BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL,	: No. 111 DB 2023
	:
Petitioner	:
v.	:
	:
LISA ANN JOHNSON,	: Attorney Registration No. 200101
Respondent	: (Allegheny County)

ANSWER TO PETITION FOR DISCIPLINE AND REQUEST TO BE HEARD IN MITIGATION

Respondent, Lisa Ann Johnson, by and through her counsel, Bethann R. Lloyd, Esq. of DiBella Weinheimer, respectfully provides this Answer to the Petition for Discipline and Request to be Heard in Mitigation.

1. Petitioner, whose principal office is located at Pennsylvania Judicial Center, Suite 2700, 601 Commonwealth Avenue, P.O. Box 62485, Harrisburg, PA 17106-2485, is invested, pursuant to Rule 207 of the Pennsylvania Rules of Disciplinary Enforcement (hereafter "Pa.R.D.E."), with the power and the duty to investigate all matters involving alleged misconduct of an attorney admitted to practice law in the Commonwealth of Pennsylvania and to prosecute all disciplinary proceedings brought in accordance with the various provisions of the aforesaid Rules.

Admitted.

2. Respondent, Lisa Ann Johnson, was born in 1974. She was admitted to practice law in the Commonwealth of Pennsylvania on October 20, 2005. Respondent's attorney registration mailing address is 1800 Murray Avenue, #81728, Pittsburgh, Pennsylvania 15217.

Admitted.

3. Respondent is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court of Pennsylvania.

Admitted.

CHARGE

In the matter of Stanley et al. v. DEP

EHB Docket No. 2021-013-L

4. In January of 2020, Bonnie Dibble filed a complaint with the Department of Environmental Protection (hereinafter the "DEP") regarding the water supply at a property located in New Milford, Pennsylvania (hereinafter the "Dibble Property").

Admitted.

5. By letter to Ms. Dibble dated January 15, 2021, the DEP advised that, *inter alia:*

> the Department has determined that the Water Supply was not adversely affected by oil and gas activities including but not limited to the drilling, alteration, or operation of an oil or gas well.
>
> On January 20, 2020, after the Department's initial sampling of your Water Supply, you had your water sampled by a private laboratory. You and your attorney expressed concerns about your laboratory's detection of triethylene glycol ("TEG") in the samples collected by the private laboratory as noted in the table below. Staff from the Department's Bureau of Laboratories ("BOL") reviewed the results from the private laboratory. As discussed with you and your attorney, the BOL identified a number of potential problems with the analysis conducted by the private laboratory resulting in unreliable results. Nevertheless, the Department agreed to sample your Water Supply again and include analysis for TEG.
>
> Department staff sampled your Water Supply again on July 1, 2020. Samples were also collected on that date by your private laboratory. TEG was not detected in the samples collected by the Department as explained by the BOL. However, your private laboratory results again detected TEG, although at lower concentrations than previously detected in the first samples. BOL staff again reviewed the results of the samples collected by the private laboratory and identified a number of potential problems with the analysis, including the fact that the New Jersey laboratory that analyzed the sample is not accredited by the BOL Laboratory Accreditation Program in Pennsylvania for glycol analysis. On a number of occasions during the investigation, the Department requested that your private laboratory share the raw data from their analysis so that further evaluation could be conducted in an effort to resolve the discrepancies in the TEG sample

results. However, you refused to allow your private laboratory to share the raw data with the Department.

Ms. Johnson admits that the above is an excerpt of the DEP's Determination Letter, but the excerpt omits virtually all context and background, including the nature of the water problems first experienced by Ms. Stanley. Ms. Johnson's clients' water issues were not limited to the presence of TEG. To the contrary, beginning in approximately late 2019 and continuing in early January 2020, her clients experienced water stoppages, a bad odor, discoloration (brownish-red water), poor water pressure, solid material being expelled and an oily film with solids in the toilet tank water. The potential presence of TEG was an additional concern upon detection by the private laboratory. The excerpt also omits that Ms. Johnson explicitly authorized the DEP in February 2020 to discuss sampling results with the private laboratory. Ms. Johnson does not admit to the conclusions of the DEP, except for the fact that the DEP advised that her clients' water was polluted and not safe to drink.

6. On February 15, 2021, Respondent filed a Notice of Appeal with the Environmental Hearing Board (hereinafter the "EHB") regarding this letter on behalf of Tonya Stanley, Bonnie Dibble and Jeffrey Dibble.

Admitted.

