuum of selected portions of a formidable trial record, where the Court's recollections of the entire proceedings together with a review of the entire record captures the full story and its context. The record shows infractions by attorneys on both sides. It also shows a swift and thorough response at each and every instance where the Court, in its judgment, felt that a statement by an attorney required a curative instruction, cautionary remark or an occasional reprimand in order to assure fairness to the other side.

**f. Court expressed satisfaction with counsel, confidence in jury**

The record further shows that at various times throughout the trial, the Court shared with counsel his faith and confidence in the jury, and appreciation for how counsel for both sides tried their respective cases. For example, the following statements made by this Court during conferences demonstrate reassuring observations of the jury, acknowledgment of the difficulties of the case, tolerance for sidebars, and an understanding of the challenges of trial advocacy:

I want to commend you both for your opening statements. I very much appreciated them. I think you have set the stage well for what will follow. N.T. 2/23 73:8-10.

[T]his jury strikes me as particularly attentive and particularly good in terms of following advice and instruction I have given them. I will note that as I have given them limiting instructions, the jurors not only appeared to understand but often times will nod their agreement with the limiting instruction I am imposing.

So I expect this jury will be able to, as you [Ms. Lewis] put it, unring the bell in the very same way that I found that the jury was able to do that when [Ms. Lewis] forayed into some matters I deemed inappropriate yesterday.... I have enormous confidence in the attention this jury is paying to this very complicated case. N.T. 3/2 232:6-23.

This jury has been very attentive to my instructions and they've been a very attentive jury, and they strike me as a very cohesive bunch. N.T. 3/8 134:18-20.

You all have collectively selected I think a very good jury, and we'll look forward to seeing what their outcome is. N.T. 3/8 138:1-3.

I wanted to tell you all that I thought that in a case that involved enormous challenges and a great deal of very hard work, that I appreciated the advocacy of all counsel in this matter. N.T. 3/8 142:14-17.

(Addressing Ms. Lewis) [M]y denial of the reconsideration request was [not] construed in any way as a criticism of your conduct and your performance because it is not. You worked very hard on this case in terms of trying to address issues. ... But I want to make sure ***I made it clear on the record that I appreciate your efforts on behalf of your client, who I think are well served by your zealous advocacy.***" (emphasis added) N.T. 2/24 5:12-25.

(Addressing Ms. Lewis) You have been very scrupulous in

terms of trying to [limit Dr. Ingraffea's testimony to the records]. N.T. 2/29 130:14-15.

(Addressing Ms. Lewis upon her having called for a sidebar) I appreciate you clarifying where you were at. N.T. 3/1 94:5.

(Ms. Barrette allegation) I'm not going to characterize [Ms. Lewis' question] as "deliberately designed" [to move into an area covered by the *Motion in Limine* on the consent orders.] N.T. 3/1 179:24-25.

(Addressing Ms. Lewis) *I understand, and I can appreciate -- that's one of the reasons I raise these at sidebar for counsel, because you all have to make a judgment on whether a curative instruction helps or hurts, and you're making, Ms. Lewis, a seasoned and tactical judgment that you would prefer not to have a curative instruction, and I think we'll move onto a different area. Is that fair, counsel?*

MS. BARRETTE: Yes. (emphasis added) N.T. 3/1 181:23-182:5.

(To Ms. Lewis) *I appreciate that cooperative approach. I understand.* (emphasis added). N.T. 3/2 46:20-21.

(Addressing Mr. Dillard) I will note for the record that when Ms. Switzer went there, Ms. Lewis came to sidebar, that Ms. Lewis immediately indicated that was not an answer that she was endeavoring to elicit. *She acknowledged it was not an answer that she intended or, that she wished to have presented to the jury.*

*And Ms. Lewis took the affirmative step of indicating that she believed that that question and answer should be withdrawn and that I should instruct the jury to disregard it. That contemporaneous conduct by Ms. Lewis, I thought, was an appropriate response to what appeared to have been in that instance an unexpected development.* And so I took that step, which I felt was appropriate in that case in that instance. *I understand and appreciate the concerns each party has in this case. I also very much understand and appreciate the passions all parties bring to this case.*

***But I expect that all counsel will continue as they have done throughout these proceedings to conduct themselves in a professional fashion, and all counsel may rest assured that in instances where I believe they have not, I will feel free to address those matters with counsel.***

As I noted this morning, to the extent that I conclude that efforts of mine have been misconstrued or inadequate, counsel may rest assured that ***I am prepared to do whatever is necessary to make sure this case is fairly tried for all parties. And that's what I have done thus far.*** I do appreciate the observations of both sides. ***I have not found anything in the matters raised here with me at the noon hour require more action beyond the action that I have taken...[Y]ou may rest assured if I find that the actions I'm taking are inadequate, I will be prepared at the request of the parties or on my own to take actions.*** (emphasis added) N.T. 3/2 117:11- 118:21.

(Addressing Ms. Barrette) No one has to apologize. You are advocates. You are engaging in the advocate's art. Sometimes because I have engaged in the advocate's art, ***I understand how zeal for a cause can, every once in a while, get ahead of judgment. The only way you find out if your zeal has gotten ahead of your judgment is when the Court speaks up.*** There's nothing to apologize for, but I endeavor to draw some bright lines for everyone. I appreciate the offer of an apology because I deem one unnecessary. I tell you it's unnecessary. ***Both sides are trying to be good and advocates. Sometimes folks will get in the wrong place. I let you know if you are.*** (emphasis added) N.T. 3/2 15:24-16:10.

[P]art of the process for counsel is trying to anticipate what other counsel is going to do. I understand that's often why people show up at sidebar.

(Addressing Ms. Lewis) I appreciate you alleviating [Ms. Barrette's] concern. N.T. 3/4 84:1-2.

**g. Not a perfect trial**

As this Court knows, every case is different; every trial is different. This trial was not perfect, but neither was it fundamentally unfair to Defendant. Based on the selected portions of the “cold record,” taken in isolation, packaged in Cabot’s Appendices and brief, Plaintiffs’ counsel comes off as something less than a model of decorum. She tried a “very complicated case,” and sometimes “let zeal get ahead of her judgment.” However, despite accentuated and magnified reference by Defendant to Plaintiffs’ counsel’s every misstep, nothing that she did or did not do, separately or cumulatively, during the better part of an exhausting 2-week trial served to manifestly prejudice the Defendant, or the outcome of the trial. Taken as a whole, Plaintiffs’ conduct, under the odds and pressures that she faced, minute-to-minute, against Cabot’s formidable legal firewall, might from other corners have been considered an overall good effort.

**h. Orchestrated effort to characterize Plaintiffs’ counsel as “untrustworthy” before the Court**

A review of the record shows that Defendant’s counsel, from the start, attempted to paint Plaintiffs’ counsel and her witnesses as prone to intentional and strategic misbehavior. This was the *modus operandi* for each of Cabot’s attorneys. For example, Ms. Barrette, in a single morning during a single defense witness’ testimony did, on several occasions during sidebar

originated at the request of Defendant's counsel, accuse Ms. Lewis of questioning the witness in such a fashion as to intentionally "portray...the witness [as] tr[ying] to hide something from the jury, as *she had done with other witnesses*." (emphasis added). See N.T. 3/4 31:22-25; 42:25-43:2; 82:17-18. Similarly, Mr. Dillard would ascribe ulterior motives to Ms. Lewis and her witnesses, including on day one of trial: "See, the worse thing I can do is let her know what I would like because it automatically becomes the opposite." N.T. 2/23 72:4-6.

**i. Numerous sidebars doubtful issue for jury**

On the issue of sidebars, Cabot asserts that Plaintiffs' counsel was responsible for provoking them, and that their repeated occurrence somehow necessarily prejudiced the jury against the Defendant, by causing the jury to believe that Cabot had something to hide.<sup>28</sup> Sidebar conferencing became a reality during this trial as a result of the sweeping motion *in limine* rulings demanded by Defendant, and generally granted by the Court, at its discretion, over most vigorous objection from Plaintiffs.

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<sup>28</sup> On the one hand, Cabot complains that Plaintiffs' counsel forced them to sidebar to their clients' detriment, on the other hand they condemn Plaintiffs' counsel for failing to approach the bench regularly enough in order, for example, to clarify evidentiary rulings of the Court. See Doc. 765, p 46.

While the jury may have wondered now and then what was going on at sidebar, or become momentarily impatient with them, there is no evidence whatsoever to support Cabot's conclusion that sidebars themselves weighed against Cabot in particular, in the eyes of the jury, especially in light of the Court's occasional observations to the jury on the topic, e.g.:

From time to time I may need to speak to counsel outside your presence, or need to speak to counsel at side-bar, I'm not doing that to hide anything from you or conceal anything from you, but it's necessary for me sometimes to speak with the attorneys about legal issues to make sure that evidence is presented to you in a proper and appropriate way at trial. N.T. 2/22 178:5-11.

As I have noted for you throughout these proceedings, we have the sidebar conversations really to help me make sure that I'm able to make informed rulings on legal questions and able to guide the testimony before you and nothing in the -- you shouldn't speculate on the nature of the sidebar discussions or anything of the sort. N.T. 2/24 88:15-20.

It is equally plausible that the occurrence of sidebars impacted the jury's perception favorably toward Defendant's cause based on the number of Defendant-favorable rulings, curative instructions, and occasional upbraiding of Plaintiffs' counsel by the Court that followed sidebars, but had absolutely nothing to do with their deliberations, when, as instructed, they weighed the evidence, decided the facts and applied the law.

As this Court well knows, the necessity for sidebars was the result of "unfinished business," requiring an as-the-situation-arises determination by

the Court as to admission of particular testimonial or documentary evidence in light of its numerous rulings on Cabot's extensive motion *in limine* requests. Indeed, in the days leading up to trial, this Court, no doubt recognizing the extent of the exclusions, interrelationship of excluded evidence to the facts of the case, unpredictability of the course of the trial, and inability to cover all possible bases in the time left before trial, directed that issues relating to the propriety of questions in light of exclusions of evidence would be addressed as they arose at trial, outside of the presence of the jury, at sidebar. This reflects precisely what transpired subsequent to a pretrial telephonic conference between the Court and Parties days before commencement of trial.

**j. Navigating regulatory exclusions extraordinary complication**

Most critical, and posing the greatest challenges by far to Plaintiffs' counsel with respect to coherently presenting her clients' cases and refuting Cabot's defenses before the jury, was the Court's decision to exclude Notices of Violations issued to Cabot by the PA DEP with respect to Cabot's negligent conduct at the Gesford 3 and Gesford 9 wells, which represented the Department's conclusion that Cabot caused contamination of Plaintiffs' water supplies, requiring testing, remediation and water replacement.

