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

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

PLAINTIFFS' COMBINED BRIEF IN OPPOSITION

Defendant, Cabot Oil & Gas Corporation ("Cabot") seeks to exclude from the jury at trial of this matter swaths of information pursuant to Cabot's:

I. Motion *In Limine*, Requests for Exclusion Nos. "1-28"; and

II. Motion to Exclude Testimony by Paul D. Rubin.

Plaintiffs take exception to the blanket exclusion of any category of proof sought by Cabot based on the following facts and arguments, and respectfully assert that in each instance the Court should adopt at least a middle ground.[1]

I. Motion *In Limine*

A. Requests for Exclusion Nos. "1-28"

[1]Because of the overlap and interconnectedness of the proposed exclusions, Plaintiffs have elected to oppose both motions in a single brief.

Cabot seeks to bar Plaintiffs, their counsel and witnesses from mentioning, inquiring, or eliciting testimony during trial regarding a sweeping 28 categories of evidence. For the most part and contrary to Defendant's proposition, the evidence described is relevant, admissible, and will not confuse the jury or unduly prejudice Cabot, *to wit* the evidence sought to be excluded does not "[tend] to suggest decision on an improper basis." *See Bhaya v Westinghouse Elec. Corp*., 922 F. 2d 184, 188 (3d Cir. 1990) (citing Fed. R. Evid. 403, advisory committee's note). Other more nuanced areas should also be allowed for reasons described. Rules 401-403, 703, 801-803 of the Federal Rules of Evidence provide guidance.

Request for Exclusion No. "1"
Should be Granted in part and Denied in part

Plaintiffs agree not to mention, inquire or elicit testimony or other evidence during trial of drafts of the December 15, 2010 Consent Order Settlement Agreement ("COSA"), negotiations related to the COSA or any evidence as to prior consent orders entered between the Pennsylvania Department of Environmental Protection (PA DEP) and Cabot.

Plaintiffs do not agree that the mere reference to the existence or selected content of the COSA should be excluded or that Plaintiffs' experts should be restricted from testifying that they examined the COSA and

weighed the scientific findings of the PA DEP in forming their opinions, as anyone in such a position would do.

Pursuant to Rule 703 of the Federal Rules of Evidence:

> *An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.*

The claims and issues in this case are inextricably tied to the COSA, which has been in the public domain for five (5) years. It was Cabot who literally before the ink was dry, published the fact and content of the agreement to the world. *See* Press Release entitled "Cabot Oil & Gas Corporation Announces Global Settlement with the Pennsylvania Department of Environmental Protection" annexed hereto as Ex. "1." The inclusion of the word "global" is an interesting choice of words, and could reasonably be assumed to mean all claims in all matters, administrative and civil, had been resolved. The public relations release contains statements attributed to Chairman and CEO Dan O. Dinges about settlement terms:

> *The settlement agreement sets out specific obligations regarding claims related to water quality for 19 Pennsylvania households in the Dimock Carter Road area. The most notable obligation in the settlement agreement is the establishment of escrow accounts for the 19 households and to provide for those that agree to participate, the*

> *financial resources to rectify this situation. The total of the escrow funding is approximately $4.1 million.*

The effect of the COSA was to terminate a municipal water pipeline promised to Plaintiffs. The COSA memorializes the obligation of Cabot to offer treatment systems. The efficacy of treatment systems is at issue in this case, particularly since the fall of this year when the Court allowed Cabot to amend its answer to include failure to mitigate, which Defendant has acknowledged involves refusal to accept a water treatment system. Identities of residents entitled to receive water treatment systems originate with and are identified in the COSA and its predecessors. Plaintiffs do not intend to rely on the COSA to prove liability, and the Court if concerned in this regard could provide a limiting instruction rather than omit reference to any relevant facts in the COSA altogether. The COSA is relevant information, probative of the facts and circumstances surrounding the issue of water degradation in this case.

The probative value in helping the jury evaluate the case in general and the testimony of expert witnesses in particular clearly outweighs the prejudice alleged by Defendant. Fed. R. Evid. 401-403, 408. Respectfully, Defendant's Request for Exclusion No. "1" should be **granted** in part and **denied** in part.

Request for Exclusion No. "2" Should be Denied

Plaintiffs should not be barred from comment, reference or evidence regarding Notices of Violations ("NOVs") issued by the PA DEP to Cabot. When introduced by a person with personal knowledge of the contents at trial, the NOVs are not hearsay. *See Hooper v. DEP*, 1996, EHB 1318, 1996 WL 660628, at *4, n. 4 (Pa. Envt'l Hearing Bd. Nov. 5, 1996) ("we cannot rely on the factual statements made in the notices of violation to establish that the appellant has violated the statutes or regulations. **However, the charged violations have been established through the affidavit of Sarah Pantelidou based on personal knowledge."** (emphasis added). Plaintiffs' intend to obtain authenticated copies of the NOVs from the PA DEP and subpoena at least one witness with firsthand knowledge to testify during trial about their content. Nowhere in Defendant's memorandum is there authoritative reference to NOVs being mere "charges" or "allegations," and therefore automatically inadmissible. The NOVs document factual findings by the state regulatory body responsible for oversight of the quality of residential drinking water of citizens of the Commonwealth. Under the public records exception to the rule against hearsay, they are admissible. Fed. R. Evid. 803(8)(A)(iii).

The NOVs probative value in assisting the jury in their search for the truth and in evaluating the opinions of Plaintiffs' experts outweighs the

prejudice to Cabot. From any standpoint, the NOVs provide some evidence of fault. Plaintiffs do not propose to admit the NOVs as conclusive evidence of liability by Cabot. Cabot earned these NOVs, they relate to the claims in this case, and Defendant should not be able to bury them. Respectfully, Defendant's Request for Exclusion No. "2" should be **denied**.

Request for Exclusion No. "3" Should be Denied

Plaintiffs cannot agree and should not be ordered to omit any comment, reference to, or evidence concerning the United States Environmental Protection Agency ("EPA") having referenced NOVs which implicated faulty cement jobs by Cabot at certain wells, including Cabot gas wells known as Gesford 3 and 9 wells. Plaintiffs cannot agree to Cabot's proposal to deny EPA's presence in this case.

Cabot's own experts have expressed reliance on selected findings from the EPA, as well as the PA DEP in forming their opinions and anticipated testimony. ("There was a press release associated with the results of a series of tests that EPA did in and around Dimock, yes. That's what I'm referring to and cited in my report." *See* excerpt of deposition testimony of Brun Hilbert 106:18 annexed hereto as Ex. "2") (Expert Pinta quoting EPA press release attached as Ex. 4 to his report: "… our goal was to provide the Dimock communities with complete and reliable information

about the presence of contaminants in their drinking water, and determine whether further action was warranted to protect public health. … (t)he sampling and evaluation of the particular circumstances at each home did not indicate levels of contaminants that would give EPA reason to take further action. Throughout EPA's work in Dimock, the agency has used the best available scientific data to provide clarity to Dimock residents, and to address their concerns about the safety of their drinking water." *See* excerpt of deposition testimony of James Pinta, 236:13 – 237:5 annexed hereto a Ex. "3") Exclusion of this relevant information would be unfairly prejudicial to Plaintiffs and serve to confuse and misinform the jury.

On the one hand, Cabot and its experts have embraced certain reported EPA findings, notably an official report issued in 2012 announcing that Dimock water was safe to drink and the Agency was wrapping up its investigation; while on the other hand, they reject the veracity and the relevance of a leaked internal EPA PowerPoint questioning the safety of the water and expressing the need for further study of the water. *See* cover page of EPA Powerpoint annexed hereto as Ex. 4.

This Court should not allow Cabot witnesses to rely on EPA findings to suit their message, while excluding EPA findings that do not fit with their defense strategy. EPA reports fall under the Public Records exception to the

rule against hearsay. Furthermore, Plaintiffs have requested authenticated copies two (2) EPA documents they expect to use at trial. Plaintiffs intend to subpoena a person or persons with personal knowledge of the latter document to testify at trial during Plaintiffs' case in chief. Respectfully, Defendant's Request for Exclusive No. "3" should be **denied**.