7. Respondent failed to propound any interrogatories in connection with this matter.

Admitted. However, Ms. Johnson denies any implication that she was not gathering evidence to support her clients' claims. To the contrary, Ms. Johnson collected and reviewed information, both factual and legal, relative to the activities of the oil and gas companies, the potential cause of her clients' water pollution and legal theories to pursue. As examples, she gathered and/or reviewed:

- **Well Records**
- **The Dimock Report of the Agency for Toxic Substances and Disease Registry**
- **Water rest results**
- **The private laboratory reports (Eurofins Reports)**
- **Coordinates and Distances**
- **Photographs**
- **Statements of her Clients**
- **A Grand Jury Report dated February 27, 2020 critical of the DEP (made publicly available in June 2020).**
- **Social Media Sites, including Marcellusgas.org, which identifies permitted wells, violation reports, well sites and other information.**
- **FracFocus—A national hydraulic fracturing chemical disclosure registry.**
- **Scholarly Articles**
- **General Internet Research**

8. Respondent failed to propound any requests for production of documents in connection with this matter.

Admitted, as explained above in response to No. 7.

9. Respondent failed to propound any requests for admissions in connection with this matter.

Admitted, as explained above in response to No. 7.

10. Respondent failed to conduct any depositions in connection with this matter.

Admitted, as explained above in response to No. 7.

11. On February 19, 2021, attorneys Amy Barrette and Robert Burns filed a Notice of Appearance on behalf of Cabot Oil and Gas Corporation, n/k/a Coterra Energy, Inc. (hereinafter "Cabot" or "Coterra").

Admitted.

12. On February 22, 2021, Respondent filed a Motion to Disqualify Counsel, seeking to disqualify Ms. Barrette and her firm "in order to, among other things, encourage open and forthright testimony from Appellants and similar witnesses as well as the free flow of information between the Appellants and Appellee."

Admitted, as to the filing of the Motion as set forth in its entirety.

13. This Motion had no basis in fact that is not frivolous.

Denied as stated. Ms. Johnson's concerns were based on facts that were not frivolous, including what she perceived to be SLAPP litigation filed by this same lawyer and law firm against another landowner. (Susquehanna Co. Dkt. 2017-936).

14. This Motion had no basis in law that is not frivolous.

Ms. Johnson admits, in hindsight, that her legal authorities were not sufficiently on point.

15. Respondent failed to file a memorandum in support of this Motion, as required by 25 Pa. Code § 1021.95(d).

Admitted.

16. By letter to Respondent dated February 23, 2021, Mr. Burns, *inter alia:*

(a) demanded that Respondent withdraw the Motion set forth in paragraphs 12-15 *supra;* and

(b) stated that, "Appellants fail to allege any actionable basis for disqualification and instead attempt to disparage Attorney Barrette and obtain a disqualification by blatant misrepresentations to the Board."

Ms. Johnson admits that Mr. Burns sent the letter. She does not admit to misrepresentations.

17. On February 26, 2021, Respondent filed a Renewed Motion to Disqualify Counsel, in which she asserted that Mr. Burns' February 23, 2021 letter amounted to "harassment and intimidation."

Admitted.

18. This Motion had no basis in fact that is not frivolous.

Denied as stated. Ms. Johnson's concerns were based on facts that were not frivolous, as explained in response to No. 13.

19. This Motion had no basis in law that is not frivolous.

Ms. Johnson admits, in hindsight, that her legal authorities were not sufficiently on point.

20. Respondent failed to file a memorandum in support of this Motion, as required by 25 Pa. Code § 1021.95(d).

Admitted.

21. On March 8, 2021, Respondent filed an Amended Notice of Appeal.

Admitted.

22. By Order dated March 26, 2021, *inter alia,* the Motions set forth in paragraphs 12-15 and 17-20 *supra* were denied.

Admitted.

23. By email to Respondent dated April 2, 2021, attorney Michael Braymer, Supervisory Counsel with the DEP, said:

> Thanks for your e-mail. The intention of my conversation yesterday was not to offer a "new" investigation but to simply convey that the Department has not been able to substantiate the claim that TEG is present in the groundwater. While the Department is aware your clients' lab has differing results, the Department believes its sample results are reliable and accurate. However, understanding all of this, the Department is willing to sample your clients water supply again and would even be willing to split samples with multiple labs if so desired.
>
> Further, you had asked about whether Cabot used TEG on their respective well sites, and I indicated that the problem was that the Department has not been able to detect any TEG in the groundwater. Thus, use of TEG at the well site was assumed, but the issue remaining at hand is that TEG is not appearing in any of the samples taken by the Department.
>
> The Department in no way is trying to intimidate or silence anyone and welcomes the Board's review of this matter.

Ms. Johnson admits that the above is an excerpt of an email she received.

24. On April 7, 2021, Respondent filed an Appellant's Motion for Summary Judgment in which she represented that, *inter alia,* "[t]he Department advised Appellants and Appellants'

counsel on April 2, 2021 for the first time that (a) TEG was being used at the well sites operated by Cabot during the period in question and while all respective water tests were performed."

Ms. Johnson admits that the above is an excerpt from the Motion.

25. On April 7, 2021, Respondent filed a Brief in Support of Appellants' Motion for Summary Judgment in which she represented that, *inter alia,* "[a]ccording to the Department on April 2, 2021, TEG was being used at all of such well sites being operated by Cabot."

Ms. Johnson admits that the above is an excerpt from the Brief.