In its hyperbolic attention to Plaintiffs' counsel's every possible misstep, Cabot's counsel ignores the possibility that the jury reasonably viewed the evidence for what it was, and that Cabot, as a result of the behavior of its own counsel and witnesses, might have unintentionally invited the jurors to question the possibility that information was being kept from them. Examples include counsel's focus on treatment systems during opening and summation, and questioning of Plaintiffs; counsel's focus on Plaintiffs' refusal to sign a piece of paper acknowledging that Cabot made no admission of liability in exchange for water deliveries; a Cabot witness, Ms. Locey, bringing up a the proposed water pipeline to Dimock and the [drilling] moratorium during cross examination; and counsel's articulating the leading question to Cabot employee, Mr. Stalnaker, i.e. "And the DEP didn't order any *additional remediation*, correct?" (emphasis added) N.T. 3/1 211:2-3. The formidable presence of counsel and personnel on behalf of Cabot also may have sent a message to the jury, wholly unrelated to Plaintiffs' counsel's performance. This is not to say that evidence was not appropriately analyzed and weighed against the facts and the law by the jurors, but rather that, the jury was also took into account everything they observed in the courtroom.

For her part, Plaintiffs' counsel, coming from a place of advocacy, was required to walk something of an uncharted path during trial. It was her obligation to present her clients' case in as fair and linear manner as possible, all the time navigating through a figurative landmine of excluded evidence. Contrary to Defendant's assertions, at no time during the course of trial did Plaintiffs' counsel *intentionally* refer to inadmissible evidence; raise inflammatory and unsubstantiated innuendos; or violate rulings of this Court to Defendant's manifest prejudice. Plaintiffs' counsel attempted to "walk the line" in maintaining a proper respect and decorum for the Court and every person who came before it, while putting on the best case she could for her clients. As the Court observed, there were challenges, details and pressures, arising minute-to-minute from 8:00 a.m. until 5:00 p.m. every day for the better part of two weeks in this "very complicated case" that both sides faced, which at times may have pushed both sides to their civil limits.

**k. The conduct on both sides**

Principles of equity would seem to require that when accusing opposing counsel of misconduct, complaining counsel should present with clean hands. In going down this road of magnifying and cataloguing every innocent misstep of Plaintiffs' counsel, Cabot should not be permitted to insinuate by unspoken contrast that its lawyers counsel somehow performed

flawlessly throughout the trial proceedings. In light of some of the following examples, that would appear to be incorrect. The record demonstrates the following missteps on Ms. Barrette's behalf:

So when Mrs. Ely testifies, if I question her about that and she says she moved in 2001, *would that be a lie on her part?* (emphasis added) N.T. 2/23183:14-16.

And so *somehow now your memory has gotten better now in 2016* that you're able to remember a different time when the concrete footers were put in, correct? (emphasis added) N.T. 2/23 197:23-25.

(During cross examination of Mr. Rubin) "So there's another -- it's too timely. *You didn't want to take the time to do it. It took too much time to do it.*" (emphasis added) N.T. 2/25 172:15-16.

Mr. Rubin, *I understand, you know exactly where I'm going*, because there were a lot of things you did not do with that sampling that—(emphasis added) N.T. 2/25 194:21-23.

Q: Mr. Rubin, you would agree with me it is not generally accepted scientific practices to have a homeowner purging the well as part of the sampling procedure, correct?

A: In certain circumstances I think it's perfectly fine.

Q: *In circumstances when it's your sample result, correct?* (emphasis added) N.T. 2/25 210:2-6.

Q: Mr. Rubin, I'm not referring -- we're going to get to the point -- *I know you want to explain the total* -- (emphasis added) N.T. 212:7-8.

(During examination of Cabot employee, Mr. Stalnaker) *And the DEP didn't order any additional remediation, correct?* (emphasis added) N.T. 3/1 211:2-3.

Further, as review of the transcript of Mr. Dillard's summation demonstrates, Defendant's counsel engaged in his own brand of missteps, including regularly inserting his personal opinion, unfairly attacking Plaintiffs' experts, and seemingly vouching for the credibility of his client and witnesses. *Polansky v. CNA Insurance Co.*, 852 F.2d 626, 628 (1st Cir. 1988) ("Courts have long recognized that statements of counsel's opinions or personal beliefs have no place in a closing argument of a criminal or civil trial.") (Citations omitted). Missteps were apparent in Plaintiffs' estimation his closing argument, including so regularly infusing his personal opinions as to potentially blur the line between "what he thought" and what the evidence was. Mr. Dillard:

References "those who depend on Cabot," necessarily and implicitly including himself: "First of all, I want to thank you on behalf of ... *all of those who depend upon Cabot*. Thank you for your jury service. We appreciate it very much." (emphasis added) N.T. 3/9 52:10-12.

Invokes conversation with the Court to which the jury was not necessarily a party: "But one thing that Judge Carlson said in the early part of the trial, I think it was in the presence of counsel *and maybe the jury was not in the room*." N.T. 3/9 52:15-17.

Suggests an area of consideration for the jury which it condemns Plaintiffs' counsel for doing in her closing argument.<sup>29</sup> "But one good approach is often to look back at

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<sup>29</sup> Specifically, Cabot counsel alleges misconduct on the part of Ms. Lewis when she observed during her summation that Cabot had failed to produce,

the beginning of the trial to opening statements...*[a]nd let's see which party did what it said it would do.*" (emphasis added) N.T. 3/9 53:2- 6.

Misrepresents to the jury the reason why Cabot decided not to present a toxicologist, having in reality not cancelled their witness' appearance until the very morning when he was in the courthouse scheduled to appear and only after their proposed demonstrative exhibits were disallowed, two weeks after opening statements: "When I come to hear an opening statement as we did a couple of weeks ago, and counsel says there are no toxic substances in the water, the water is nontoxic, then *I decide I don't need to waste this jury's time with putting a toxicologist on the stand to say just that, and I released him and I let him go home.*" (emphasis added) N.T. 3/9 53:14-19.

Attempts to shift the burden as to proof of the effectiveness of water treatment systems and "failure to mitigate" by indirectly capitalizing on the unavailability of Plaintiffs' treatment system witness due to illness: "And when counsel says, as she did a few moments ago, that we didn't present any treatment system expert. We had one of those too, and we released him and let him go home because not a single person said on that witness stand and related about their treatment system and the fact *that it didn't work.*" (emphasis added) N.T. 3/9 53:20-24.

Offers his opinion, testifies as to a fact not in evidence and vouches for the efficacy of water treatment systems: "And of course, these systems are *all highly individualized* for whatever the water needs are of that particular resident." (emphasis added) N.T. 3/9 53: 25-54:1.

Vouches for Cabot's evidence: "And what seems at first perhaps to be a complicated decision becomes, in effect, a very, very straightforward decision, *about as simple in my mind as it gets.*" (emphasis added) N.T. 3/9 56:4-6.

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as promised during its opening statement, witnesses who would testify as to the toxicological profile of Plaintiffs' water and the effectiveness of the type of water treatment systems Defendant had offered to Plaintiffs.

Raises, likely to his own client's detriment, the possible inference for the jury that Plaintiffs in fact did suffer from medical conditions associated with contamination of their water: "We learned that [Mr. Ely] also told his doctor the same thing, it appeared in doctor's notes." N.T. 3/9 58:4-5.

Attempts to mislead the jurors into believing that the stipulated fact regarding the "on-or-about September 25, 2008" drill date is binding upon jurors, where the law allows that jurors may consider a stipulated fact as true: "[T]hat stipulation is binding, as the Court has instructed you." (emphasis added) N.T. 3/9 61:1.

Inserts inflammatory personal speculation and opinion regarding facts not in evidence: "Mr. Ely, *I believe* rejected a treatment system to fix his cosmetic water issues out of hand because he did not want that. *He wanted to sue Cabot for money damages in this case.*" (emphasis added) N.T. 3/9 83:10-15.

Distorts the evidence in order to leave the jury with the unmistakable impression that Cabot, on the two occasions that it provided drinking water and a water buffalo to the Huberts, did so because the Huberts' "well went dry," when in fact on the second occasion, in January 2009, it was because the Huberts' water had become contaminated with explosive levels of methane gas: "Cabot supplied bottled water *when [the Huberts'] well went dry, as it had before, as the well had gone dry before*, supplied a water buffalo and filled it." (emphasis added) N.T. 3/9 85:6-8.

Expressed personal satisfaction with his presentation of Cabot's case, perhaps sinking, so to speak, his own client's ship: "*So I made the decision in sizing up where we were that we could put our case on in two days*, and we did that...*And I'm pleased*...I'm inviting you now to grade our papers, to grade our papers." (emphasis added) N.T. 3/9 54:8-24.

Inserts his opinion in place of evidence for the unsupported proposition that Cabot's activity was definitively not a factor in bacteria appearing in Plaintiffs' water: "Aside from some bacteria issues, which they've had that *no one blames on Cabot[.]*" (emphasis added) N.T. 3/9 55:3.

Implies that something untoward occurred between Plaintiffs' counsel and Mr. Ely during a break in his testimony: "As I'll explain in a moment. **It came immediately after a break that we took in the afternoon.** I believe it was on the first full day of testimony. If the cart couldn't be moved then maybe the horse could be moved. We could get it in front of the cart. And we were told about a very dramatic event -- sounded dramatic to me--that occurred in June or July was the testimony. June or July of 2008." (emphasis added) N.T. 3/9 61:7-14.

"Testifies" as to a fact not in evidence in an effort to portray Mr. Ely as a liar: "And he went there and it, quote, stunk like crazy, only of course later to have to admit that methane does not have an odor. They put the odor in there to transport it." N.T. 3/9 61:19-21.

Refers to an affidavit, and its asserted contents, which were not in evidence: "[Mr. Ely] filed a lengthy affidavit under oath, sworn to before a notary public, never mentioned any of those places. He never mentioned it anywhere." N.T. 3/9 62:3-6.

Suggests without any legal basis that Plaintiffs' expert must identify a single pathway: "Mr. Rubin, he *couldn't identify one.*" (emphasis added) N.T. 3/9 66:22-25.

Asserts as true a fact not in evidence: "*And of course* [Dr. Ingraffea] never has performed a pressure integrity test on a well in his life." (emphasis added) N.T. 3/9 67:3-6.

Testifies as to his opinion: "And the pressure test always showed that these wells were within tolerance, allowable tolerance, *which means that what's in the well is not getting outside the well, and what's outside the well is not getting in the well.*" (emphasis added) N.T. 3/9 67:8-12.