Request for Exclusion No. "4" Should be Denied

Plaintiffs will agree to refrain from introduction of the fact that certain consent orders and agreements predating the 12/15/10 COSA required Cabot to provide temporary water supply to Plaintiffs, but object to withholding from the jury the fact that the PA DEP issued NOVs requiring Cabot to deliver water to the Plaintiffs. This information relates directly to the issue of water quality, inescapably the central issue in this lawsuit. It would be unfairly prejudicial to the Plaintiffs to disallow the jury to hear this relevant fact. Respectfully, Defendant's Request for Exclusion No. "4" should be **denied**.

Request for Exclusion No. "5" Should be Denied

It is essential for the jury to know that this action did not exist in a vacuum. Plaintiffs appreciate the Rule 408 restriction on disclosure and do not intend to introduce the fact that Cabot has settled with certain Plaintiffs in this case, even though settlement documents are a matter of public record

and have been thoroughly publicized by Cabot directly and through front organizations such as "Dimock Proud."

Ely et al v Cabot is what remains of the consolidated *Fiorentino* action that involved 22 households in a circumscribed locale, many on the same country road, complaining of the same injuries caused by the same company due to the same activities. Plaintiffs will not be attempting to use the fact that Cabot settled with other households in the *Fiorentino*, a.k.a. this case, in order to demonstrate Cabot's liability to the Elys and Huberts. The remaining, non-settling Plaintiffs should not be restricted, however, from eliciting or submitting evidence at trial regarding the fact that there were residents living in close proximity to the Elys and Huberts in 2009 who noticed degradation of their water after Cabot commenced its operations, and that those neighbors finally came together and tried to do something about it. This type of evidence is particularly relevant and crucial to the Plaintiffs' case in light of the fact that Cabot intends to call witnesses to testify from personal experience growing up in northeastern Pennsylvania that there has always been methane in the water and that explosive levels of methane was a naturally-occurring phenomena in Northeastern Pennsylvania years prior to Cabot ever initiating natural gas exploration and drilling activities in the area. The Defendant is expected to solicit testimony from

residents who have previously submitted declarations containing sworn statements to that effect. Omission of such relevant evidence, probative on the issue of whether the elevated methane was pre-existing or not, would unfairly prejudice the Plaintiffs. Respectfully, Defendant's Request for Exclusion No. "5" should be **denied**.

Request for Exclusion No. "6" Should be Denied

Plaintiffs have no intention of soliciting or introducing evidence of claims that have, for the time being, been disposed of as a result of summary judgment in motions filed by Defendant in 2013, almost three years ago. However, Cabot should not be allowed to vaporize all circumstantial evidence in this case, bit by bit. Cabot seeks to exclude relevant evidence that is an essential part of the background and context of the case. To exclude it would be to tie Plaintiffs' arms and misinform or inadequately inform the jury. It is evidence acquired in this lawsuit, in Case Number 3:09-cv-02284, formerly captioned *Fiorentino et al v Cabot Oil & Gas Corporation*. That there are other residents in Dimock in the vicinity who claimed water damage, recovered for water damage is inescapable. How is it fair that Cabot would be able to cite former *Fiorentino* plaintiff William Ely's purported positive experience with a Cabot-provided water treatment system, as evidence in support of Cabot's mitigation defense against these

Plaintiffs that water treatment systems work? Respectfully, Defendant's Request for Exclusion No. "6" should be **denied**.

Request for Exclusion No. "7" Should be Denied

Cabot's conduct is at issue in this case. This case is the *Fiorentino* case. Defendant again seeks to unfairly hamstring Plaintiffs and their experts from presenting their version of the facts to jury. This case is not in a vacuum. It would be false, misleading to the jury, and unfairly prejudicial to Plaintiffs to restrict introduction of relevant evidence as if the Ely and Hubert families were the only two households in Dimock to experience degradation of their water after Cabot commenced operations. Mr. Ely's testimony as a whistleblower as to his first hand observations of conduct of Cabot agents and employees is highly relevant and probative of the issue of what happened to the Elys' and the Huberts' water. Respectfully, Defendant's Request for Exclusion No. "7" should be **denied**.

Request for Exclusion No. "8"
Should be Denied in part and Granted in part

Plaintiffs have no intention of introducing evidence of prior monetary settlement offers to Plaintiffs or statements made in settlement discussions between the parties. However, as described previously Plaintiffs reserve their right to elicit testimony regarding the $4.1 million that Cabot publicized on its website as a "global settlement" of the Dimock case if

appropriate and necessary during the course of the trial. Respectfully, with this caveat, Defendant's Request for Exclusion No. "8" should be **denied** in part and **granted** in part.

Request for Exclusion No. "9" Should be Denied

Cabot seeks to eliminate any reference to the widely acknowledged fact that this operator's performance in conducting natural gas exploration and exploitation activities in Dimock commencing in 2008 was negligent, and by estimation of a former DEP official expected to testify at trial, deplorable. Cabot has openly acknowledged their negligence. At a public meeting held at the Elk Lake School on the evening of March 9, 2010 before a large crowd of Dimock area residents, Cabot's external affairs spokesperson at the time, Kenneth Komoroski, admitted that mistakes had occurred in connection with precisely the two wells at issue in this case, explained the likely source of the problems, which correlates with explanations within drilling records reviewed and testified to by Dr. Ingraffea.[2] A review of the testimony of Anthony Ingraffea (*See*

[2] Plaintiffs' counsel (at the time in 2010 and now) attended the entirety of the referenced meeting, where she heard Mr. Komoroski's candid inculpatory remarks regarding Cabot's conduct. It may be of note that Mr. Komoroski was replaced as Cabot company spokesperson shortly after making these statements at the Elk Lake School meeting. Furthermore, the Court should take judicial notice that this allegation regarding Mr. Komoroski's admissions were raised in Plaintiffs' Brief in Opposition to

Defendant's "Ex. A") demonstrates that Dr. Ingraffea is covering territory which is absolutely relevant to whether the Gesford 3 and Gesford 9 wells resulted in the contamination of Plaintiffs' water. So long as such proof is properly introduced, statements of criticism of Cabot's timing and preparedness to competently commence operations are relevant and probative on the issue of negligence and reckless conduct. This type of proof educates the jury as to if, how, and why mistakes happened that affected the Ely-Hubert water supplies. Plaintiffs will call at least one witness with knowledge on this issue.

For the record, this is exactly what Mr. Komorski had to say at the Elk Lake School gathering on March 9, 2010, which the Court might agree touches on Cabot's failure to "work out the kinks" before drilling:[3]

There is the potential during drilling, during site construction, during trucks moving in and out, I mean, there have been diesel spills. We don't have to use things like petroleum distillates. If you spill those additives on the surface, yes it can affect the water supply, if there were a problem with the several series of casings, steel casings and cementing at the surface, yes it can. The contents of that flows back, it's heavily, heavily laden salt-laden. There I, in addition, whatever additives that we've put in…. that never enters the water supply, unless we spill it on the surface. We've had diesel spills, we've had spills of hydraulic fracturing fluid. And we have to avoid those

---

Defendant's summary judgments motions in 2013; the record will show that Cabot did not deny or retract these incriminating statements. If necessary, Plaintiffs will subpoena Mr. Komoroski to testify regarding his recorded comments during that town hall-style meeting in March 2010.

[3] The videographer-transcriber will appear at trial to authenticate the recording.

when possible. The reality is it is going to happen. If proper practices are used in drilling the well, there is a very, very rare occasion that anyone's water supply is affected, and in most of those situations, the vast majority of those situations, it's temporary. There are those rare few where it's longer term and more serious. We have continued to evaluate the presence of methane in the water supply. It is possible that methane in the water supply came from one well where there was a problem, where a well was being drilled and the rock collapsed around the equipment while it was being drilled. We were unable to recover the equipment while it was being drilled. We were unable to recover the equipment immediately. It is at least a theoretical possibility that that allowed migration of gas from 2000 feet to 500 feet and allowed it a pathway to get to the water supply. There are measures in place to insure that that cannot ever happen again whether or not that was the cause. It's possible that wasn't the cause, but if it was caused by Cabot that's our most likely culprit. So we're continuing to focus our efforts there, continuing to work with the Department, and make sure, as best we can, to do the right thing.