26. The representations set forth in paragraphs 24-25 *supra* are false. As set forth in paragraph 23 *supra,* Mr. Braymer advised Respondent on April 2, 2021, that the DEP "has not been able to detect any TEG in the groundwater. Thus, use of TEG at the well site was assumed, but the issue remaining at hand is that TEG is not appearing in any of the samples taken by the Department."

Denied. Ms. Johnson has come to understand that she may have misinterpreted the DEP's email, but she did not knowingly make a false representation. She had specifically asked the DEP if TEG was used at the well site and the DEP's response indicated use of TEG at the well site was assumed, but the DEP focused instead on whether it was found in the groundwater. The DEP's email was not sufficiently clear and was reasonably capable of a differing interpretation. Her misinterpretation further stemmed from her general knowledge of fracking fluids and also, that the private laboratory testing of the Dibble water detected TEG in both February 2020 and July 2020, albeit below the reporting limit. There was no other natural or logical reason to believe that the TEG could be from any source other than nearby fracking activity. It is not a natural substance. Rather, it is commonly used by the oil and gas industry in fracturing operations.

27. On May 7, 2021, Mr. Braymer and DEP Assistant Counsel Kayla Despenes and Paul Strobel filed a Department's Brief in Support of Its Response to Appellants' Motion for Summary Judgment, stating that, *inter alia:*

> The Department has not made any determination regarding whether Cabot used TEG on the nearby well sites and has not communicated to Appellants otherwise. Cabot's use of TEG on the nearby well sites remains a disputed material fact.

> Appellants attached to their Motion an email chain that includes several emails exchanged among counsel of record for the parties. The contents of this email exchange do not support Appellants' claims and, in fact, directly contradict those claims... the Department's April 2, 2021 email demonstrates that the Department's counsel was simply advising Appellants' counsel that the Department has been unable to substantiate that TEG is present in groundwater serving the Appellants' Water Supply. Further, Department's counsel indicated that even if Cabot's use of TEG at the well sites was *assumed for the sake of argument,* use of TEG at the well sites would not resolve the fundamental issue that TEG was not detected in any of the Department samples. Appellants' claim that this email was evidence that "the Department was aware that Cabot uses TEG in its well operations and that TEG was being used at the subject well sites" is false.

(emphasis in original, footnote omitted).

Ms. Johnson admits that the above is an excerpt of the Brief. Ms. Johnson states further that the Brief paraphrases the DEP's email. The DEP's email did not use the words "*assumed for the sake of argument,*" and that was not Ms. Johnson's interpretation at the time, as explained above in response to No. 26.

28. On May 21, 2021, Respondent filed Appellants' Reply Brief in Support of Appellants' Motion for Summary Judgment.

Admitted.

29. On May 28, 2021, Ms. Barrette and Mr. Burns filed Intervenor Cabot Oil & Gas Corporation's Motion to Strike Portions of Appellants' Reply on Appellants' Motion for Summary Judgement or in the Alternative, for Sur-Reply.

Admitted.

30. On June 1, 2021, Ms. Stanley filed a disciplinary complaint against Ms. Barrette.

Admitted.

31. On June 3, 2021, Respondent filed Appellants' Response in Opposition of Intervenor Cabot Oil & Gas Corporation's Motion to Strike Portions of Appellants' Reply on Appellants' Motion for Summary Judgment or in the Alternative, for Sur-Reply, in which she averred that, *inter alia,* "[w]ith respect to

potential misconduct under the Rules of Professional Conduct, Appellants have filed ethics complaints with the Disciplinary Board of the Supreme Court of Pennsylvania so that this Board is able to focus on the matter at hand."

Ms. Johnson admits that the above is an excerpt from the Motion.

32. On June 11, 2021, the EHB issued an Opinion and Order on Motion for Summary Judgment that, *inter alia:*

(a) Denied the Motion set forth in paragraph 24 *supra;* and

(b) noted that, "[m]uch of the problem is related to the fact that no discovery has been conducted yet by any party and we are working with a record in need of further development."

Ms. Johnson admits that the above is an excerpt from the Opinion.

33. On June 22, 2022, Respondent issued several subpoenas commanding various individuals, including Ms. Barrette, to "attend a videoconference deposition."

Admitted. Ms. Johnson states further, however, that any inference of a failure to develop facts prior to June 2022 is denied. Ms. Johnson had been diligent in collecting and reviewing information, as explained above in response to No. 7.

34. On July 1, 2021, Ms. Barrette and Mr. Burns filed Intervenor Cabot Oil & Gas Corporation's Motion to Quash Subpoenas and for Protective Order.

Admitted. By way of further response, the Subpoenas were never served. Rather, after the Subpoenas were filed on June 22, 2021, Coterra immediately filed an Emergency Motion to Stay Compliance with Subpoenas. Coterra's Motion was granted on June 25, 2021. Accordingly, as of the time of this July 1, 2021 Motion, relief had already been granted.