Misleads the jury as to the legal questions that the Court will instruct them to answer: “[T]he question that you’re here to answer. And that is, *Is this a naturally occurring phenomenon?*” (emphasis added) N.T. 3/9 68:7-11.

Plays to the emotions of the jury by referring to Defendant’s witnesses Ms. Green and Ms. Loucey as “*little ladies.*” (emphasis added) N.T. 3/9 69:17-20.

Misrepresents the evidence, describing a 230-gallon, hard plastic, holding tank (“water buffalo”) as “*bladder.*” (emphasis added) N.T. 3/9 70:7-9.

Inserts his opinion as to the present-day quality of Plaintiffs’ drinking water, based on water data that is not present day: “*[I]t isn’t bad.*” We have proof ... in the form of *records from the United States Environmental Protection Agency.* (emphasis added) 3/9 N.T. 71:2-6.

Invites speculation, invokes partial findings of one administrative agency, skirts Cabot’s own *in limine* requests for exclusion of administrative investigations and results: “The EPA had been running tests on their water and supplying them with bottled water. And when the results came back the EPA stopped delivering the bottled water, *and we know why.*” (emphasis added) N.T. 3/9 73:6-11.

Substitutes his personal opinion for facts regarding Plaintiffs’ expert, Paul Rubin: “*[B]y my account, [Mr. Rubin ‘didn’t do’] anything right. And frankly, it was embarrassing.*” (emphasis added) N.T. 3/9 73:12-14.

Substitutes his personal opinion for facts: “Ladies and gentlemen, *they clearly overpumped this well. They dewatered this water.*” (emphasis added) N.T. 74:8-10. “And this water is -- *it’s a small fire hydrant is the way it appears to me.*” (emphasis added) N.T. 3/9 74:19-20.

Misstates and mischaracterizes Plaintiffs' counsel's comments during argument: "[S]he said *no witness* who testified for Cabot was telling the truth, and the *only witnesses* who told the truth were those that they called." (emphasis added) N.T. 3/9 76:19-22.

Inserts his opinion and vouches for his witnesses: "If you believe Ms. Green was not honest, if you believe that Ms. Loucey is not honest, *I'll be very, very, very, very surprised to hear that. I thought she was treated disrespectfully, but that's just a personal observation.*" (emphasis added) N.T. 3/9 76:23-77:1. "Was Shelly Williams telling the truth? *Of course she was.*" (emphasis added) N.T. 3/9 77:2-3. "I'll let you decide if she's telling the truth. *I've already told you my impression about that.*" (emphasis added) N.T. 3/9 77:13-14. "[Dr. Ingraffea] displayed a total lack of candor in coming into this courtroom here in Scranton[.]" N.T. 3/9 77:24-25.

Implies that Dr. Ingraffea was running an illicit organization: "*It's a charity, in his mind, a foundation that he created...that foundation and another foundation which funnels money to and through it [.]*" (emphasis added) N.T. 3/9 78:5-13.

Inserts speculation, his opinion regarding facts not in evidence, and substitutes his statements for evidence: "And there was this *subtle suggestion* that maybe we didn't give him all the records, *at least that's how I read it, so I made it clear that all the records had been produced and had been produced, were without end in this litigation over six years. More records than anybody, and be thankful you don't get them all because you would be back there with stacks of paper.*" (emphasis added) N.T. 3/9 79:16-22.

Uses personal opinion and rank speculation to fuel attack on Plaintiff: "I didn't hear that Mr. Ely was regularly working, certainly not on any regular basis." N.T. 3/9 84:6-8.

Inserts his personal opinion: "As I say, **part of this is pretty simple in my mind and can resolve this entire case.**" (emphasis added) N.T. 3/9 85:14-17.

Uses personal opinion to fuel attack on Plaintiff “Ladies and gentlemen, *I believe* the plaintiffs here are pursuing more of a cause than a case. *That's strictly my belief.*” (emphasis added) N.T. 3/9 86:7-11.

Even assuming that Plaintiffs’ counsel had made inappropriate statements during summation, it is settled that in civil jury trials, “improper comments during closing arguments rarely rise to the level of reversible error.” *Dunn*, 1 F.3d at 1377 (citation omitted). (noting that “our disapproval of portions of the closing is not enough to warrant reversal on that ground.”).

“It is clear that counsel on both sides of the table share a duty to confine arguments to the jury within proper bounds.” *United States v. Young*, 470 U.S. 1, 8 (1985). It is recognized that “[t]he lines separating acceptable from improper advocacy is not easily drawn.” *Id.* at 7. Though neither side’s closings were textbook, in Plaintiffs opinion, and while Plaintiffs’ counsel’s argument may be couched as animated, overly rhetorical, and, yes, one that contains a few unintentional missteps, the conduct does not rise to the level of manifest prejudice. Hopefully, this Court will decide as did the judge in *Dunn*, that its “disapproval of portions of [Plaintiffs’] closing is not enough to warrant a reversal on that ground.” See *Dunn v. Hovic*, *supra*, p. 1377.

**I. Inappropriate areas raised by the Court, addressed**

During her closing argument the Court alerted Plaintiffs' counsel on those occasions where he felt she was approaching "inappropriate areas," and promptly provided the jury with what he believed to be "adequate instructions," reinforcing that "closing argument is not evidence." Nothing indicates that the jury did not heed the Court's words. As reinforced in *Richardson*, it is to be presumed that where the jury has been instructed that the arguments of counsel do not constitute evidence, that the jury followed the Court's instructions. *Richardson v. Marsh, supra*, 211.

This scenario differs from *Draper*, a case relied upon by Cabot. In that case, the Third Circuit reversed the trial court's decision to deny a new trial, where trial counsel made multiple "vituperative and insulting references to opposing counsel," multiple references to the Defendants' wealth, as well as repeated insertions of personal opinions as to the justness of his client's cause during summation. *Draper v. Airco, Inc., supra*, p. 94. In reaching its determination to reverse, the Third Circuit considered that the curative instruction of the trial court *came a day after the offending conduct*. (emphasis added) *Id.* at 97.

Another case that Cabot cites is *Fineman v. Armstrong World Industries, Inc., supra*. There, defendant-counter-claimant's counsel

characterized his client as the true victim in the case; characterized the case as a "financial million dollar nightmare" for defendant; accused defendant's counsel of deliberately misrepresenting the evidence; ascribed defendant's counsel's motives for his misrepresentations to his \$1.1 million legal fee, "hammered home how [counsel] had earned it;" improperly provided his personal opinion as to the justness of counsel's cause; repeatedly interjected his own credibility and honesty as an issue at trial; accused defendant's witnesses of lying and perjuring themselves on the stand; described defendant's theory of the case as insulting to the jury's intelligence; uttered "I believe"; focused upon the credibility of witnesses; accused Fineman of lying and urged the jury to disbelieve the plaintiffs' theory of plot and conspiracy. J.A. at 6977; 6971-83.

Statements by Plaintiffs' counsel during her closing argument cannot be fairly analogized to that brand of conduct. Nor was there any instance of delay by the Court to make a ruling, issue an instruction, or admonish Plaintiffs' counsel. On occasion, where the Court anticipated counsel's wondering into "inappropriate areas," it even acted preemptively. This Court was exceedingly prompt and thorough in issuing curative instructions, informing the jury of the proper legal standard, repeatedly advising the jury that counsels' arguments were not authoritative statements of the law, and

directing the jury to disregard any statement, question or elicited testimony by Plaintiff's counsel which in its opinion was inappropriate.

**m. No manifest injustice**

Statements in the context of this particular case do not rise to the level of a "manifest injustice" warranting a new trial. While Plaintiffs counsel's statements may have been "overly rhetorical," they did not adversely impact the jury's impartiality. *Burlington v. News Corporation*, Dist. Court, ED Pennsylvania 2016. Accordingly, alleged misstatements should be deemed "harmless" (*In re Bayside Prison Litigation*, 331 Fed.Appx. 987 (3rd Cir. 2009), falling below the level of unaddressed prejudice that compels a new trial.

The record demonstrates a barrage of objections by Defendant's counsel, even to the point where, on one memorable occasion, Defendant's attorney, Amy Barrette, made a speedy objection, only to have it withdrawn after a lengthy silence where counsel was completely unable to come up with a remotely colorable basis for the objection. The record is replete with the innumerable occasions where one or the other of Defendant's four attorneys objected to questioning, and the Court quickly sustained the objections issuing thorough corrective instructions to prevent any substantial prejudice, individually or cumulatively.

Furthermore, the record demonstrates occasions where during cross examination of Plaintiffs' witnesses, Defendant's counsel posed questions that necessarily built on facts not in evidence, to the prejudice of Plaintiffs. For example, on one occasion, Ms. Barrette attempts to impeach hydrologist, Daniel Farnham by posing the question: "Now, Mr. Farnham, the -- you submitted over \$25,000 worth of bills to the plaintiffs for work on this case, correct?" (N.T. 3/2 230:8-9). Ms. Barrett asked this question, of a witness she had deposed during the course of litigation, and with the implicit knowledge that such a sizable bill was related to services Mr. Farnham had provided to 22 households involved in *Fiorentino*, including the Elys and the Huberts, and all of whom, other than the Elys and Huberts had settled their claims under the *Fiorentino* caption.

Outside of the jury's presence, the Court noted a number of areas it felt were improper for Plaintiffs' counsel to have touched upon during her closing argument, including reference to the jury that Plaintiffs had made a *prima facie* showing, and avoiding any reference to anything having to do with settlement matters with Cabot. The Court spoke, offered curative instructions and determined that the instructions expunged any potential prejudice. As demonstrated by the law, swift and strong instructions by the

court are to be construed as sufficiently neutralizing the potential prejudicial effect of misstatements.

A party who fails to object to errors during closing argument generally waives the right to complain about them following trial. *Waldorf v Shuta*, 142 F.3d 601, 629 (3d Cir. 1998) Courts have consistently held that “[c]ounsel’s failure to object precludes him from seeking a new trial on the ground of the impropriety of opposing counsel’s closing remark[.]. *Burlington v New Corp.*, *supra* (citing *Murray v. Fairbanks Morse*, 160 F.2d 149, 152 (3d Cir. 1979). *See also Waldorf*, 142 F.3d at 629 (affirming denial of motion for new trial because counsel failed to object to closing remarks at trial. An exception exists “where a manifest injustice would result [if] counsel failed to object to a fundamental and highly prejudicial error resulting in a miscarriage of justice. *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 116 (3d Cir. 1992). That is not the case here.