Respectfully, Defendant's Request for Exclusion No. "9" should be **denied.**

Request for Exclusion No. "10" Should be Denied

Plaintiffs personal observations, experiences, and reactions to symptoms they correlate in time with exposure to degradation of their water after commencement of Cabot oil and gas operations within 1000 feet of their homes and around the community is relevant as to and probative of Plaintiffs' discomfort and inconvenience, and therefore, admissible. What weight to give this evidence is the jury's prerogative, subject to the Court's instructions. Defendant proffers no authority demonstrating that Plaintiffs are required to produce medical corroboration to introduce such firsthand,

personal testimony of Plaintiffs. Respectfully, Defendant's Request for Exclusion No. "10" should be **denied**.

Request for Exclusion No. "11" Should be Denied

Once again, Plaintiffs personal observations, experiences, and reactions **including lingering fear and concern** as to their health and that of their children, the concerns of which correlate in time with exposure to degraded water coming from their tap, is evidence supportive of Plaintiffs' discomfort and inconvenience damages claims, is relevant and admissible. What weight to give this evidence is the jury's prerogative subject to the Court's instructions. Respectfully, Defendant's Request to Exclude No. "11" should be **denied**.

Request for Exclusion No. "12" Should be Denied

It is critical that before reaching a decision at this time regarding Cabot's proposed exclusion of so-called "off-the-record" EPA statements to Mr. Ely, the Court assures itself that it fully understands the sequence of events relevant to this issue, which is as follows:

> On January 19, 2012, the U.S. Environmental Protection Agency inserted itself into this matter by announcing in an official press release that:
>
> *[EPA] planned to perform water sampling at approximately 60 homes in the Carter Road/Meshoppen Creek Road areas of Dimock, Pa., to further assess whether any residents [were] being exposed to hazardous substances that cause health concerns. EPA's decision to*

conduct sampling [was] based on EPA's review of data provided by residents, Cabot Oil and Gas, and the Pennsylvania Department of Environmental Protection. (*See* copy of 1/19/12 EPA Press Release annexed hereto as Ex. "5.")

In a letter dated January 26, 2012, Cabot's Chairman/President/CEO Dan O. Dinges responded, making clear to Administrator Lisa P. Jackson, that the gas company strongly disagreed with EPA's decision to intervene, and accusing EPA of acting in a less than "objective" manner and in veritable contravention of the intentions of the President of the United States, and the interests of the United States, *to wit*, stating in part:

We understand that the US Environmental Protection Agency (EPA) intends to test water wells in the area of Dimock, Pennsylvania. ... We [developers] are concerned that EPA's actions can be easily ***misinterpreted*** *and can undermine regulatory certainty necessary for development of oil and natural gas. EPA's activities appear to undercut the President's stated commitment to this important resource. ... EPA's approach has caused* ***confusion*** *that's undermines important policy goals of the United States to ensure safe, reliable, secure and clean energy sources from domestic natural gas. ... To prevent* ***uncertainty*** *and further advance these opportunities, in our view, what is needed is an objective approach by EPA to dealing with community concerns – something missing in recent EPA actions.* (emphasis added) (*See* copy of letter dated 1/26/12 from CEO Dinges to Administrator Jackson annexed hereto as Ex. "6.")

On July 25, 2012, EPA announced in an official press release that the Agency had completed its studies in Dimock, essentially signally that the water was safe to drink. The release read in pertinent part:

[*EPA] announced today that it had completed its testing of private drinking water wells in Dimock, Pa. ... Based on the outcome of that sampling, EPA has determined that there are not levels of contaminants present that would require additional action by the Agency.* (*See* copy of 7/25/12 EPA Press Release annexed hereto as Ex. "7.")

> It was in conjunction with this EPA public announcement that the vast majority of original *Fiorentino* plaintiffs settled their claims against Cabot.
>
> However, approximately one year later, on July 28, 2013, a journalist from the Washington bureau of the *Los Angeles Times* published a story based on an internal EPA document which called into question the accuracy, conclusiveness, and certainty of EPA's official reported finding (Exhibit "3") that water in Dimock was safe to drink and that additional monitoring is unnecessary. The document is in the form of a PowerPoint® entitled Isotech – Stable Isotope Analysis. Determining the Origin of Methane and Its Effect on the Aquifer. The PowerPoint was prepared and presented internally in 2012. (*See* copies of the *Los Angeles Times* article entitled "Message is Mixed on Fracking" and the subject PowerPoint, annexed hereto cumulatively as Ex. "4.")
>
> An EPA spokesperson admitted that the PowerPoint originated within the EPA. Yet, during deposition Cabot experts rejected the authenticity of the PowerPoint and omitted inclusion of the disclosed findings in forming his opinions regarding the true condition of Plaintiffs' water.
>
> In the mix of these events, Mr. Ely was advised by EPA personnel coordinating the sampling investigation "not to drink the water," or words to that effect.
>
> Plaintiffs have formally requested authenticated copies of these EPA documents as well as the voluntary appearance of two EPA thought to have knowledge of the authorship of the PowerPoint be allowed to voluntarily appear to testify at trial as to authenticity of the PowerPoint, it contents and scientific bases. Plaintiffs presently await the EPA's response to both of Plaintiffs' requests.
>
> This is highly relevant information being played out before the public.

Some middle ground must be carved out to allow for certain of this proof, relevant to the condition of Plaintiffs' water and its relationship to the

drilling, to come out at trial. To do otherwise would be extraordinarily prejudicial to Plaintiffs, and particularly unfair as Defendant's experts have demonstrated that they have relied on EPA findings that favor Defendant's position. Respectfully, Defendant's Request to Exclude No. "12" should be **denied**.

Request for Exclusion No. "13" Should be Denied

To the extent that the EPA's presence, investigations, and various reported findings are relevant to the issue of Plaintiffs' water condition and which will be introduced at trial through admissible means and in compliance with the applicable Federal Rules of Evidence 803, this proof must not be kept from the jury. Defendant attempts to exclude a "so called EPA 'leaked document.'" The fact that the document exists and was leaked is beyond dispute. It was admitted by EPA administration. The leaked document contains an internal PowerPoint document created in 2012 which came to public light on July 28, 2013 through journalist Neela Banerjee then of the *Los Angeles Times*. The statements in the PowerPoint throw into question the findings of the EPA disclosed earlier in 2012, which contributed to effectively taking the steam out of *Fiorentino* litigation. Plaintiffs will have the subject leaked PowerPoint authenticated by the EPA by the time of trial, and are taking steps to obtain the voluntary presence at

trial one or both of the EPA agents who authored the PowerPoint document. Under applicable exceptions to the rule against hearsay, assured reliability as a public record duly acknowledged and authentication and/or testimony by one or more of its authors on at trial, this critical relevant evidence on the issue of Plaintiffs' water quality and safety is surely admissible. Respectfully, Defendant's Request for Exclusion No. "13" should be **denied**.

Request for Exclusion No. "14" Should be Granted

Plaintiffs agree to the exclusion of testimony and evidence related to Plaintiffs' fraud, breach of contract and lost royalties claims, which for the time being were dismissed via summary judgment.[4] Respectfully, Defendant's Request for Exclusion No. "14" should be **granted**.