35. On July 16, 2021, Respondent filed Appellants' Memorandum of Opposition to Intervenor Cabot Oil & Gas Corporation's Motion to Quash Subpoenas and for Protective Order, in which she averred that, *inter alia,* "Appellants have filed ethical complaints with the Supreme Court Disciplinary Committee

attempting to shield themselves and other landowners from Attorney Barrette's potential and egregious violations of the Rules of Professional Conduct."

Admitted.

36. On July 21, 2021, the EHB issued an Opinion and Order on Motion to Quash Subpoenas and for Protective Order that, *inter alia,* granted the Motion set forth in paragraph 34 *supra.*

Admitted, as explained above in response to No. 34.

37. On August 9, 2021, Respondent filed a Motion to Extend Discovery in which she averred that, *inter alia:*

(a) "[t]o date, the parties have not served any discovery"; and

(b) "continuing negotiation of the terms of a consent order and agreement with the Department is the best use of Appellants' and the Board's resources while discovery continues."

Ms. Johnson admits that the above is an excerpt of the Motion she filed.

38. Respondent failed to aver in this Motion the position of the nonmoving party on the relief requested or otherwise state that, after a reasonable effort, she was unable to determine the position of such party, as required by 25 Pa. Code § 1021.92(c).

Ms. Johnson admits that these technical elements were not contained in the Motion, but due to the contentiousness of the matter, she felt it obvious that Coterra would oppose the Motion.

39. The representation set forth in paragraph 37(b) *supra* is false. Neither Respondent nor Cabot were negotiating the terms of a consent order and agreement with the DEP.

Ms. Johnson acknowledges that her language should have been more precise, but denies making a false statement. By way of explanation, the Office of Attorney General has a special section dedicated to environmental crimes. However, it does not have the power to initiate such prosecutions on its own. The Attorney General

may only act if an outside agency refers the case for investigation. As of the time of the Motion, Ms. Johnson had been in discussions with the Attorney General about a referral by which the Attorney General would obtain jurisdiction over the matter. She understood that if the Attorney General became involved, settlement discussions and the possible negotiation of a consent order were part of the normal course of events. Ms. Johnson assumed negotiations to be both inevitable and a desirable means to resolve her clients' matter.

40. Respondent's assertion that "continuing negotiation of the terms of a consent order and agreement with the Department is the best use of Appellants' and the Board's resources while discovery continues" has no basis in fact that is not frivolous.

Denied as stated, as explained above in response to No. 39.

41. On August 16, 2021, Mr. Braymer propounded the Department's First Set of Interrogatories and First Request for Production of Documents Directed to Tonya Stanley, Bonnie Dibble, and Jeffrey Dibble, which requested, *inter alia:*

(a) the identity of "each person that the Appellants intend to call as an expert witness at the hearing in this case"; and

(b) "[n]otes, worksheets, test data and reports, correspondence, memoranda, opinions, and conclusions of all expert witnesses who will or may testify at trial on behalf of Appellants."

Admitted.

42. On August 19, 2021, Ms. Barrette and Mr. Burns filed Intervenor Cabot Oil & Gas Corporation's Response to Appellants' Motion to Extend Discovery Period, in which they "denie[d] that Appellants have been negotiating the terms of a `consent order and agreement with the Department."

Ms. Johnson admits to Coterra's filing.

43. On August 24, 2021, Mr. Braymer filed Department's Response to Appellants' Motion to Extend Discovery Period, in which he averred that, "there is no consent order and agreement being negotiated. The Department is not currently considering any consent order and agreement in this matter."

Ms. Johnson admits to the DEP's filing.

44. By Order dated August 24, 2021, the Motion set forth in paragraphs 37-40 *supra* was denied "due to the Appellants' failure to comply with the Board's Rules requiring that procedural motions `shall contain a statement indicating the nonmoving party's position on the relief requested or a statement that the moving party, after a reasonable effort, has been unable to determine the nonmoving party's position.' 25 Pa. Code § 1021.92(c)."

Admitted.

45. On September 14, 2021, Ms. Barrette and Mr. Burns filed Intervenor Cabot Oil & Gas Corporation's Motion for Summary Judgment and a Memorandum of Law in Support thereof, in which they averred that, *inter alia:*

> Appellants conducted no discovery in this appeal and can offer no evidence to support their contention that the Department incorrectly concluded that Cabot's operations did not pollute Appellants' water supply with TEG.
>
> Appellants bear the burden of proving that Cabot's activities caused their water supply to become polluted with TEG. The record contains zero evidence to support Appellants' claim that Cabot's activities caused Appellants' water supply to become polluted with TEG. The sample results of Appellants' water supply do not demonstrate TEG pollution and, even if they did, Cabot did not and does not use TEG in its operations on the Abbott D and Abbott M well pads.
>
> Appellants' Eurofins Analysis Report dated February 4, 2020, reported TEG at 28 mg/L, with a "B" data qualifier. The data qualifier "B" denotes that Eurofins detected TEG in the method blank. The detection of TEG in the method blank is indicative of laboratory or instrument contamination, as noted in the March 16, 2020 email which Attorney Johnson represented reflected Eurofins' explanation of the analysis.
>
> The presence of a substance in the method blank indicates that the substance was introduced through the lab's testing process. In fact, Eurofins analyzed Appellants' January 20, 2020 sample three times. The first and second trial reported TEG in both the method