Noting that Plaintiffs’ counsel should “refrain from implying anything about settlements or resolution of other matters” N.T. 3/9 49:4-7. Involved a gray area for Plaintiffs’ counsel as the scope was vast and vague. In its brief, Cabot broadens the scope to in was the by suggesting that Cabot should be allowed to portray their delivery of water to “local residents/royalty owners [was] a good will gesture.” *See Doc. 765, Cabot brief*, pp 54-55. The fact

remains Cabot was required to deliver water to Plaintiffs. Counsel for Defendant demonstrated that Cabot had pressured Plaintiffs to accept water treatment systems, which were a condition of the COSA, in cross-examination of Ray Hubert and Victoria Hubert:

Q: You were offered a treatment system by Cabot, correct?

A: That's correct.

Q: You turned it down, correct?

A: Correct. N.T. 2/24 223:7-10.

Q: Mrs. Hubert, I'd like to move on to a different but related topic. You're aware that Cabot offered a methane separator for you and your husband to use at the property where you live correct?

A. Yes.

Q. And you refused the methane separator to be installed correct?

A. Yes. N.T. 2/25 85:18-25.

**n. Question of Stalnaker misconstrued**

Plaintiffs' counsel's question of Phillip Stalnaker about *alleged* destruction of evidence related not to documents but to the manner of unreported disposal of tainted soil from the Gesford 3 pad following a diesel fuel spill. The line of questioning about occurrences on the Gesford pad was anticipated and allowed during the proffer stage at sidebar with Defendant's

counsel, Ms. Barrette. The fact of the contamination is confirmed by the filing of a remediation report by Defendant's expert, James Pinta, and David Testa, URS Corporation, and a subsequent Notice of Intent to Remediate, which collectively challenge the testimony elicited by Ms. Barrette from Mr. Stalnaker at trial that, "And all of those test results showed there was absolutely nothing to Mr. Elys claims correct? A: Correct." N.T. 3/1 210: 21-23.

**o. Question to Williams misinterpreted**

Mr. Mercer's assertion that Plaintiffs' counsel's question implied that GDS work tickets may have been destroyed is misplaced as demonstrated by a review of the trial record during questioning of GDS employee Shelly Williams:

Q: Okay. And have any—have any tickets been removed for any reasons, and that's not to implicate anything untoward by you, but have for any reason, any of the work tickets that you might expect to be there been removed?

A: No." N.T. 3/8 94:10-14

This question was entirely appropriate in light of the stunning absence of any work ticket in September 2008 for the actual drilling of the Gesford 3 well. The fact that no work ticket exists among all GDS work tickets for the month of September 2008 for drilling the Gesford 3 well undermines the credibility of the stipulated fact.

**p. Regulatory-civil intersect entanglement**

Rather than intentionally questioning witnesses about excluded evidence, on occasion attorney Lewis' questions related unavoidably to underlying facts which were common to the administrative case and the civil litigation which are inextricably linked as demonstrated by questions asked by Defendant's counsel with respect to water treatment systems and plugging the Gesford gas wells. Counsel for Defendant by implication referred to the COSA and information regarding PA DEP's investigation of Dimock, including questions regarding treatment systems and no violation being found by the DEP when Ms. Barrette "cross-examined" Mr. Stalnaker. Plaintiffs' counsel properly referenced evidence relating to two water wells, to which Defendant's counsel had previously referred when questioning Plaintiff Nolen Scott Ely regarding water treatment solutions offered to the Elys by Cabot. The reference by Plaintiffs' counsel to the second well was for purposes of disputing Dr. Saba's assertion that the geology was "tight" at the location of the Hubert's water well, and that is why his well went dry. On the issue of a video demonstrating "bubbling" at Gesford well heads, well records produced by Cabot and from which Dr. Ingraffea testified, reflect that Defendant did in fact create a videotape of bubbling at the Gesford wells.

**q. Plaintiffs' counsel did not under-instruct or over-instruct witnesses**

Plaintiffs' counsel is not a clairvoyant. The best she could do was to advise witnesses of the restrictions on the case, and the limits to which they may testify. Plaintiffs and the lay witnesses who appeared on Plaintiffs' behalf have limited, if any, experience testifying in a courtroom. It is not unreasonable to assume there would be unintentional "slips," and when that occurred, the Court hastily terminated the questioning and issued curative instructions, where it saw fit.

In one instance, Defense counsel points to lack of preparedness of Ms. Angel Hubert. It is a fact that Ms. Hubert and Plaintiffs' counsel had never had the opportunity to physically meet prior to her appearance in court to testify, primarily because Ms. Hubert lived outside of the Hubert family home for the majority of the period of time that the instant litigation was pending and during which she was not a plaintiff. However, it is also a fact that Plaintiffs' counsel and Ms. Hubert communicated with one another during the evening before she appeared in court to testify, and at which time she was prepared for what to expect and the restrictions on her testimony.

Cabot accuses Plaintiffs' counsel of misconduct in "conced[ing] that she had not met with her clients to prepare them for their testimony at trial." However, the reason Plaintiffs' counsel did not "meet" with Mr. Ely prior to

his testimony on Wednesday, February 24<sup>rd</sup> is because it would have been unethical for her to do so, as Mr. Ely was still under oath and had completed his testimony on the previous day, Tuesday, February 23<sup>rd</sup>.

**r. Leading and other poorly-formed questions unintentional, harmless effect**

Plaintiffs' counsel did her best to adhere to the Court's instruction as to forming questions. When considered alone, or together with other alleged trial errors, the leading questions of Plaintiffs' counsel should not be construed as so improper or harmful to Defendant as to warrant a new trial, as Cabot urges. *Herman v. Hess Oil Virgin Islands Corp.*, 379 F.Supp. 1268 (D.Virgin Islands 1974). As to leading questions occurred during the examination of two Cabot employees during Plaintiffs' case-in-chief, Rick Mullins and Phillip Stalnaker appeared pursuant to subpoena to testify under direct examination during their case-in-chief. As Defendant's employees, Mr. Mullins and Mr. Stalnaker were, by definition, "adverse" witnesses; they were "hostile" to the interests of Plaintiffs in proving their case.

Plaintiffs' counsel respectfully represents that a review of the testimony of both gentlemen objectively demonstrates a general unwillingness, or inability because of lack of preparedness, from each of these adverse witnesses. Accordingly, it might be legitimately viewed by this Court, that occasional leading questions by Ms. Lewis of Mr. Mullins

and Mr. Stalnaker were, at least to some extent, appropriate and necessary under Rule 43(b), and nonetheless harmless. As to her direct examination of other of Plaintiffs' witnesses, counsel was often attempting to have witnesses repeat testimony previously elicited during discovery. Therefore, rather than "putting words in the witnesses' mouths or suggesting desirable answers," Ms. Lewis was at times merely "trying to speed the presentation of evidence which probably would have been forthcoming in any event."

*Herman v. Hess Oil Virgin Islands Corp., supra.*

In *Fattman*, the District Court ruled the questions asked on direct examination were leading but found that "[l]eading questions should not be used on the direct examination of a witness *except as may be necessary to develop the witness' testimony.*" *Fattman v. Bear*, 249 Fed.Appx. 956 (3rd Cir. 2007). As the Advisory Committee Notes attendant to Fed.R.Evid. 611(c) state, "*[a]n almost total unwillingness to reverse for infractions [regarding leading questions] has been manifested by appellate courts because "[t]he matter clearly falls within the area of control by the judge over the mode and order of interrogation and presentation...."* Fed.R.Evid. 611 Advisory Committee Notes; see also 1 *McCormick on Evidence* § 6 (6th ed. 2006)("The allowability of leading questions is discretionary, and the

judge's action will not be reversed unless it contributed to an unfair trial.”) (footnotes omitted).

Pennsylvania Rule of Evidence 611(c) Leading Questions recognizes the need to permit leading questions “to develop” a witness' testimony.<sup>30</sup> In *Katz v. St. Mary Hosp.*, appellants argued that they were deprived of a fair trial due to the cumulative effect of numerous leading questions and their corresponding answers. The court rejected this argument, noting that the law in that area was clear that “[T]he allowance of leading questions lies within the discretion of the trial court and a court's tolerance or intolerance of leading questions will not be reversed absent an abuse of discretion.” *Katz v. St. Mary Hosp.*, 816 A. 2d 1125 (Pa. Sup. Ct. 2003), *Commonwealth v. Johnson*, 373 Pa.Super. 312, 541 A.2d 332 (1988).

In its brief, Defendant gives a tally of the number of questions posed by Plaintiffs' counsel objected to as leading, but fails to note that fully half of the objections were overruled. In a number of instances the Court

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<sup>30</sup> Pa.R.E. 611(c) reads: (c) Leading Questions: Leading questions should not be used on the direct or redirect examination of a witness **except as may be necessary to develop the witness' testimony**. Ordinarily, leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party or a witness identified with an adverse party, interrogation may be by leading questions; a witness so examined should usually be interrogated by all other parties as to whom the witness is not hostile or adverse as if under redirect examination. (emphasis added) Pa.R.E. 611(c).

permitted leading questions in order to develop witness' recollections of matters, to focus witness' attention on specific matters, and where helpful in the case of the children's testimony. N.T. 3/1 148:23-24, N.T. 3/1 149:11-14, N.T 3/2 156:3-4.

**t. Speaking to the press**

Cabot excoriates Plaintiffs' counsel for speaking to the press, and, in particular, for her statement to the effect that she believed it her responsibility to her clients to "push the envelope" of the limitations of the exclusions of critical evidence that was imposed by the Court at Cabot's request. Such use of the vernacular is nothing more than a substitution of terminology such as "zealously asserting the client's position," which the ABA Model Rules describes as the very responsibility of an attorney to her client. Pushing the envelope is distinguishable from crossing the line. Indeed, this Court on more than one occasion acknowledged during trial that it is the role of counsel to advocate vigorously for their clients:

As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. ABA Model Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities, ¶2.

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. ABA Model

Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities, ¶8.

Likewise, a passing statement to the press by Plaintiffs' counsel as to the eventfulness of sidebar conferences, does not equate to an orchestrated endeavor by Plaintiffs' counsel to literally "try the case at sidebar," as Cabot alleges. Such a charge is ludicrous and flies against the very purpose of a trial by jury, which is what all parties and their representatives were there for.