Request for Exclusion No. "15" Should be Denied

On the issue of Cabot's efforts to limit Plaintiffs' damages, it bears noting that this may well be the case of first impression regarding the calculation of damages where water has been contaminated by the natural gas "gold rush." The equities weigh heavily in favor of revisiting the damages calculus for damaged water articulated in the 1909 decision and its

[4] This is one of a number of items that could have been resolved without a motion had Defendant actually attempted in good faith to obtain concurrence with plaintiffs' counsel prior to filing their lengthy motions and briefs.

progeny upon which Cabot relies, moving away from the market value. We have on the one hand a gas company that has made untold millions, if not billions, by rapid and aggressive exploitation of natural resources beneath the feet of folks who live in $25,000 trailers. Plaintiff Ray Hubert lives with his family in such a trailer. Why is his degraded water less important than an affected neighbor with greater real estate holdings? If it is determined that Cabot was responsible for degrading Plaintiffs' water, as is presumed to be the case under the PA Gas & Oil Act, how can that resident in a manufactured home be expected to provide water to his family for the foreseeable future on $25,000? Why must a property owner living in a trailer be put into a forced-sale situation because he cannot afford to remediate the water that the gas company destroyed? Even as this case is novel, it is also accompanied by a highly unusual fact pattern, in particular the fact that Dimock Plaintiffs were promised a pipeline by the government. They heard the former Secretary of the PA DEP tell them that the only measure available to them to receive guaranteed restoration of clean water to their households was a municipal pipeline. Plaintiffs will testify that they took the Secretary's statement very seriously. How can that bell be unrung? Why should politics and antiquated state common law stand in the way of the remedy they were told they required? Whether damage is permanent or

temporary only time will tell. In the meanwhile Defendant's objection to including testimony regarding the pipeline should be rejected. It is highly relevant background to this case. The fact that the PA DEP was going to run a water pipeline to Dimock homes is at least some evidence of the seriousness of the degradation of the Plaintiffs' water and indication of what was thought to be the necessary remedy to the problem. Therefore, there is a reasonable basis for the conclusion that the cost of a pipeline should be factored in to the calculus of damages.

Plaintiffs expect to have a former senior level PA DEP official testify at trial as to the opinion by the Governor the Commonwealth and PA DEP senior management that the necessary mechanism for permanently restoring Plaintiffs' degraded water to pre-drilling condition was the construction of a pipeline. Plaintiffs' expect that the PA DEP official will testify that design plans for the pipeline had been developed, that construction costs had been calculated and therefore could not be considered speculative, and that it was politics and Cabot's orchestrated conduct directed against the project that caused the withdrawal of the pipeline in December of 2010.[5] The potential prejudice to Plaintiffs of excluding this information would be extraordinarily unfair and biased in favor of Defendant. The fact that Cabot goes to such

[5] At least one of Cabot's own experts during deposition has implicitly confirmed the conduct.

lengths to exclude reference to a promised pipeline in favor of limiting damages to property value as expressly memorialized in the 12/15/10 COSA further enforces Plaintiffs' position that the subject public agreement, which did away with the promised pipeline, cannot be extricated from this related federal matter. Plaintiffs ask to be heard on this, as well as all other objections, during a hearing on the record. For the time being, respectfully, Defendant's Request for Exclusion No. "15" should be **denied**.

Request for Exclusion No. "16" Should be Denied

It would be extraordinarily prejudicial to the Hubert Plaintiffs in prosecuting their litigation to artificially limit their presentation of damages on the premise that "injury to water supply is [always and exclusively] an injury to real property." This is novel litigation without black letter law applicable to the exact and extensive facts in this first natural gas case to proceed to trial in Northeastern Pennsylvania, and the intertwined issues and evidence between the civil and related environmental matter. In 2009, the Huberts were determined by the PA DEP to be residents affected by Cabot operations in Dimock. In 2010, the Huberts were to have been among the residents in Dimock tagged to receive a link to municipal water via a pipeline ordered by the PA DEP. In the 12/15/10 COSA, the Huberts were named residents who were to be offered escrow money and treatment

systems to permanently restore their water to pre-drilling conditions. As stated by Mr. Hubert in his affidavit in opposition to Defendant's motion for summary judgment:

> *2. I reside with my family at 120 Carter Road, Dimock, PA where we have lived for over 20 years. My wife and I also own about 3 acres of undeveloped property across the road. Nolen Ely and I consider that my wife and I own this property after so many years of habitation and according to the wishes of Ken Ely, deceased, my wife, Victoria's stepfather and owner prior transferring title to Scott. The damages with respect to loss of water, devaluation of property, and other derive from use of the property at 120 Carter Road.* Doc. 426-2.

The evidence is relevant, informative and useful for the jury and prejudicial to no one other than the Huberts were they to be treated as second-class citizens because they live in a trailer on someone else's land, even though the owner of the land concedes and will testify to the fact that after all this time the land belongs to the Huberts based on something akin to a friendly adverse possession scenario. Respectfully, Defendant's Request for Exclusion No. "16" should be **denied**.

Request for Exclusion No. "17" Should be Denied

Plaintiffs will not mention, inquire, or elicit testimony or other evidence regarding earthquakes, climate change or global warming. On the other hand, Plaintiffs will cautiously testify as to their personal and reasonable concerns regarding their well being and that of their children in connection with exposure to degraded water, noise pollution, and other

negative physical intrusions that they experienced in connection with exposure to Cabot's oil and gas exploration and drilling activities near and about their residences. This is relevant information, probative as to Plaintiffs' private nuisance claim, and inconvenience, loss of use of enjoyment and discomfort damages. Plaintiffs will not abuse the boundaries expected to be set by the Court in this area, but otherwise respectfully suggest that the bulk of Defendant's Request for Exclusion No. "17" should be **denied**.

Request for Exclusion No. "18" Should be Denied

Plaintiffs absolutely intend to introduce the testimony of Mr. Ely about his firsthand knowledge and direct experiences as an employee of Cabot's drilling company, GasSearch Drilling Services Corp. ("GDS") during a time period relevant to this litigation.[6] Plaintiff's counsel will vigilantly avoid the introduction of any hearsay. The evidence elicited by Mr. Ely as employee of defendant-company and whistleblower goes to his direct observations of Cabot's reckless and unrestrained misconduct. Cabot has every right to refute this proof by calling rebuttal witnesses, for example, Dennis Harton who was the President of GDS, Cabot's subsidiary drilling company, during the time in question. Plaintiffs mention Mr. Harton

[6] GDS was acquired by Cabot at some point after commencement of *Fiorentino*.

because he was previously deposed in this matter. Respectfully, Defendant's Request for Exclusion No. "18" should be **denied**.

Request for Exclusion No. "19" Should be Denied

Cabot's effort to omit any reference by Plaintiffs to the sale and facts surrounding the sale of former *Fiorentino* plaintiffs, Craig and Julie Sautner should be rejected. This sale and its conditions are a matter of public record and should be of interest to the jury in assessing just how vital the Dimock/Carter Road real estate market is since Cabot came to this rural town, contrary to Cabot's relentless public relations messaging to the contrary.[7] The facts are that the Sautners' had bad water, Cabot bought their, as it has other in Dimock/Carter Road, through one of its companies, Susquehanna Real Estate Corp., located at the same address in Houston as the parent company. Cabot bulldozed the Sautner's house (captured on video), "sold" the property to the industry-friendly neighbors next door, the Mayes, for a few thousand dollars, and conveyed a deed restrictions, *to wit*, that Cabot retained the subsurface mineral right, and restricting the "buyers" from ever building a structure on their newly-acquired acreage. Plaintiffs' valuations expert will testify as to his acquisition and the relevance of the

[7] *See* December 22, 2015 acknowledged Cabot-sponsored "Power to Save" segment on WNEP 16 TV Scranton entitled "Susquehanna County Open For Business" and solely featuring for 6:14 seconds Cabot's contributions to local business. http://wnep.com/2015/12/22/power-to-save-dec-2015-susquehanna-county/

public documents and the implications of this transfer and others on and about Dimock/Carter road. This all goes to Plaintiffs' damages, the realities of the marketplace and mitigation. Plaintiffs have no intention or interest invading the possible terms of a settlement reached with the Sautners. In the Defendant's belated assertion of this defense, it opened the door for interpretation as to what exactly Cabot intends to be the range of potential mitigation tactics that aggrieved property owners should be required to resort to, regardless of their historical roots in the community.