> blank and the water sample. The third trial did not identify TEG in either the method blank or the sample. The absence of TEG in the third trial supports that the findings of TEG in trials one and two were the result of lab or instrument contamination. Thus, Appellants' premise of TEG pollution was based on Appellants' counsel's flawed interpretation of Appellants' Eurofins Analysis Report, dated February 4, 2020.
>
> Appellants cannot point to any evidence in the record to support their claim that Cabot used TEG because Cabot did not and does not use TEG in its operations at the Abbott D or Abbott M well pads. This fact is not in dispute.
>
> Appellants did not conduct any discovery on this point. This lack of discovery is not surprising given that Appellants were advised on multiple occasions, as early as February 27, 2020, that Cabot did not use TEG in its hydraulic fracturing operations. Moreover, information related to the constituents used by Cabot in its hydraulic fracturing operations on the Abbott D and Abbott M well pads is publicly available to Appellants.
>
> The constituents used in Cabot's hydraulic fracturing operations are publicly located at https://www.fracfocus.org. As a result, Appellants have always had the ability to confirm whether or not Cabot used TEG in its hydraulic fracturing operations. Had Appellants elected to actually conducted *[sic]* discovery in this appeal, they would have learned that Cabot did not and does not use TEG in any of its operations on the Abbott D or Abbott M well pads.

(internal citations omitted).

> **Ms. Johnson admits to the filing itself, but not the content or conclusions. Coterra's facts and conclusions have never been established on the merits, in light of the nonsuit granted to Coterra. As illustration, Coterra stated in this excerpt that the constituents used in its hydraulic fracturing operations are publicly located at www.fracfocus.org. However, this is misleading, as fracfocus does not list all chemicals utilized. The Oil and Gas Act allows the industry to keep "trade secret" or "proprietary chemicals" confidential. 58 Pa.C.S. §3222.1(b)(3)(4) & (d). Also, there are other loopholes to disclosure, such as for chemicals present in trace amounts, chemicals not intentionally added to the stimulation fluid, or chemicals not disclosed by the manufacturer. §3222.1(c). With the benefit of hindsight and greater experience, Ms. Johnson recognizes that she could have posed focused discovery to Coterra as to the constituents used in its operations. However, Ms. Johnson denies that Coterra's recitation of facts by its counsel as set forth in this Motion is accurate. Further, Ms. Johnson's legal position on behalf of her clients was that the burden of proof shifted, primarily because the DEP did not comply with its statutory duty to issue a Determination letter within 45 days as required by the Oil and Gas Act. 58 Pa.C.S. §3218.**

45. By letter to Ms. Stanley dated September 15, 2021, the Office of Disciplinary Counsel dismissed the disciplinary complaint set forth in paragraph 30 *supra.*

(a) Respondent was copied on this letter.

Upon information and belief, admitted. However, Ms. Johnson has not found a copy of this letter in her file.

47. On September 15, 2021, Respondent provided Appellants' Responses to the Departments' First Set of Interrogatories and First Request for Production of Documents Directed to Tonya Stanley, Bonnie Dibble, and Jeffrey Dibble.

Admitted.

48. These responses did not identify any proposed expert witnesses.

Admitted. Ms. Johnson objected to the form and substance of the discovery requests in her responses.

49. These responses did not provide any expert reports.

Admitted. Ms. Johnson objected to the form and substance of the discovery requests in her responses.

50. On September 17, 2021, Respondent filed Appellants' Motion to Strike, for Sanctions for Spoliation of Evidence and Under Rule 4005, in which she averred that, *inter alia:*

> the Board denied Appellants' motion to extend discovery on August 24, 2021 due to the Board's finding of material noncompliance with 1021.92(c) requiring that procedural motions "shall contain a statement indicating the nonmoving party's position on the relief requested or a statement that the moving party, after a reasonable effort, has been unable to determine the nonmoving party's position."

Ms. Johnson admits that the above is an excerpt of the Motion.

51. Respondent failed to aver in this Motion the position of the nonmoving party on the relief requested or otherwise state that, after a reasonable effort, she was unable to determine the position of such party, as required by 25 Pa. Code § 1021.92(c).

Ms. Johnson admits that these technical elements were not contained in the Motion, but due to the contentiousness of the matter, she felt it obvious that Coterra and DEP would oppose sanctions.

52. Respondent failed to include a memorandum of law in support of this Motion, as required by 25 Pa. Code § 1021.94(a) and 25 Pa. Code § 1021.95(d).

Admitted.