Continuing on the issue of the press, Cabot slings barbs at Plaintiffs' counsel for a measured exchange with a local correspondent following the conclusion of the trial. Yet, Cabot's counsel openly engaged during most of the trial the services of "media" surrogates to issue day-to-date, "Court TV-style," Cabot-friendly, reports of what supposedly transpired in the courtroom, Plaintiffs' counsel's ineffective performance, the evidence that was "coming in," and what it should mean in terms of an outcome. These reports appearing, practically in real time on YouTube, were tailored to influence the perceptions of the public regarding the course of the trial and an impending favor outcome. By way of example, on Monday, February 29, 2016, Defendant's surrogate Phelim McAleer, a highly-visible, pro-fracking "journalist" and "documentary filmmaker," well-known for his public attacks on Plaintiffs going back to the *Fiorentino* days began recording

courtroom proceedings. This conduct by Mr. McAleer continued despite repeated admonitions by the Court. Plaintiffs' expert witness observed and overheard associate attorney for Cabot, Lauren Brogdon, actively encourage Mr. McAleer to approach Ms. Lewis in the Courtroom, whereupon he threatened her with the statement, "You better watch your step." This conduct was immediately reported to the Court. See Declaration of Dr. Anthony Ingraffea annexed hereto as Exhibit "\_\_\_."

On at least three occasions Mr. McAleer approached and invaded the personal space of individual Plaintiffs, their attorneys, and most egregiously, Plaintiffs' expert, Dr. Anthony Ingraffea. Mr. McAleer conducted a campaign of actual harassment against Plaintiffs and their attorneys, as was documented by posts to his blog. A least one video posted by Mr. McAleer on YouTube showed Plaintiff's co-counsel shielding Plaintiffs' expert from Mr. McAleer's phone camera with her winter coat while he hurled verbal assaults. See of Anthony Ingraffea, Elisabeth Radow, Nolen Scott Ely and Leslie Lewis annexed hereto, respectively, as Exhibits "2"- "5", repectively.

The menacing nature of Defendant's surrogate necessitated a private meeting in chambers with Judge Carlson during which Defendant's four member team were uncharacteristically silent. The Court took steps to

restrict the harassment of Plaintiffs and their witnesses, while also respecting Courtroom spectators' first amendment rights.

Specifically, following the meeting in chambers, the Court ordered the presence of federal marshals to police the Courtroom for the duration of the trial. Defendant's surrogate, Mr. McAleer, disregarded the Court's admonition to refrain from recording in, and transmitting from, the Courtroom, requiring a federal marshal to usher him from the Courtroom before the trial resumed for the afternoon session. On that occasion, and as Mr. McAleer was being physically ushered out of the Courtroom, Ms. Barrette was observed to have stormed out of the Courtroom after the federal marshal. The Court oversaw these developments and did so with an even hand.

This type of misuse of the "press" was apparent as Defendant succeeded in transmitting their version of the trial "news" through the Internet [from the Courtroom] in record time. This was especially apparent at the conclusion of the trial, following the unanimous jury verdict, when attorney Mercer read into the record Cabot's Rules 50 and 59 motions with considerable specificity as required, only to have Defendant's public relations surrogate, George Stark, recite the identical statements to the press within minutes of the close of the trial.

Based on the foregoing, this Court, respectfully, should deny Defendant's motion for a new trial based on the conduct of Plaintiffs' counsel during trial.

3. **Admission of Roos, Switzer testimony, proper, not unduly prejudicial, decision by Court, should not be reversed**

Cabot attempts to obtain a new trial on the basis that the Court erred in allowing the testimony of Erik Roos, and Victoria Switzer. Cabot strikes from multiple directions, Rule 404(b); Rule 37(c)(1); non-disparagement clause; and defective subpoena service.<sup>31</sup> Having provided the Parties with legal precedent for allowing the testimony of Erik Roos and Victoria Switzer, and having availed Cabot full and multiple opportunities to make its case for exclusion under Rule 404(b) and Rule 37(c)(1) grounds, this Court determined that the Roos-Switzer testimony had sufficient relevance on the issue of causation to be allowed under Rule 401, and that its relevance

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<sup>31</sup> During trial, when Cabot argued for a prohibition of Roos-Switzer testimony, counsel's focus was on undisclosed confidentiality language in settlement agreements between these witnesses and Cabot. In its brief, counsel limits their argument to the presence of a non-disparagement clause in the same agreements, which language was also not produced by Cabot at any time during trial. Hopefully, the Court will apply the same principles it did with respect to the confidentiality clause during trial in finding that compulsion by subpoena is sufficient to override a non-disparagement clause as well.

outweighed any prejudice to Cabot under Rule 403. N.T. 2/23 8:3-9:1;<sup>32</sup> There is no indication that the Court failed to conduct a “probing analysis” along the framework described in *Becker*, a case referenced by Cabot. Doc 765, p. 90. Contrary to Cabot’s implicit assertion, this Court, as demonstrated by the record, conducted the “searching analysis” required under Rule 404(b):

The Court: And I will note that I have looked at this, under the analytical paradigm of Rule 404(b), and I would note that my Motion in Limine ruling alluded to that as one of the paradigms, and that I think you have made a persuasive argument this is not 404(b) evidence.

I have, as I've tried to articulate here earlier today and as we have been discussing this over the past few days, I've made a judgment that it has some direct relevance under Rule 401, in that, it is evidence that could, if credited, have a tendency to prove a fact in dispute, which is some causal relationship

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<sup>32</sup> The Court: I note for counsel that my preliminary research...suggests that in an instance where testimony is compelled by subpoena, that compulsion of subpoena typically would be sufficient to override any non-disclosure provision in a settlement agreement. Now, sometimes that turns on the precise language of the agreement, and I note I have not reviewed the precise language of the agreements in this case. But with no further general proposition, the testimony compelled via subpoena is still permitted, notwithstanding a non-disclosure provision in a settlement agreement, I would just direct the party's attention to *Peskoff v. Faber*, 433 F.R.D. 207, a decision out of the District Court of the District of Columbia, which in turn relies on two cases out of the Eastern District of Pennsylvania, FED. R. CIV. P. 404(b) ....157 and *Marine Realty Credit Corp vs. LLMD of Michigan*, 821 Fed. Supp. 370. In light of that authority I am of the view that this testimony, if it is compelled by subpoena, may still be permissible, notwithstanding a non-disclosure provision in a settlement agreement[.] N.T. 2/23 8:3-8:15.

between water problems and drilling activity in this immediate area.

The weight of that evidence to be given by a jury, the jury will determine, it will be subject to your cross examination, and I'm going to give a cautionary instruction trying to very much limit the weight and the nature and use of that evidence. But I'm going to permit the evidence, so I'd note that your objection and your argument is framed on Rule 404(B), which talks about other acts.

But my ruling admitting this evidence takes a much more direct path. I take the path of legal least resistance, and I deem it to be directly relevant, because under Rule 401, I believe evidence of a roughly contemporaneous nature concerning a connection between drilling near a home and water problems has a tendency to be relevant to issues of causation.

That doesn't mean that anything about the drilling has been established to have violated a standard of care. The Plaintiffs are still going to have to carry a burden of proof on negligence, and this testimony, I don't think, would establish anything, regarding negligence at the Gesford site or even at the other neighbor's locations, but it may permit an inference of causation, and for that limited purpose alone, I believe that it has some relevance, and I'm going to permit brief testimony in that score, while noting the vigor of your argument on the 404(b) grounds. N.T. 3/1 221:25-223:9.

The Court concluded, to its satisfaction, that the Roos-Switzer testimony was relevant, had a legitimate purpose other than demonstrating “propensity,” was more probative than prejudicial, and would be accompanied by an appropriate “court charge to the jury on [the testimony’s] limited purpose,” which it was. *Becker v. ARCO Chem. Co.*, 207 F.3d 176, 189 (3d Cir. 2000). N.T. \_\_. Contrary to Cabot’s implication, prior to hearing

the testimony of Mr. Roos and, once again, prior to hearing the testimony of Ms. Switzer, this Court provided what it felt to be a sufficient limiting instruction to the jury as to the proper purpose for which the testimony could be considered:

The Court: Thank you, ladies and gentlemen. I appreciate the time and attention.

We're going to hear from a witness, a Mr. Rouse, but before we hear from him, I wanted to just provide you a little guidance, in terms of the consideration, in terms of the testimony you'll be hearing.

The only claims in this case are property damage claims brought by the Elys and Huberts, relating to alleged negligence and private nuisance by Cabot. These claims concern drilling activities near the Plaintiffs' homes.

There are no other parties or claims in this lawsuit, as I have told you. I am, however, permitting some brief testimony by Mr. Rouse and, perhaps, by another witness who lived within a mile or so of the Plaintiffs' home, regarding their experiences on their property, as it relates to Cabot drilling and activity nearby that property.

You may give this evidence the weight that you feel it deserves, in determining whether the Plaintiffs have carried their burden of prove on claims relating to their property, which are the only claims in this lawsuit.

In considering this evidence, you should assess the credibility of the witnesses, like you would any other witness in this case, any bias or prejudice the witness may have, the quality of the witness' testimony and how closely related their testimony is in time, in place and in quality to the testimony of the Plaintiffs relating to their claims.

You should feel free to give this testimony whatever weight, if

any, you feel it deserves in determining whether the Plaintiffs have carried their burden of proof on their claim relating to their property.

Keep in mind, though, that it is the -- it is always the Plaintiffs' burden of proof to establish their claims of damage to their property and to the use and enjoyment of their property by a preponderance of the evidence.

Counsel, any questions or concerns regarding the instruction I have provided?

Ms. Lewis: No, thank you, Your Honor.

The Court: Mr. Mercer?

Mr. Mercer: No, Your Honor.

The Court: Very well. With that instruction and for that very limited purpose, you may call your next witness, Ms. Lewis.  
N.T. 3/1 224:8-225:22.

The Court to the jury: I will note for you, ladies and gentlemen, that I -- we are going to have another witness, a woman named Ms. Switzer, who is going to be testifying briefly today about some matters relating to her property.

I want to just remind you that the only claims in this case are property damage claims brought by the Elys and the Huberts relating to alleged negligence and private nuisance by Cabot concerning drilling activities near their homes. As I told you yesterday, there are no other parties or claims in this lawsuit. I am, however, permitting some brief testimony by two witnesses who live within a mile or so from the plaintiff's home regarding their experiences on their property as it related to Cabot drilling activities.