Furthermore, Cabot may raise in its defense when balancing the benefits of natural gas production versus the nuisance improved real estate values and transactions in the region. As disquieting as presentation of this information may be for Cabot, the aforementioned is a situation of defendant's making, and is highly relevant to Ely property damages claim as it goes to the calculus of assessing and determining damages. Respectfully, Defendant's Request for Exclusion No. "19" should be **denied**.

Request for Exclusion No. "20" Should be Denied

Reference to Addendum A of Paul Rubin's July 20, 2015 Response Report ("Rubin Response Report") should not be excluded. Mr. Rubin prepared the report at the request of a third party. He acquired approval to release it. It addresses conditions in Dimock as described by the expert. It

relates to information provided by Mr. Ely. It contains information that was conveyed to the PA DEP and Cabot by Mr. Ely. It is information for which the PA DEP ordered remediation activities by Cabot which cleanup activities involved the services of Defendant expert James Pinta, Jr., for one, and were referenced extensively in his export reports. It is the document created by a Plaintiffs' expert who will take the stand during trial. He can be challenged about the credibility of the evidence by counsel. The jury can decide what if any weight to give to the evidence as well as whether a "Love Canal" analogy is apt. The evidence is relevant, probative, and goes to nuisance damages, including discomfort, loss of use and enjoyment, and inconvenience. Respectfully, Defendant's Request for Exclusion No. "20" should be **denied**.

Request for Exclusion No. "21" Should be Denied

Upon hearing the evidence elicited from Mr. Rubin, the jury should decide whether "Love Canal" reference in Mr. Rubin's report is an appropriate one. The evidence is relevant, probative, and among other things goes to private nuisance damages, including discomfort, loss of use and enjoyment, and inconvenience. Respectfully, Defendant's Request for Exclusion No. "21" should be **denied**.

Request for Exclusion No. "22" Should be Denied

Defendant's seek to exclude any and all reference to statements of toxicologist, Dr. David Brown, and medical doctor, Dr. Kathleen Nolan referred to by Plaintiffs' expert hydrogeologist, Paul Rubin, in his Response Report (identified as Defendant Ex. K) served on Defendant on July 20, 2015. The Response Report was accepted without apparent comment from Defendant. Thus, Cabot had fair notice of the complete content of expert Rubin's Response Report that contains references to conversations with Drs. Brown and Nolan well prior to taking Mr. Rubin's deposition on August 10, 2015. Attorney Barrette took ample opportunity to question expert Rubin regarding this evidence during her nine (9) hour examination of the witness, after which Cabot at no time requested the depositions of the toxicologist and pediatrician in question. As he explained in his deposition at page 54, Mr. Rubin felt he had the duty to inquire of other specialists regarding Plaintiffs' water quality once they had reported physical symptoms to him when they were exposed to the affected water. Expert witnesses may base opinions on facts or data that the expert "has been made aware of or personally observed." Fed. R. Evid. 703. If the facts and data relied upon are the sort that experts in that field would reasonably rely on, then those facts "need not be admissible for the opinion to be admitted." *Id.* Accordingly, experts may base their opinions on otherwise-inadmissible

information, such as hearsay, so long as the information is the sort reasonably relied upon in the experts' field. Plaintiffs purport that an expert in the field of hydrogeology would logically consult with a toxicologist and medical doctor upon learning of complaints of physical symptoms from a resident with a history of documented degradation of their water supply. Respectfully, Defendant's Request for Exclusion No. "22" should be **denied**.

Request for Exclusion No. "23" Should be Granted

Plaintiffs have no intention of showing documentary or demonstrative evidence or exhibits to the jury during opening statements without first showing such material to Cabot's counsel and the Court. Plaintiffs expect the same behavior on the part of defendant counsel. Respectfully, Defendant's Request for Exclusion No. 23 should be **granted**.

Request for Exclusion No. "24" Should be Denied

Plaintiffs intend to adduce at trial that Cabot's conduct with respect to the Ely and Hubert households has been outrageous, e.g., associated with reckless indifference justifying punitive damages. Thus, at least for the time being, evidence of Cabot's financial condition, admissible according Defendant's own arguments and authority, must not be excluded at this time. See *Williams v Betz Lab. Inc.*, No. CIV. A 93-4426. Furthermore, it is

anticipated that Cabot's financial windfall from Dimock operations, thus financial condition, will indirectly come into play as the company, in defending against Plaintiff's nuisance claim, will attempt to engage the Court in a balancing of the benefits to the community and the risk of harm to certain households. Respectfully, Defendant's Request for Exclusion No. "24" should be **denied**.

Request for Exclusion No. "25" Should be Denied

Plaintiffs agree that they will not make any improper generally-understood-to-be prohibitive mention or reference to counsel colloquy, objections, responses, etc. during depositions, but believe that rather than granting a blanket-exclusion that Defendant requests now, decision is better reserved until such time as the issue arises, if at all, closer to or during trial. Respectfully, Defendant's Request for Exclusion No. "25" should be **denied**.

Request for Exclusion No. "26" Should be Denied

Plaintiffs generally agree that they will not make any mention or reference to the instant motion or the Court's rulings at trial, but believe that rather than granting a blanket-exclusion that Defendant requests now, decision is better reserved until such time as the issue arises, if at all, closer

to or during trial. Respectfully, Defendant's Request for Exclusion No. "26" should be **denied**.

Request for Exclusion No. "27" Should be Denied

Plaintiffs do not accept counsel's request to exclude "any mention, reference, or inquiry to any Cabot witness as [regarding] the extent preparation with counsel for the testimony of such witness." Plaintiffs will solicit the amount of time spent in preparation with counsel. The time and money Cabot expended in obtaining witness opinions and testimony is relevant to as to the independence of the witness and the extent of his or her bias. Plaintiffs will not inquire or attempt to solicit from any Cabot witness information protected by the attorney-client expert privilege, except to the extent that an expert may have previously waived or dissolved the privilege. Respectfully, Defendant's Request for Exclusion No. "27" should be **denied**.

Request for Exclusion No. "28" Should be Denied

Plaintiffs do not agree to omit mention, reference or inquiry regarding escrow payments they accepted from Cabot. It is clearly relevant and probative as to the calculus of damages to which Defendant intends to limit Plaintiffs' recovery, if any. Fed. R. Evid. 401. Respectfully, Defendant's Request for Exclusion No. "28" should be **denied**.

II. Motion Excluding Paul Rubin Testimony

The determination of competency of an expert witness rests with the discretion of the district court. *Caisson Corp.,* 622 F.2d at 682; *Knight v. Otis Elevator Co*., 596 F.2d 84, 87 (3d Cir.1979); *Universal Athletic Sales*, 546 F.2d at 537; *Aloe Coal Co. v Clark Equip. Co*., 816 F.2d 110, 114. There is a liberal policy of permitting expert testimony which will "probably aid" the trier of fact." *Knight*, 596 F.2d at 87.

Cabot seeks to suppress any statement from Mr. Rubin that Cabot was, more likely than not to a reasonable degree of scientific certainty, substantially responsible for degrading plaintiffs' drinking water supplies. The excessively sweeping nature of Cabot's requests should be cautiously decided by the Court in favor of modifying or limiting disclosure to relevant testimony rather exclusive of any relevant evidence that would help the jury better understand the context of the Dimock case and the "realities on the ground." With this and Cabot's other efforts to suppress evidence described in Cabot's motion *in limine* and brief in support, the gas company wishes to reduce the matter to two families living in the middle of nowhere subjectively suspect an unsavory change in the water, and must start from step one to figure out what happened. This is not a criminal trial. This civil matter must be viewed as a saga of mounting evidence, no individual part

conclusively proving that Cabot degraded the Plaintiffs' water, but cumulatively provided an overwhelming body of proof that the water was clean before, became degraded after Cabot commenced operations with methane and other known (unknown) contaminants, and, because aquifers are dynamic and high density natural gas drilling activities continue, conditions are not static and cannot be readily corrected.