53. By letter to Respondent dated September 23, 2021, Mr. Braymer said that, *inter alia:*

(a) the DEP found the Appellants' Responses to the Departments' First Set of Interrogatories and First Request for Production of Documents Directed to Tonya Stanley, Bonnie Dibble, and Jeffrey Dibble set forth in paragraphs 47-49 "to be deficient and noncompliant with the Rules of Civil Procedure"; and

(b) "[y]ou have not produced a single responsive document, identified any documents not produced, nor stated any objections or bases for non-production."

Ms. Johnson admits that the above is an excerpt of the letter, but denies the conclusions as to deficiency, as Ms. Johnson had already filed documents starting with the Amended Notice of Appeal and continuing with many other exhibits attached to various pleadings. As examples, see EHB Dibble Dkt. 47 (water tests), EHB Dkt. 48 (water tests), EHB Dkt. 49 (AG Report and criminal charges), EHB Dkt. 50 (Surface Activities Inspection Report and photos), and EHB Dkt. 58-59 (multiple documents attached to support summary judgment, including the Eurofins' test results) Although Ms. Johnson admits that she did not serve these documents again in response to discovery, the responsive documents on which she was relying were already served on the DEP. Moreover, she referred to the documentation already on the record in the Answer. (*Dibble* EHB Dkt. 78, Exh. B, Answ. to Interrogatory No. 2.).

54. By email to Mr. Braymer dated September 29, 2021, Respondent said, "[w]e will not be supplementing our responses to the Department's interrogatories for a number of reasons. If the Department feels the need to file a motion to compel, that is the Department's prerogative."

Ms. Johnson admits that the above is an excerpt of her response.

55. By Order dated October 5, 2021, the EHB:

(a) denied the Motion set forth in paragraphs 50-52 *supra* "due to the Appellants' failure to comply with the Board's rules at 25 Pa. Code §§ 1021.93, 1021.94, and/or 1021.95"; and

(b) "warned that a continuing failure to comply with the Board's rules may result in the imposition of sanctions, including but not limited to a dismissal of the appeal and/or the award of attorneys' fees to the opposing parties."

Ms. Johnson admits that the above is an excerpt of the Order.

56. By Order dated November 23, 2021, Respondent was directed to file a pre-hearing memorandum on or before December 30, 2021, containing, *inter alia:*

(a) "[a] list of all expert witnesses";

(b) "[a] summary of the testimony of each expert witness or a report of the expert as an attachment";

(c) "[a] list of the exhibits the party seeks to introduce into evidence"; and

(d) "[c]opies of these exhibits."

Admitted.

57. This Order further noted that, *inter alia:*

> Any party desiring to respond to a petition or motion must do so within the time set forth in 25 Pa. Code §§ 1021.91 - 1021.95, unless otherwise ordered. A party will be deemed to have waived the right to contest any motion or petition to which a timely response has not been filed. The Board will not notify the parties that a response may be due.

(emphasis in original).

Admitted.

58. Respondent failed to file a pre-hearing memorandum on or before December 30, 2021.

Admitted. By way of further response and context, after receiving the EHB's Opinion and Order resolving the pending summary judgment motions, Ms. Johnson sought to certify the Order for immediate appeal, arguing and believing that it would promote efficiency. (EHB Dkt. 84). The EHB denied said Motion. (EHB Dkt. 88). On or about December 20, 2021, Ms. Johnson filed a Petition for Review with the Commonwealth Court. (EHB Dkt. 89). At the time the Petition for Review was pending, the Dibbles' pre-hearing memorandum was due.

59. By Rule dated January 3, 2022, the EHB:

(a) directed Respondent to "show cause why the Board should not impose sanctions pursuant to 25 Pa. Code § 1021.161 for failing to file a pre-hearing memorandum"; and

(b) noted that, "[r]eceipt of the pre-hearing memorandum on or before January 10, 2022 will constitute a discharge of this Rule" (emphasis removed).

Admitted.

60. On January 7, 2022, Respondent filed Appellants' Motion to Stay Proceedings, or in the Alternative, Extend Time for Appellants to File Pre-Hearing Brief, in which she requested, *inter alia,*

that the EHB "[e]xtend the time period for a short period for Appellants to file its pre-hearing brief on January 19, 2020."

Admitted.

61. By Order dated January 7, 2022, the EHB, *inter alia,* granted Respondent's request for an extension until January 19, 2022, to file the pre-hearing memorandum set forth in paragraph 56 *supra.*

Admitted.

62. On January 19, 2022, Respondent filed Landowners' Pre-Hearing Memorandum.

Admitted.

63. This Landowners' Pre-Hearing Memorandum listed the following among the "facts likely in dispute":

(a) "Landowners' Water Supply was and continues to be contaminated by oil and gas operations"; and

(b) "Coterra's oil and gas operations caused and continues *[sic]* to cause, among other things, such contamination."

Admitted.