You may give this evidence the weight you feel it deserves in determining whether the plaintiffs have carried their burden of proof on claims relating to their property, which are the only claims in this case. But in considering this evidence, you should assess the credibility of any witnesses, any bias or prejudice the

witness may have, the quality of the witness' testimony and how closely related their testimony is in time, in place and in quality to the testimony of the plaintiffs. And you should feel free to give this witness testimony what weight, if any, you feel it deserves in determining whether the plaintiffs have carried their burden of proof on the claims relating to their property, which are the only claims in this case. And finally, I remind you to keep in mind that it is always the plaintiff's burden to establish their claims of damage to their property and to their use and enjoyment of their property by preponderance of the evidence. Ms. Lewis, you may proceed. N.T. 3/2 32:4-33:8

Furthermore, in reaching its decision to allow the testimony, the Court had to have implicitly considered and determined that Plaintiffs' disclosure of these witnesses was timely, that any delay was "substantially justified," and did not offend Rule 37(c)(1), and that any prohibitive language allegedly to have been contained in settlement agreements between the witnesses and Cabot, which Defendant did not see fit to produce during trial, would not preclude their testimony where the Court decided that the witnesses had been compelled to appear by service of subpoena.<sup>33</sup> Accordingly, Cabot's zealous argument for reversal of the Court's decision on this issue should once again, respectfully, be rejected.

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<sup>33</sup> Despite Plaintiffs' request that it do so, Cabot did not disclose during trial the language of the clauses in the Roos-Cabot and Switzer-Cabot settlement agreements that allegedly restricted their ability to testify. Instead, Cabot opted to release the information for the first time, after-the-fact, in conjunction with its post-trial motion and brief.

The Court correctly determined that Rule 404(b) did not automatically exclude the testimony of Mr. Roos and Ms. Switzer, instead pinning its logic in admitting the testimony on relevance, grounds pursuant to Rule 401. The Court stated that: “As a paradigm of direct relevance and not 404(b) because Dr. Ingraffea, you project will testify to there was excessive drilling in this area.” N.T. 2/29 10:5-7. “And so, I'm going to -- and recognizing as case law in the Third Circuit as the Rule 404(b)(2) is characterized by the Circuit as an inclusionary rule permitting the introduction of evidence that falls within one of the categories, such as knowledge or notice. I'm going to permit very brief testimony.” N.T. 2/23 103:11-15.

Nonetheless, Cabot twists language and fact in order to coax the Court in their direction. For example, a close reading of the record on this issue demonstrates a strategic effort on the part of Cabot during trial to sidetrack the Court, create extraordinary obstacles for Plaintiffs in obtaining the testimony of “neighbor” witnesses, and clearly attempts to place the onus for proposing “neighbor” testimony at the feet of Plaintiffs’ counsel.

However, it was the Court’s *sua sponte* decision in its order on Cabot’s *in limine* motion to allow “neighbors” to testify that gave rise to the

eventual testimony of Mr. Roos and Ms. Switzer. See Doc. 671.<sup>34</sup> The Court made this offer to Plaintiffs in conjunction with denying, over Plaintiffs' most vigorous objection, the admission of any of the myriad PA DEP notices of violations, which provide, if not *per se* evidence, some evidence that Cabot's conduct at the Gesford 3, 3S and 9DD well pads was negligent, and that that negligent conduct was a substantial contributing factor in causing the contamination of Plaintiffs' drinking water supplies.

Likewise, Cabot's argument under Rule 37(c)(1) of the Federal Rules of Civil Procedure lacks luster and should be rejected by the Court. As described above, the Court made certain motion *in limine* rulings prior to the commencement of the trial. One such ruling was a *sua sponte* determination by the Court that Plaintiffs' neighbors shall be allowed to testify during trial under Rule 401 as to temporality and causation:

First, no party or witness may refer to the settlement of other civil lawsuits during the trial of this case. However, *if relevant*

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<sup>34</sup> From time to time, Cabot seems to subtly mislead the Court with reference to citations from the trial transcript which cites do not necessarily conform with its assertions. For example, citing to N.T. 2/23 100:17-25, Mr. Mercer asserts: "Over repeated **objections** from Cabot, **the Court allowed Plaintiff to call Roos and Switzer[.]**" (emphasis added) However, a review of that text reveals an "argument," not an "objection," raised by Ms. Barrette, regarding testimony she anticipated would be elicited by Plaintiffs' counsel during her direct examination of Mr. Ely. No reference at all is made to the appearance and testimony of Mr. Roos or Ms. Switzer. (See Defendant's brief in support, p 106, section "a." and footnote 46.)

*and probative of the claims made here, other persons residing nearby the plaintiffs may testify to factual occurrences on their property which were similar to the events allegedly experienced by plaintiffs and which took place following Cabot's drilling activity.* Any party proffering such proof shall provide an offer of proof outside the presence of the jury prior to calling witnesses, so the scope of testimony may be clearly defined. (emphasis added) Doc. 671, p. 39.

The Court did not place any limitations on that directive, other than its eventual ruling that such testimony would be limited to no more than two neighbor witnesses:

So in order to avoid -- in striking the Rule 403 balance, between relevance and unduly cumulative evidence, I'm going to permit you, Ms. Lewis, to present *no more than two witnesses* on that score, no more than two neighbor witnesses who would be testifying to things that are spatially, temporally and topically related to the experience of the Elys. So I will permit limited testimony on that score, subject to that type of cautionary instruction. (emphasis added) N.T. 3/1 10:18-11:7.

In addition, as the parties will note, I've limited the number of these witnesses to two, because, I believe that while the Plaintiff should have some limited ability to present this sort of evidence, that I'm not going to turn this case into a trial of other landowner issues, and none of you want to do that. N.T. 3/1 220:5-10.

Prior to such ruling by the Court, the only neighbor Plaintiffs intended to call was William Ely, Mr. Nolen Scott Ely's uncle and across the road neighbor, to testify on the solitary issue of water treatment system ineffectiveness. As Mr. Mercer implicitly acknowledges, ten (10) days prior

to trial, Cabot's counsel became aware of the identities of proposed neighbor-witnesses, which list included identification of Erik Roos and Victoria Switzer. As the trial progressed, and as ultimately decided by the Court, the list of neighbor witnesses appearing by subpoena for Plaintiffs was whittled down to two, Mr. Roos and Ms. Switzer.

Mr. Mercer's further argument on this point, that Cabot was "harmed substantially" by so-called "late designation" of Mr. Roos and Ms. Switzer, is hollow, and should be completely disregarded by the Court. The Roos family and Switzer family were among the 22 families that sued Cabot in the original lawsuit in 2009, of which the instant case is a continuation. The Elys and Huberts, unlike the other 20 households, chose to continue their lawsuits rather than settling with Cabot in 2012. Prior to the conclusion of discovery and entering settlements with the other 20 families, including the Roos and Switzers, Cabot had full opportunity to, and did, conduct thorough depositions of Mr. Roos and Ms. Switzer, and to explore the temporal relationships between their complaints and those of others in their community. There can be no element of surprise posed by the appearance and circumscribed testimony of Mr. Roos and Ms. Switzer during trial, as

these were former plaintiffs against whose claims Cabot had long ago thoroughly prepared its defense.<sup>35</sup>

Defendant, in its brief, contends that the subpoenas on Roos and Switzer “were invalid under Rule 459(b).” However, the Pennsylvania courts have found that “[w]hether a subpoena shall be enforced rests in the judicial discretion of the court.” *See Pennsylvania Crime Commission v. Nacrelli*, 5 Pa.Commw. 551, 577 (1972). In the instant case, the Court found that:

The situation of Mr. Roos and Ms. Switzer I find to be somewhat different. They've received subpoenas. I do not -- I do not know the nature of compliance with the requirements of rule 45. But ***I believe in terms of them appearing pursuant to a process, they have not challenged that process.*** They have not challenged it by moving to quash. They've not challenged the legal process by failing to appear. ***They received what for each of them would have been a facially valid subpoena, and they had complied with it by testifying.*** I think that given the case law I cited to the parties relating to exceptions to non-disclosure

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<sup>35</sup> Prior to the testimony of Dr. Ingraffea, Mr. Roos, or Ms. Switzer, Jeremy Mercer is able to assert: “The testimony will—should it come out—would be Ms. Switzer didn’t begin experiencing water issues until approximately seven months after the Elys and Huberts claim they did, and the Roos’ didn’t begin experiencing water issues until approximately a year after the Elys and Huberts claim that they experienced water issues.” N.T. 2/29 10:21-11:1. Mr. Mercer’s detailed assertion to the Court as to his predictions on exactly how the neighbors would testify with respect to the temporal connection between Cabot activities and changes to their water demonstrates that Cabot was fully prepared for the testimony of these witnesses, and therefore were not surprised, harmed or prejudiced in any fashion by the timing of disclosure to witnesses, which witnesses were authorized and approved by this Court to testify in a circumscribed manner.

agreements for testimony compelled by legal process, that I would be placing too much of a burden on witnesses to expect those witnesses who have received a subpoena and have appeared to go, hum, I'm not sure if this subpoena fully complied with all of the provisions of rule 45 B. 1 because although I have received a sum of money in connection with this subpoena, I have not checked to see if that sum of money meets the witness fee as specified under Title 28 of the U.S. Code Section 1820. So I believe that as to those witnesses even if there were failures of -- in terms of the nature of the subpoena for them, they were appearing pursuant to a subpoena, and given that fact while I understand and recognize your position - - and you certainly I think have placed another arrow in your quiver as to that evidentiary issue -- I do not believe that the situations are sufficiently alike. My ruling as to Mr. Parrish, who didn't come here, compels a different result of people who did respond to subpoenas. N.T. 3/3 223:16-224:18.

In *Peskoff*, one of the cases highlighted by the Court on the issue of determining whether service of a subpoena allowed Mr. Roos and Ms. Switzer to testify, given the language of the Confidentiality Agreement contained in the December 15, 2010 Consent Order and Settlement Agreement (“Agreement”), the court found service of a subpoena to be “a legal demand sufficient to invoke [when required by law] the exception” contained in the confidential agreements at issue in that case. *Peskoff v. Faber*, Civil Action No. 04-526 (HHK/JMF), United States District Court, District of Columbia, February 23, 2006. That court recites the language in *Reiser*: “It is well established that a subpoenaed witness testifies pursuant to legal process.” *Reiser v. West Co.*, Civ. A. No. 88-034, 1988 WL 35916, at 1

(E.D. Pa. April 14, 1988) (holding that testimony was not barred by a privately stipulated settlement agreement and court orders entered in the previous case where the confidentiality agreement provided for disclosure "pursuant to legal process"). Review of the relevant language in the Roos-Switzer agreements provides: "when required by law" an exception to the Agreement which "was intended to be kept strictly confidential."

There is no testimony in the trial record to demonstrate disparagement of Cabot on the part of either Mr. Roos or Ms. Switzer. Finally, there is no evidence to indicate that, but for the inclusion of the Roos and Switzer testimony, the jury would not have delivered a verdict in Plaintiffs' favor.