A. Rubin Testimony is Adequately Qualified, Reliable, and Provides Fit

The issues in this case regard water and rock. By any standard, Mr. Rubin possesses skill and knowledge of hydrology and geology greater than the average layman.[8] Mr. Rubin, is a local hydrogeologist with decades of experience sampling and assessing water and geology in the precise area at issue in this case, more so than any other expert retained by either side in this matter. Mr. Rubin demonstrates sufficient **credentials and qualifications** to comment on every area of testimony Cabot seeks to exclude. (*See* Rubin CV annexed hereto as Ex. "8.")

[8] Merriam-Webster defines "hydrology" as "a science dealing with the properties, distribution, and **circulation of water on and below the earth's surface** and in the atmosphere" (emphasis added) and "geology" as "a science that studies rocks layers of soil, etc., in order to learn about the history of the earth…the rocks, land processes of land formation, etc., **of a particular region**" (emphasis added) http://www.merriam-webster.com/dictionary

Paul Rubin is qualified to testify as an expert because he possesses "specialized expertise." The Third Circuit has tended to interpret this requirement "liberally," holding that "a broad range of knowledge, skills, and training qualify an expert as such." *In re Paoli R.R. Yard PCB Litig.,* 35 F.3d 717, 741 (3d Cir.1994) (*"Paoli II"*). As to **reliability**, while a court "**need not** admit opinion evidence that is connected to existing data only by *ipse dixit* of the expert" and a court "**may conclude** that there is simply too great an analytical gap between data and the opinion proferred," there is room for a middle ground at the Court's discretion even were an "analytical gap" in Mr. Rubin's approach. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Additionally, there is sufficient "**fit**" between Rubin's intended testimony and facts at issue in this case: every statement Mr. Rubin makes at trial "will relate to an issue in [this] case," for example, damages, and therefore is relevant and will be helpful to the jury. *Hayden v. Westfield Ins. Co*., Civil Action No. 12-0390, 2013 WL 5781121, at **7**-8 (W.D. Pa. Oct. 25, 2013).

Furthermore, as described in argument below, Mr. Rubin as well as Plaintiffs and their engineering expert, Dr. Ingraffea, are fully prepared to restrain themselves at trial so as to remain within the Federal Rules of

Evidence and Civil Procedure. They have no interest in inciting the Court, or unfairly prejudicing the gas company, if that is possible.[9]

B. Regarding Exclusion Requests "A-G"

Request for Exclusion "A" Should be Denied

In connection with Cabot's request to exclude any opinion or testimony by Paul Rubin that "hydraulic fracturing caused or contributed to plaintiffs' drinking water supplies, plaintiffs agree that neither Mr. Rubin nor any witness on behalf of plaintiffs shall affirmatively testify that it was hydraulic fracturing[10] *per se* that directly caused or was a substantial factor in causing degradation of plaintiffs' drinking water.

However, Mr. Rubin should not be precluded from stating, based on his decades experience with the geology of the region, greater firsthand knowledge than any expert contracted by either side, testifying that the science is inconclusive, that we just do not know to what extent if

[9] Because of the significance of each decision regarding exclusion, Plaintiffs furtively request that the Court set aside adequate time prior to trial of this matter for a full hearing where Plaintiffs can be heard on the record regarding each proposed exclusion by Cabot. Plaintiffs intend to produce Paul Rubin for *voir dire* during the scheduled Daubert hearing.

[10] "Hydraulic fracturing produces fractures in the rock formation that stimulate the flow of natural gas or oil, increasing the volumes that can be recovered. … Hydraulic fracturing is a technique used in "unconventional" gas production." http://www.epa.gov/hydraulicfracturing/process-hydraulic-fracturing

concentrated fracking activity in a discrete area, creates or exacerbates conditions suitable to making methane and other escape of contaminate a possibility.

Furthermore, Mr. Rubin should not be barred from comment on the fact that Cabot's purpose in drilling the Gesford 3/9 gas wells was to drill down to the Marcellus shale depth and vertically or horizontally hydrofrack at the level, which goal was aborted due to Cabot's negligent drilling and cementing operations.

Also, neither Mr. Rubin, nor plaintiffs' expert engineer, Dr. Anthony Ingraffea should be restrained from noting the fact for the jury that it was in the endeavor of isolating and extracting Marcellus shale gas via hydraulic fracturing that problems arose at the level of the aquifer that feeds the Ely and Hubert water wells.

Finally, Plaintiffs draw the Court's attention to examples of Mr. Rubin's deposition testimony, omitted by Defendant, which support the context of Mr. Rubin's opinions in this area and goes to the reliability of his expertise:

> Q. Okay. Are you making any type of allegation at all whether produced water is impacting the Ely or Hubert water supply?
>
> A. No, only to the extent that some of this may have been disposed in the drill cuttings waste pit. If some of

> these chemicals are in there, then they may be available for migration. So because we haven't tested the chemistry exactly of what is in this Gesford waste pit, if indeed it does contain any hydraulic fracking or produced water fluids, then there is a potential that that may migrate down toward homeowners' wells." [11]
>
> Q. Earlier you testified that you were not making any claim that Ely or Hubert waters were impacted by frack fluid, correct?
>
> A. Below ground frack fluid. If frack fluid was spilled on the surface, then there's the potential as – as any of the contaminants might infiltrate into the ground and move with the groundwater flow system that these contaminants may show up as some point in time in these homeowner wells.[12]

Request for Exclusion "B" Should be Granted in part and Denied in part

The Court should decline to exclude "any testimony" by Mr. Rubin regarding the quality of the plaintiffs' drinking water. It is agreed that Mr. Rubin shall not opine from the stand that the Ely-Hubert water is "toxic" or that it has or necessarily will cause the Plaintiffs specific injuries to their health. However, the condition of the water is approximated by water testing results as well as the testimony by plaintiffs and Mr. Rubin. Mr. Rubin will not testify as a toxicologist or as a medical doctor as to issues of toxic content or specific medical effects of the water. Mr. Rubin will not

[11] Rubin Deposition Ex. "9" 266:14-25
[12] Rubin Deposition Ex. "9" 317:14-23

testify as an expert in support of any claim for medical claim. As a result of summary judgment, they presently have no such standing claims. Mr. Rubin must, however, be allowed to testify as to what he believed to be his duty after receiving descriptions from the Plaintiffs was his duty upon receiving information from plaintiffs as to symptoms they experienced when exposed to untreated unfiltered water coming from the tap at around the time that Cabot commenced its activities in the area near plaintiffs water supplies and homes.

Finally, Plaintiffs draw the Court's attention to examples of Mr. Rubin's deposition testimony, omitted by Defendant, which support the context of Mr. Rubin's opinions in this area and goes to the reliability of his expertise:

> Q. Okay. And with respect to the healthcare and toxicology, you would agree with me that you are not qualified to testify as to the health effects of certain constituents in ground water, correct?
>
> A. In my assorted reports that you've provided to me here, I have references to toxicology, and that's because as a scientist I don't work in a vacuum. I routinely collaborate with experts that I know; and, you know, I listen to what they have to say. I listen to their presentations. I talk to them. I read their papers. You know, I consult with them. And it's as a result of that type of collaboration, which I do in all my work, here included, that I come to conclusions based on what I hear

from the experts in those fields and then I relate my own expertise to see how they correlate.[13]

Q. And you are not qualified to opine as to whether the Ely or Hubert water supplies are safe; correct?

MS. LEWIS: Objection.