64. Respondent averred in this Landowners' Pre-Hearing Memorandum that, *inter alia:*

> In a case involving expert witnesses, the exchange of expert reports or answers to expert interrogatories is required. Any party, including the Department, who wishes to present expert testimony must identify the expert and submit either an expert report or answers to expert interrogatories, even if not required to do so by Pa.R.C.P. No. 4003.5. This also applies to experts that may be called in rebuttal.
>
> The Department and Coterra, in a clear waiver, failed to include the use of experts as such testimony is not required to prove pollution from oil and gas operations, particularly in the

instant matter. At any rate, the burden to engage and utilize expert testimony is on the Department, however, such expert reports are a significant waste of taxpayer dollars. Moreover, Landowners requested that the discovery period be extended on August 7, 2021 and each of the Department and Coterra opposed such extension.

The notion that an "expert" could make any definitive finding without having all critical information, such as each of the chemicals used by an operator or the impact that prior and current drilling has on the subterranean landscape, is not credible. Further, the use of an expert without taking effects of the subject fracking in relation to the past fracking, including from adjacent wells, particularly given the length that horizontal laterals are drilled *[sic]*.

(internal citations omitted).

Admitted. By way of further response, the Memorandum was consistent with Ms. Johnson's legal position on behalf of her clients that the burden of proof shifted, primarily because the DEP did not comply with its statutory duty to issue a Determination letter within 45 days as required by the Oil and Gas Act. 58 Pa.C.S. §3218. The Commonwealth Court criticized the DEP's delay in the *Glahn* case and, in a footnote, commented that it appeared to the majority that the timeframe was intended to be mandatory. Glahn v. Dep't of Env't Prot. (Env't Hearing Bd.), 2023 Pa. Commw. LEXIS 98, *12.

65. This Landowners' Pre-Hearing Memorandum failed to identify any expert witnesses that Respondent intended to call at the impending evidentiary hearing.

Admitted, as explained above in response to No. 64. Ms. Johnson further acknowledges not being sufficiently experienced in the process of presenting evidence before the EHB. She expected the EHB to consider those items that she had filed, including the private laboratory reports. She viewed the administrative hearing as an informal one, where the landowners would have an opportunity to tell their story and discuss the documents she had filed as part of their testimony, again, including the private laboratory reports.

66. This Landowners' Pre-Hearing Memorandum failed to identify or attach any exhibits that Respondent intended to introduce at the impending evidentiary hearing.

Admitted, as explained above in response to No. 64 and 65.

67. On January 27, 2022, Ms. Barrette and Mr. Burns filed Coterra Energy, Inc.'s Motion *in Limine* to Preclude Appellants from Offering Expert Witness Testimony Not Identified in Appellants' Pre-Hearing Memorandum, averring that, *inter alia:*

(a) "Appellants filed their Pre-Hearing Memorandum on January 19, 2022, but they failed to identify any expert witnesses in their Pre-Hearing Memorandum" (internal citation omitted);

(b) "Appellants' Pre-Hearing Memorandum failed to summarize any expert testimony that Appellants intended to offer at the hearing" (internal citation omitted); and

(c) "Appellants failed to attach any expert witness reports to their Pre-Hearing Memorandum" (internal citation omitted).

Admitted.

68. On January 28, 2022, Ms. Barrette and Mr. Burns filed Coterra Energy, Inc.'s CORRECTED Motion *in Limine* to Preclude Appellants from Offering Expert Witness Testimony Not Identified in Appellants' Pre-Hearing Memorandum, averring that, *inter alia:*

(a) "Appellants filed their Pre-Hearing Memorandum on January 19, 2022, but they failed to identify any expert witnesses in their Pre-Hearing Memorandum" (internal citation omitted);

(b) "Appellants' Pre-Hearing Memorandum failed to summarize any expert testimony that Appellants intended to offer at the hearing" (internal citation omitted); and

(c) "Appellants failed to attach any expert witness reports to their Pre-Hearing Memorandum" (internal citation omitted).

Admitted.

69. On February 1, 2022, Ms. Barrette and Mr. Burns filed Intervenor Coterra Energy, Inc.'s Motion *in Limine* to Exclude Fact Witnesses Not Identified in Appellants' Pre-Hearing Memorandum, averring that, *inter alia:*

(a) "Appellants January 19, 2022 Pre-Hearing Memorandum identified certain fact witnesses that they intend to call at the hearing on the merits" (internal citation omitted); and

(b) "[i]n their Pre-Hearing Memorandum, Appellants also purported to `reserve the right to amend this Pre-Hearing Memorandum at any time[,]' in an attempt to leave open the possibility of including witnesses beyond those disclosed in their Pre- Hearing Memorandum" (alteration in original, internal citation omitted).

Admitted.