Based on the foregoing, including the Court's considerations in issuing its prior determinations on this issue, Cabot's motion for a new trial based on the improper and prejudicial admission of Erik Roos and Victoria Switzer should be denied.

4. **No basis for mistrial at *voir dire* stage or now based on single dismissed venire member statement**

Defendant argues for a new trial based on the strained premise that one remark by a potential juror before a large jury pool so tainted the entire pool, including the eventual jurors, such that it could not have obtained a fair trial in light of the solitary remark in question. In other words, if the Court were to follow Cabot's thread, it would have to be convinced that the eight

actual jurors heard the remark, were impacted by the remark, carried the remark with them for the entirety of the trial, and after 11-days of testimony, and two and a half weeks of trial recalled and relied upon the remark in order to arrive at a favorable verdict for Plaintiffs. This is just not a reasonable argument. The Court conducted *voir dire*.<sup>36</sup>

The Court tightly managed *voir dire* on pre-agreed lines, pivoted and took additional protective measures when it saw fit, and did not err in denying Defendant's original request for a mistrial, during *voir dire* and before the trial commenced, due to the remark of a *voir dire* member, nor should it allow for a new trial now. Contrary to Cabot's assertions, there is no evidence to indicate that the gentleman's statement was "calculated;" came from a place of "fervor;" intersected on any level with Plaintiffs' counsel's trial performance or the Roos-Switzer testimony; was actually heard by any juror; or, if it was heard by any juror, the weight or effect, if any, the statement may have had on jury deliberation and/or the verdict 12 or 13 days later.

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<sup>36</sup> For some reason, Cabot uses the terminology "extrajudicial" in reference to an alleged impunity by a prospective juror during the *voir dire* process. It is Plaintiffs' understanding that there is nothing "extrajudicial" about the questioning of prospective jurors by a judge.

The Court conducted a thorough and individualized *voir dire* of each potential juror, including a thorough probe for potential inability of any potential jury member to receive the evidence and deliberate fairly. This was one statement. The Court nipped the possibility of further open-court commentary regarding opinions as to either Parties with prompt and repeated instruction regarding the need for decorum, opinion-mindedness, fairness, and avoidance of the media; and thereafter, conducted *voir dire* questioning on more sensitive issues at side bar.<sup>37</sup> The Court took into full consideration the concerns of Cabot's counsel, denied Cabot's request for a mistrial and thereafter promptly and deftly provided observations and instructions to the jury pool, which sufficiently expunged any possible taint or prejudice. N.T. 2/22 78:16-80:21; 145:7-25-146:1.

Based on the foregoing, the Court should, respectfully, deny Defendant's motion for a new trial based on this issue.

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<sup>37</sup> It is interesting to note that while the topic doesn't appear in Cabot's brief in support of its proposition that Cabot essentially needed a new jury trial to receive a fair trial, attorney Dillard also raised to the Court during *voir dire* that a single article reporting on the trial on the day of *voir dire* in a local newspaper and a supposed "rally" on behalf of Plaintiffs, which Mr. Dillard concedes he did not attend, created a cause for concern regarding the jury. N.T. 2/22 72:5-73:8.

**C. Jury's Award Should Not Be Remitted, Offset or "Molded"**

Respectfully, without question, this Court should uphold the damages award rendered by a unanimous jury of eight members of the Plaintiffs' peers who determined the facts and applied the law, as instructed by the Court, to the facts. There is simply no clear line or corollary to require this Court to upset the deliberative will of a unanimous jury.

**1. Unanimous damages award not excessive, punitive**

The \$4.24 million damages award does not shock or offend the conscience of the Court. Contrary to all the Defendant has to say on this matter, the award is rational and supported by the record. It is nothing but speculation to imply that the award cannot be justified except as a result of for example, abandon of analysis for sympathy, improper influence exercised by Plaintiffs or their counsel, or as a result of some misunderstanding as to the inclusion or exclusion of emotion distress damages, or water hauling damages. Respectfully, the unanimous jury verdict award should not be the subject of second-guessing and speculation where the Court and parties observed a jury, that gave no indication whatsoever that it had done anything other than honor its oath to receive the evidence and deliberate and reach a unanimous decision in good faith, based on the evidence. It is inconsistent with what the Court and party counsel

observed about these jurors during the two and a half weeks of trial. Furthermore, the jury structured its award based on the jury instructions and verdict form it was given by the Court, the contents of which were arrived at upon a process of full involvement and participation by party counsel invited by the Court.<sup>38</sup>

The case law upon which Cabot relies, in order to advance its argument for a new trial based on the amount of the award, might be viewed distinguished on the facts and realities of this 2016 trial, and on today's economy, and the application of modern shale gas extraction technologies and the associated problems that can occur. The fact is, obtaining clean water has been the centerpiece of the Elys' and Huberts' lives since 2009. The jury understood this, the obvious and tacit discomforts and inconveniences, of such a way of life, without an end in sight.<sup>39</sup>

Pursuant to the operative pretrial case management order, both sides provided the Court with proposed jury instructions and proposed verdict forms. Subsequently, the Court issued initial versions of its proposed jury

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<sup>38</sup> The Court was particularly pointed in its invitation of counsel to search for any Pennsylvania law indicating the propriety or formula for application of "caps" for inconvenience and discomfort damages in private nuisance. None was reported by either party or the Court.

<sup>39</sup> On that point, Plaintiffs' respectfully draw the attention of the Court to the results of a report released by a water study including the Huberts and Elys

instructions, and verdict form. At the time, both sides were offered the opportunity by the Court to object and comment, which the Parties did. The Court, applying its sound discretion, ultimately decided upon the language for each.

On Friday, March 4, 2016, this Court informed counsel that draft jury instruction form would be handed out that day with the negligence instructions included, foreshadowed for counsel that the negligence claim was in jeopardy and invited counsel to provide comments by Monday on the negligence claim and the jury instructions. N.T. 3/4 45: 9-25-46:1-8. The Court indicated it would review these topics as well. On March 8, 2016, prior to jury deliberation, the Court advised counsel that “I have revised the jury instructions that I had previously tendered to you all to provide a set of instructions on private nuisance claims [only].” N.T. 3/8 15:9-12

In the afternoon of March 8<sup>th</sup>, the Court advised counsel:

I've provided you with updated jury instructions and with a verdict form. I had understood there were no concerns about a verdict form which was a fairly straightforward question form that I think takes us through the elements, requires findings as to each element, gives the jury instructions on what to do at each stage depending on their findings, and then we'd permit the jury in the last question to-- if it has answered all of the questions yes as to one or more claims to award compensatory damages on the nuisance claim.

MR. DILLARD: *I don't think we had any.*

THE COURT: This is the part in the wedding where you speak now or you end up married to each other forever, so I'd note that for you. N.T. 3/8 124:21-25 125: 1-10.

Accordingly, all party counsel agreed without objection to the Verdict Form, which the jurors ultimately received, and completed and signed upon rendering their verdict. The approved verdict form contained a single, unambiguous and unqualified question for the jury to answer with respect to inconvenience and discomfort damages for any Plaintiff against whom Cabot was found to liable. The question, "Question 4" read:

Only as to those Plaintiffs for whom you answered "Yes" in response to Question 2 and 3 what amount of money, if any, do you award as damages sustained by those Plaintiffs as a result of the private nuisance created by Cabot?

Answer in dollars and cents, if any, only as to those Plaintiffs for whom you answered "Yes" in response to Question 3.

- a. Inconvenience and discomfort to Nolen Scott Ely.  
Answer: \$\_\_\_\_\_ ...

*(See Doc. 745.)*

The Court provided Cabot's attorneys no fewer than three opportunities to amend the jury instructions and verdict form to address any concerns the Defendant's wished to raise. Cabot did not do so, even when the jury, on the first day of its deliberations, posed a question to the Court regarding quantum of damages:

THE COURT: We [] have received a second question from the jury, and the question reads as follows: Is there any guidance for the amount of money awarded? ... In response to this question what I would propose to do, subject to thoughts that the parties may have, is reread page 15 of the instructions which I provided to the jury. Those instructions, while spare on the issue of damages, described what I told the jury regarding the award of damages and the nuisance claim for inconvenience and discomfort. Do either of the parties, Ms. Lewis, do you have any other suggestion as to how to proceed?

MS. LEWIS: I really don't, your Honor.

MR. DILLARD: Give us just a moment.

(After deliberating with his colleagues)

MR. DILLARD: Your Honor, we don't see any further guidance that can be provided beyond the language that's in the instructions.

THE COURT: Yes. I don't know that there really is much that we can usefully do besides repeat that instruction, which is what I would propose to do. N.T. 3/9 126:8-127:17.

Despite Mr. Dillard's response, the following morning, Cabot proposed to this Court in chambers that a proposed supplemental instruction pertaining to calculation of damages award be given to the jury. At the March 10<sup>th</sup> conference, the Court addressed counsel:

THE COURT: I regard the request for a supplemental instruction as perhaps also inviting me to **speculate** on what the jury is doing. And similarly disinclined to give a further instruction noting that **the instruction given was one that we had provided to all parties several days before that we had a charge conference on. And then when the question came up, had yet another conference, and allowed parties to discuss how they wish to proceed. It also strikes me that that a jury**

**assessing issues of private nuisance and the harm caused by private nuisance in terms of use and enjoyment of property may well be entitled to consider what the nature of the property is. In terms of – in terms of its status and amenities.** So, it would seem to me that any supplemental instruction would have to be far more detailed than what is proposed. And **any supplemental instruction calls upon me to speculate as to what the jury is doing.** N.T 3/10 5:1-17.

Respectfully, it is obvious that the Court did the right thing, so to speak, in denying Defendant's last-minute request that the Court interfere with the flow of the jury deliberations to supplement jury instructions during deliberations, to essentially, and informally "cap" damages.