Q. You can answer.

A. As a hydrogeologist who is familiar with groundwater flow dynamics and routinely analyzes chemical data and looks at contaminant threats, through the years, from Love Canal and other cases, I am very familiar with contaminant presence, hydrogeologic movement, and as a hydrogeologist, not a toxicologist or not as a medical doctor, I am in a reasonable position to – to state based on my collaboration with others and my knowledge of subsurface groundwater flow as to whether it is scientifically sound to drink water that may have contaminants perched and poised to move with the groundwater flow system."[14]

Q. Okay. You did not follow that, did you?

A. I elected to follow the specific directions with sampling from the laboratory that sent me the bottles that has written directions that says 'Do Not Wear Gloves.' I think the – I would imagine they don't want to risk imparting any potential contaminants that might come from some sort of rubber gloves, whether it's phthalates or whatever it might be.[15]

Q. Okay. You did not do that did you?

---

[13] Rubin Deposition Ex. "9" 45:8-25
[14] Rubin Deposition Ex. "9" 46:7-24
[15] Rubin Deposition Ex. "9" 110:5-14

> A. I didn't have turbidity, but I did monitor pH and conductivity.[16]
>
> Q. So again, you did not follow the EPA guidance with respect to the stabilization of parameters; correct?
>
> A. Not correct. I purged the well as best as reasonably possible to obtain representative conditions. I did take – you know, I took an additional one. I took conductivity, pH, temperature, and total dissolved solids."[17]
>
> Health based statements I have made regarding gas field medical concerns are based on discussions with Dr. David Brown and Dr. Kathleen Nolan over many years. In addition, I have attended health-related presentations made by these toxicologists – one where Dr. Brown and I were part of a four-person presentation panel before Governor Cuomo's executive staff (August 13, 2012).[18]

Request for Exclusion "C" Should be <u>Denied</u>

With respect to geological "pathways" and "connections" testimony, exclusion should, respectfully be out of the question. Mr. Rubin is an experienced and local geologist. His life's work is analyzing and acquiring expert knowledge as to the geology of the region that includes Dimock. He absolutely must be allowed to testify as to his opinions regarding the likely relationship, hydrogeologically, between the defective conditions of the

---

[16] Rubin Deposition Ex. "9" 111:15-17
[17] Rubin Deposition Ex. "9" 111:25 - 112:7
[18] Rubin Report Defendant's Ex. "B" at 11

Gesford 3/9 wells and the appearance of explosive levels of methane in the Plaintiffs' water supplies. This coupled with the statutory presumptions and findings by the PA DEP comprise Plaintiffs' proof, to a reasonable degree of scientific certainty that Cabot actions were a substantial factor in causing documented degradation of the Ely-Hubert drinking water.

Finally, Plaintiffs draw the Court's attention to examples of Mr. Rubin's deposition testimony, omitted by Defendant, which support the context of Mr. Rubin's opinions in this area and goes to the reliability of his expertise:

> Q. Okay. Did you identify any specific fault that connects the Gesford 3/9 well location to the Ely water supply?
>
> A. Well, I did identify faults in the area and I have a figure showing faulting in the area. I cannot see below the ground surface to identify whether there is, in fact, other faults or continuation of the same fault below the ground surface.[19]
>
> Q. And you can't say for certain that what you've seen on the surface in that quarry is indicative of what is actually between the—the Gesford 3/9 well location and the Hubert-Ely water supply; correct?
>
> A. I can say with a great deal of certainty that what I see in that quarry in terms of joint trends, joint presence, joint density, that indeed because they're regional in nature, as documented by structural geologists like Jacobi

[19] Rubin Deposition Ex. "9" 311:25 - 312:8

> and Fountain, that they are present throughout the area, yes.[20]

> Joint, fault, and sediment pathways are available to move contaminants between gas well sites and homeowner wells. Monitoring wells should have been installed and regularly monitored for water quality and hydrogeologic parameters so that vertical and horizontal hydraulic gradients and coefficients of transmissivity and hydraulic conductivity can be assessed.[21]

Request for Exclusion "D" Should be Denied in Part

The Court should be cautious in analyzing Cabot's request to exclude "any testimony" by Mr. Rubin regarding contamination from "alleged drilling fluid losses" in 2008. Mr. Rubin analyzed and investigated complaints by Mr. Ely with respect to illegal discharges by Cabot subsidiary GDS which about which he gained personal knowledge when employed by GDS in furtherance of Cabot's well construction and gas drilling operations. The PA DEP investigated the disclosures by Mr. Ely and as a result caused Cabot to remediate/clean up the sites after the discharges. Cabot expert Dr. Pinta headed up those efforts and presented extensive findings to the PA DEP.

Whether or not certain selected so-called "markers" of drilling mud were consistently detected or **detectable** in the circumscribed water

[20] Rubin Deposition Ex."9" 312:22 - 313:10
[21] Rubin Report Defendant's Ex. "B" at 5

sampling performed on the dynamic and changing aquifer(s) feeding the Ely-Hubert water wells, Mr. Rubin should not be barred from testifying the presence of the markers and his scientific explanation for their absence or presence. There was a discharge of drilling mud near the Plaintiffs' water supplies. One of the markers is elevated pH. Elevated pH was detected on at least one occasion in the Ely-Hubert water. All of this was important for the PA DEP and EPA to investigate and address. The proof is relevant to the Elys' and Huberts' discomfort regarding the true past, present and future impacts on the drinkability of their water. The proposed testimony is not based on impermissible hearsay; Mr. Ely will testify at trial. Mr. Rubin should be allowed to testify in support of his reports and to harmonize his opinions with his deposition testimony.

Finally, Plaintiffs draw the Court's attention to examples of Mr. Rubin's deposition testimony, omitted by Defendant, which support the context of Mr. Rubin's opinions in this area and goes to the reliability of his expertise:

> Q. And that indicates at least 55,000 milligrams per liter of chloride in – was used on 12/13/08; correct?
>
> A. That's what it indicates.[22]

[22] Rubin Deposition Ex. "9" 275:17-20

[But later in testimony, Mr. Rubin discovers that the data he was handed to review is referring to Gesford 3S, not 3/9:] Gesford 3S was the well that was drilled down to 7,058 feet. So these high chloride concentrations weren't used in the shallow well that we're concerned about with the fluid loss [Gesford 3/9]. This was used in the deep Gesford well and they left off the S on the name here [3S].[23]

Q. So, you are saying that the iron levels of 0.772, and for—the iron levels that are in early 2009, are—you're saying those are higher than background that's what makes you think his water was impacted by drilling fluids in 2008?

A. I think as an early indicator here … I mentioned only one date and that was 1/13/09 as an indicator, and I've taken that, not in isolation, but rather with the recognition that the pHs are abnormally high and above background level here, yes.[24]

Q. Mr. Rubin, the pHs at the time you're looking at those iron readings, those were well with normal limits; correct?

A. The high pHs are the single best indicator that drilling fluids have entered the system and changed the water chemistry of the area because they become elevated and then stay elevated.[25]

Request for Exclusion "E" Should be Granted in Part and Denied in Part

[23] Rubin Deposition Ex. "9" 283:10-15
[24] Rubin Deposition Ex. "9" 297:24 - 298:9
[25] Rubin Deposition Ex. "9" 298:10-18

The same is true regarding exclusion regarding potential contamination from "well-site reserve pit[]" discharges. The Court should be cautious in analyzing Cabot's request to exclude "any testimony" by Mr. Rubin regarding contamination from ""well-site reserve pit[]" discharges. Mr. Rubin analyzed and investigated complaints by Mr. Ely with respect to illegal discharges by Cabot subsidiary GDS about which he gained personal knowledge when employed by GDS in furtherance of Cabot's well construction and gas drilling operations. The PA DEP investigated the disclosures by Mr. Ely and as a result caused Cabot to remediate/clean up the sites after the discharges. Cabot expert Dr. Pinta headed up those efforts and presented extensive findings to the PA DEP.

The proof is relevant to the Elys' and Huberts' discomfort regarding the true past, present and future impacts on the drinkability of their water. The testimony is is not based on hearsay; Mr. Ely will testify at trial. Mr. Rubin should be allowed to testify in support of his analytical process and to harmonize the opinions in his reports with his testimony during deposition in this matter.

Finally, Plaintiffs draw the Court's attention to examples of Mr. Rubin's deposition testimony, omitted by Defendant, which support the

context of Mr. Rubin's opinions in this area and goes to the reliability of his expertise:

> Q. And is it your testimony that you're concerned that those organics could come out of the waste pit and impact water supplies?
>
> A. We need to separate this here. So the waste pits to a large degree are not supposed to be including all the multitude of fracking fluids. There's a much lower abundance of chemicals used during the drilling process as compared to the hydraulic fracturing process.[26]
>
> Q. Okay. If you're so concerned, can you tell me why you didn't even test for some of them?
>
> You didn't test for phthalates. You didn't test for acetone. If you're so concerned about them showing up, why didn't you even test for them?
>
> A. I tested for the main suites that I could afford to test for, the main volatile organics.[27]
>
> Q. Okay. Now, I believe earlier you said the loss of drilling fluid led to particle migration into the Ely well, Ely water supply; correct?
>
> A. I believe it contributed to it, yes.[28]
>
> Q. Okay. And what is your basis for that?
>
> A. "…(F)irst, that the – these homeowner wells are down gradient of the Gesford site. Second, that some of

[26] Rubin Deposition Ex."9" 242:8-17
[27] Rubin Deposition Ex."9" 243:9-18
[28] Rubin Deposition Ex."9" 248:21-25

the concentrations of different parameters are what I would consider to be above background levels."[29]

Q. And the reason you did not put it in there is because the Ely[s] and the Huberts don't have elevated chloride; correct?

MS. LEWIS: Objection.

A. Chloride is so soluble in water that as soon as these concentrations enter the system, I wouldn't be surprised if they're greatly diluted."[30]

Cabot's use of burying wastes short distances up-gradient of water supplies can result I water adulteration or contamination, or both. Because drill cuttings waste are buried at the Gesford 3/9 well site and spills have occurred on-site (Ely, pers. comm.), the risk of ground water contamination is resent far into the future. The use of proprietary chemicals that may not have been tested for places homeowners at risk, especially considering that most Ely and Hubert sampling was conducted on non-aquifer representative, stagnant, groundwater.

Scott Ely and Ray Hubert's groundwater supplies have one or more metals concentrations that exceed either EPA trigger levels or primary or secondary MCLs as promulgated for public drinking water systems. While these EPA standards and guidelines are not directly applicable to residential water supplies, they provide a general reference for consideration. Additionally, both wells are situated down-gradient of Gesford 3/9 buried waste pits. Hydrogeologically, the risk of contaminant

[29] Rubin Deposition Ex. "9" 249:4-10
[30] Rubin Deposition Ex. "9" 254:13-20

> migration from the Gesford 3/9 well site to these homeowner wells is great.[31]

Request for Exclusion "F"
Should be Granted in part and Denied in part

Again, the same is true "well-site surface spills." The Court should be cautious in analyzing Cabot's request to exclude "any testimony" by Mr. Rubin regarding contamination from "well-site surface spills." Mr. Rubin analyzed and investigated complaints by Mr. Ely with respect to illegal discharges by Cabot subsidiary GDS about which he gained personal knowledge when employed by GDS in furtherance of Cabot's well construction and gas drilling operations. This was one of the reported discharges/spills. Defendant has had since 2010 documentation of the disclosed discharges/spills. The PA DEP investigated the disclosures by Mr. Ely and as a result caused Cabot to remediate/clean up the sites after the discharges. Cabot expert Dr. Pinta headed up those efforts and presented extensive findings to the PA DEP.

The proof is relevant to the Elys' and Huberts' discomfort regarding the true past, present and future impacts on the drinkability of their water. The testimony is is not based on hearsay; Mr. Ely will testify at trial. Mr. Rubin should be allowed to testify in support of his analytical process and in

---

[31] Rubin Report p. 12

order to harmonize the opinions in his reports with his testimony during deposition in this matter.

Finally, Plaintiffs draw the Court's attention to examples of Mr. Rubin's deposition testimony, omitted by Defendant, which support the context of Mr. Rubin's opinions in this area and goes to the reliability of his expertise:

> Q. Did you ever hear that there were frack fluid spilled on the Gesford 3 and 9 well pad?
>
> A. … I read different violation reports, and I think I have some of them in my file actually that talk about some of the parameters, but I don't remember chemically offhand what all of them were.[32]
>
> Q. Okay. Do you know whether—oh, and Mr. Ely also claimed that there was a material that looked like antifreeze and that accumulated in the well cellar, those were the three concerns tht he had with the Gesford 3 and 9 pad.
>
> Do you recall?
>
> A. I recall that, but I also recall in a conversation with him when I first met him, I sat down with him and he talked at length about many different well sites including Gesford 3, and although it's been a while since I looked at what -- I did write down what it is he told me had happened there; and I know it involved a combination of surface spills, it involved hoses being taken off things with the fluids just released on to the ground.[33]

[32] Rubin Deposition Ex. "9" 318:4-9
[33] Rubin Deposition Ex. "9" 321:15 – 322:5

> Q. So if the pits were leaking, as you suggested, and theey had frack fluids or even drilling fluids in them, you would have expected to see some chloride still in the soil; correct?
>
> MS. LEWIS: Objection
> You can answer.
>
> A. It's possible [to see some chloride still in the soil] … if the waste pit had high chlorides in it and if the fluids had already migrated his borings and intersected them …. As I said, depending on the concentration of chlorides in the (waste) pit.[34]
>
> Table 5 provides concentrations of drilling fluids from the Hickley and Higgins sites. While not Gesford 3/9 site-specific, these values are likely to be representative of chemical parameters and concentrations found buried in Cabot drill cuttings pits in the Dimock, PA area. Note that many of the same chemicals have been detected in Scott Ely and Ray Hubert well water. As waste pit chemicals leach downward into the subsurface and down-gradient, chemical concentrations may increase over time in homeowner wells.[35]

Request for Exclusion "G" Should be <u>Denied</u>

Mr. Rubin should most certainly have the opportunity to testify at trial as to the treatability of the Plaintiffs' water. Mr. Mercer puts too much of a fine point on an artificial "gotcha moment" during Mr. Rubin's deposition. Mr. Rubin will not testify at trial that the Ely-Hubert water is toxic. While Mr. Rubin acknowledge that he does not design or manufacture or install

---

[34] Rubin Deposition Ex. "9" 328:20 – 329:9
[35] Rubin Report at p. 12

water treatments systems, as a hydrologist who has sampled and examined hundreds if not thousands of well water sample results, he is in a position of greater expertise than that of the average layperson as to the filtration and treatment options that are out there, and whether in his expert opinion as a hydrologist, they work in the unique Cart Road/Dimock/Ely-Hubert scenario. Frankly, Mr. Rubin was about as informed as Mr. Brelje and Pinta regarding the actual treatment systems in place at the various selected homes in Dimock. Mr. Rubin had opportunity to review Mr. Brelje and Mr. Pinta's report. He had opportunity to observe that Mr. Brelje's opinions regarding the effective of Cabot provided water treatment systems effectiveness of treatment systems that have been placed in homes by Or is also had the opportunity to review the reports of Dr. Brown G and Dr. Kent and in his capacity as a hydrogeologist has responded to their opinions it should be noted that the defendant intends to call at trial and employee of cabinet room himself has no direct experience with treatment systems who will testify that they will correct the degradation of you we Hubert water supplies. Frankly a close examination of the testimony of Brent Brelje and Dr. Pinta reveals a distinctly limited knowledge about the actual treatment systems in place in Dimock, demonstrated by the two travelling to Dimock to looks at the system days prior to Mr. Brelje's deposition.

WHEREFORE, and based on the foregoing, Plaintiffs respectfully request that the Court address Defendant's requests to deny and/or grant individual exclusions requested by Defendant in the manner described in each instance by Plaintiffs, and that the Court grant a hearing on the record with respect to as to all of Defendant's request to exclude and in any event that the Court strike a fair middle ground in its rulings.

Date: December 29, 2015

Respectfully submitted,

/s/ LESLIE L. LEWIS

Leslie L. Lewis (PA 314929)
Attorney for Plaintiffs
162 West 21st Street, Ste. 2-S
New York, NY 10011
(646) 267-2172
leslie.lewis.esq@gmail.com

Word Count: 11,950