**2. Unanimous damages award does not violate Fourteenth Amendment to the Constitution of the United States**

The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001),

Defendant's assertion that a leading energy company, with revenues topping \$1.3 billion in 2015, represented by the seventh largest law firm in the world is the victim of a constitutional due process violation at the hands of two Appalachian families left with permanent water contamination because of Cabot's operations is a reach. Cabot has been represented by legal advice counsel for the years leading up to trial of this matter. Given the

nature and course of its business, and fact of expert legal advisement all along the way, there can be no plausible basis for assuming that Cabot was somehow caught unaware, without “fair notice” of the type of conduct for which it might face “punishment,” and “severity of the [financial] penalty” that was possible in the context of the law and instructions on damages the jury in this federal law suit received. In *BME of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the U.S. Supreme Court refused to sustain a \$2 million punitive damages award which accompanied a verdict of only \$4,000 in compensatory damages sustained as a result of an automobile accident. The Court, in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2002), “addressed the measure of punishment, by means of punitive damages, a State may impose upon a defendant in a civil case.” The Court refused to sustain a punitive damages award of \$145 million, where compensatory damages are \$1 million, deciding the punitive damage award was excessive and in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Yet, these cases, which involved appeals involving punitive damages awards, are distinct and distinguishable from the instant case, which involves compensatory damages. Compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the

defendant's wrongful conduct." Restatement (Second) of Torts § 903, pp. 453-454 (1979), *Cooper Industries, Inc., v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). In contrast, the Court in *State Farm* addresses its “concerns over the imprecise manner in which **punitive damages** systems are administered” in the context of a case being used as a “platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country.” 538 U.S. 408, 418. The case also dealt with duplication of damages and ratio of compensatory to punitive damages.

In pressing its argument, Cabot’s counsel implicitly accuses the Court of failure to provide “meaningful guidance” to calculate damages in this case. The award to the Plaintiffs, by all indications, was based on thoughtful deliberation, and should not be construed as “pos[ing] an acute danger of arbitrary deprivation of property.” The jury considered the evidence, decided on the facts and applied the law as provided, described and instructed by the Court. Respectfully, Cabot provides no precedent that justifying the application of due process limitations imposed on punitive damages awards to compensatory damages for inconvenience and discomfort in this case.

**3. Plaintiff-children’s claims, unanimous jury awards must stand**

Cabot counsel behaves badly in conjuring the argument that, after all is said and done, the Plaintiff-children must be estopped from claiming

private nuisance, and claiming their jury awards are subject to an alleged documentation of waiver. This angle is particularly offensive where, to the knowledge of Plaintiffs' counsel, the first and only time that Cabot raised the waiver argument as grounds for disqualification of the Plaintiff-children's private nuisance claim was *during trial*, prior to their scheduled testimony.<sup>40</sup> This development is particularly disturbing given the fact that: on the one hand Cabot asserts that it received and relied on a legal waiver of the children's private nuisance claim four years prior to trial, while on the other hand, Cabot filed documents on the docket which strongly suggest otherwise, namely, that regardless of alleged waiver documentation it produced during trial, Cabot did not believe at an earlier time that there was an effective waiver of the Plaintiff-children's private nuisance claim.

As for one example only, Plaintiffs respectfully call the Court's attention to *Mr. Mercer's own words* in "Defendants' Brief in Support of Objections to the Magistrate Judge's Report and Recommendation Regarding the Ely Family Claims," filed on May 5, 2014, *which make no*

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<sup>40</sup> During trial and as an attachment to the instant motion, Cabot produced copies of an email and chart allegedly demonstrating proof of an effective waiver of Plaintiff-children's right to sue for private nuisance. These documents were apparently generated by Plaintiffs' former counsel, Napoli Bern Ripka, LLC. *See* Doc. 756-1.

*reference of waiver of Plaintiff-children's right* to sue for private nuisance.

(Doc. 523):

As it pertains to the nuisance claim specifically, the Minors may have standing as family members of a property owner living in the same dwelling (*see* RESTATEMENT (SECOND) OF TORTS, § 821E, cmt. d), but there is no evidence that the minors have incurred any of the surviving nuisance damages identified in the R&R. The R&R identifies only the same alleged diminution in value of the Property and the inconvenience cost of obtaining potable water from outside vendors as possible surviving nuisance damages (Doc. 510, pp. 45-46), and there is no evidence that the Minors could have incurred either of these categories of nuisance damages, or any other nuisance damages recoverable under Pennsylvania law. Doc. 391, ¶¶ 10-14; Doc. 392, p 3; Doc. 439, p 9.

Respectfully, had Cabot believed that there was a legally-effective waiver dating back to 2012, and “justifiably relied” upon the waiver to its potential “detriment,” as it so vigorously argues now, Cabot surely would have made that same fervent argument in its Brief in Support of Objections to the Magistrate Judge’s Report and Recommendation in 2014, as well as in other opportune filings between that time and the time of trial. *See* N.T. 3/1 7:2-8, 8:11-14, 258:20-23; N.T. 3/2 22:17- 27:20 (“[T]hose folks should not be able to testify because they have essentially waived the only damages that are recoverable here in the litigation on their behalf.”).

Plaintiffs propose that this Court cogently and correctly communicated to Cabot the basis for its decision to allow the children to

appear, to testify and to take their shot at obtaining a damages award from a unanimous jury, following full argument on the issue. The Plaintiff-children did not waive their damages claim; are entitled to recover inconvenience and discomfort damages; and the Court's decision on this issue, and application of Rule 2039 of the Pennsylvania Rules of Civil Procedure should not be disturbed.

**4. Cabot *not* entitled to off-set or credit where escrow payments *not* duplicative of recoverable damages in civil private nuisance case**

The verdict should not be “molded,” to use Mr. Mercer’s terminology, to credit Cabot for prior escrow payments made to the Plaintiffs, *to wit*, \$153,008 to the Elys and \$50,000 to the Huberts. The payments in question were made as a direct result of the Consent Order and Agreement entered between Cabot and the PA DEP December 15, 2010 (“12/15/10 COSA”); the payments were specifically earmarked by the Department for restoration or replacement of Plaintiffs’ water supplies.<sup>41</sup> In other words, *if* the funds are

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<sup>41</sup> Relevant portions of the of the 12/15/10 COSA read as follows:  
6. Settlement of Restoration/Replacement Obligation. The claims by the Department regarding Cabot’s obligations under Section 208 of the Oil and Gas Act, 58 P.S. § 601.208, and 25 Pa. Code § 78.51, including any obligation of Cabot to pay for or restore and/or replace the Water Supplies, or to provide for ongoing operating or maintenance expense shall be satisfied, as follows:  
a. Escrow Fund. Within thirty (30) days after the date of this Consent Order and Settlement Agreement, Cabot shall establish nineteen (19) Escrow

to be considered damages recovery applicable to civil court proceedings at all, which is a theory Plaintiffs have historically asserted is not the case, the monies were compensation for the costs of obtaining potable water. The dedicated purpose of the escrow payments, as described here, was confirmed and reinforced by the Pennsylvania Environmental Hearing Board judge who presided over the Ely and Huberts' administrative appeal of the 12/15/10 COSA. During a telephonic hearing on December 9, 2011, regarding Plaintiff-Appellants supersedeas motion, Hon. Judge Bernard A. Labuskes, Jr. stated that: "These funds will be more than sufficient to meet the Petitioners' water needs pending our final adjudication in this appeal." *See* EHB Docket No. 2011-003-L, Opinion and Order for Supersedeas, December 9, 2011, page 1.

Further, the cost of obtaining water is distinctly not a measure of damages allowed under Pennsylvania law governing private nuisance in a civil setting. Consistent with Pennsylvania law, the instruction to the jury, which all parties reviewed and consented to, specifically state that the damages award cannot include replacement water costs.

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Funds and each Escrow Fund shall hold an amount equal to, whichever is greater: \$50,000; or two times the assessed value by the Susquehanna County Tax Assessor of the property(ies) owned by the Property Owners within the Dimock/Carter Road Area[.]

**5. Plaintiffs' verdict *not* subject to Cabot's mitigation defense**

On the one hand Defendant interjected into the civil trial the undisclosed mandate by the PA DEP to offer water treatment systems (or a water well) to these affected parties, among others plaintiffs in the 9x9 mile affected area cross-over for which Defendant must take responsibility; and on the other hand, Defendant failed to overcome its burden regarding Plaintiffs' alleged failure to mitigate damages. The jury was charged with the following: "(i) Cabot must show, one, what reasonable steps plaintiff should have taken. Two, that those actions would have reduced damages, and three, the amount by which the damages would have been reduced." Defendant's counsel's singular effort at meeting this burden was to question Mr. Ely as to whether he was offered a water treatment system or a new water well. and Mr. Hubert if he was offered a methane separator; and then disparaging each for declining. Furthermore, Defendant failed to present a single witness to testify during trial regarding the actual efficacy of the systems. Defendant also failed to elicit any testimony whatsoever as to how installing a water treatment system would have necessarily and predictably reduced Plaintiffs' damages or the amount by which the damages could have been reduced.

Mr. Ely presented testimony based upon first-hand observation of a water treatment system installed by Cabot at the home of his uncle Bill Ely, who resides across the road. Mr. Ely testified:

They're not able to drink their water. N.T. 2/23 145:1

They run out of—because their storage tank does not hold enough capacity for them to even fill a baby pool. We were there, he couldn't wash his van because he kept running out of water. Because the tank—he's got two methane treatment systems in that building and he can't produce enough water. So he's not producing enough water, but he can't—he can't drink it. The only thing he does is bathe in it. N.T. 2/23 145:3-9

They have a methane separator in it. There is particulate filters. There's a reverse osmosis system in it. And that's about it. You know, I don't---I'm not a scientist so I can't tell you what their system really consists of but.." N.T. 2/23 145:15-18

It's a big shed N.T. 2/23 145:21.

[Bill Ely's] system was released back to him and now he's hooked up to his pond, that happened recently. Because Cabot released the system back to him. N.T. 2/23 146:2-4.

I[ve] seen Guy Parrish [who] is the subcontractor to Cabot Oil, they're there almost every day, if not towards the end every other day, on top of Moody, which is a subcontractor to Cabot Oil that does all their water testing at all the residents. He's there all the time. There is somebody there at their house every day of the week. It's that constant invasion. I've been there so many times. It's just—they're there every day N.T. 2/23 147:2-9.

In sum, Plaintiffs damages should not be reduced by any sum that represents Plaintiffs' alleged failure to mitigate damages. The trial testimony of Plaintiffs makes clear the perpetual discomfort and inconvenience they

experience on a daily basis as a result of Cabot's contamination of their well water. N.T. 2/23 140:15-143:13. Because Plaintiffs have no viable option other than to haul their water one day each week, often in punishing weather conditions, and to conserve what they consume once the water is hauled, members of the Plaintiff Ely family share bath water, and the Plaintiff Hubert family no longer washes the laundry or the car at home, and while undergoing chemotherapy during Ray Hubert's bout with cancer, he resorted to use of the pond water to bathe because the truck broke down

WHEREFORE, based on the foregoing, and the totality of the record, Plaintiffs respectfully request that this Court deny in its entirety, Defendant's Motion for Judgment as a Matter of Law, New Trial, and Remittitur.

Date: June 14, 2016

Respectfully submitted:

*/s/ Leslie L. Lewis*

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