70. On February 2, 2022, Ms. Barrette and Mr. Burns filed Coterra Energy, Inc.'s Motion *in Limine* to Exclude Issues Not Raised in Appellants' Notice of Appeal or Amended Notice of Appeal, averring that, *inter alia:*

(a) "[i]n their Pre-Hearing Memorandum, Appellants identified two issues that were not raised in either their Notice of Appeal or their Amended Notice of Appeal; namely, Appellants claim that the Department has taken their property in violation of the Pennsylvania Constitution, and that Coterra's gas operations constitute a *per se* nuisance under 58 Pa. C.S. 3252" (emphasis in original, internal citations omitted);

(b) "Appellants' Notice of Appeal does not assert an unconstitutional takings claim or a *per se* nuisance claim" (emphasis in original);

(c) "Appellants *[sic]* Amended Notice of Appeal is equally devoid of any unconstitutional takings claim or a *per se* nuisance claim" (emphasis in original);

(d) "Appellants' suggestion in their Pre-Hearing Memorandum that the Department committed an unconstitutional takings *[sic]*exceeds the scope of the objections raised in their Notice of Appeal and Amended Notice of Appeal"; and

(e) "Appellants' suggestion that Coterra's operations constitute a *per se* nuisance under 58 Pa. C.S. 3252 is equally beyond the scope of the objections raised in their Notice of Appeal and Amended Notice of Appeal" (emphasis in original).

Admitted.

71. By email to representatives of the Environmental Protection Agency and the Pennsylvania Office of Attorney General dated February 2, 2022, Respondent provided copies of the Motions set forth in paragraphs 67-70 *supra.*

Admitted.

72. Respondent copied Ms. Barrette and Mr. Burns on this email.

Admitted.

73. Ms. Barrette replied all to this email on February 2, 2022, indicating that:

> There is no need to copy me or Attorney Burns on your emails to the Attorney General's Office, the EPA, or to your clients. That said, to the extent that anyone from the AG's office or the EPA would like to discuss your completely unsupported and false allegations against my client, Coterra Energy, Inc., I would be happy to discuss.

It is admitted that this email was sent by Ms. Barrette. Ms. Johnson denies that false and unsupported allegations were made.

74. On February 3, 2022, Respondent filed Appellants' Motion to Stay Proceedings representing that, *inter alia,* "[t]he conversations that Attorney Barrette will have with the AG's Office and the EPA have a direct bearing on this matter, and are grave enough, to warrant a stay of proceedings for sixty days to provide Attorney Barrette sufficient time to have such conversations with the AG's Office and the EPA."

Admitted. By way of further response, in her Motion, Ms. Johnson asserted that her clients had filed complaints with the Attorney General's Office and the EPA. At this time, Ms. Johnson anticipated that the AG and/or EPA would be reaching out to Coterra's counsel. The factual basis of both Motions were Ms. Johnson's conversations with the Attorney General and her belief that if the expected jurisdiction were assumed by the Attorney General, negotiations would occur.

75. This Motion had no basis in law that is not frivolous.

Denied, as explained above in response to No. 74. A litigant need not cite any particular legal authority to request a stay.

76. Respondent's representation that Attorney Barrette would have "conversations" with the Pennsylvania Office of Attorney General and the Environmental Protection Agency that "have a direct bearing on this matter" is false.

Denied, as explained above in response to No. 74.

77. Respondent failed to aver in this motion the position of the nonmoving party on the relief requested or otherwise state that, after a reasonable effort, she was unable to determine the position of such party, as required by 25 Pa. Code § 1021.92(c).

Admitted.

78. By email to, *inter alia,* Ms. Barrette and Mr. Burns dated February 7, 2022, Respondent said, *inter alia:*

> Tonya, Bonnie and Jeff are rightly disgusted that we have to keep dealing with you. As such, my clients will give you until Wednesday to withdraw your four motions in limine, which were filed for the sole purpose of abusing the legal process and harassing and intimidating my clients and me. You also have until Wednesday to substitute counsel; however, we would oppose until Coterra pays my legal fees and costs on or before Friday. We all know that Coterra can put a wire together that quickly. The amount that should be paid for attorneys' fees should be the amount equal to that Coterra has paid for its legal fees and costs.

Admitted.

79. On February 7, 2022, Ms. Barrette and Mr. Burns filed Intervenor Coterra Energy, Inc's Opposition to Motion to Stay Proceedings, averring that, *inter alia:*

> Since February 2, 2022, Appellants' counsel has copied Coterra's counsel on multiple emails to the AG's office and the EPA, and has copied those agencies on emails to Coterra's counsel. Appellants' counsel has demanded that Coterra's counsel withdraw its motions in limine, withdraw from the case, and further demanded that Coterra wire-transfer money to Appellants' counsel, in an amount equal to the attorney fees Coterra has incurred in this matter. Appellants' counsel's monetary demand, combined with the threat of criminal prosecution, on its face, rises to the level of extortion.
>
> Coterra respectfully requests that the Board deny Appellants' frivolous Motion and award Coterra its legal fees incurred in connection with preparing this opposition.

(internal citation omitted).

Ms. Johnson admits the above is an excerpt of Coterra's filing, although the characterization and content is denied, as there was no extortion, and Ms. Johnson's Motion was not frivolous.

80. On February 9, 2022, Ms. Barrette and Mr. Burns filed Coterra Energy, Inc.'s Motion *in Limine* to Exclude the Introduction of Exhibits and Scientific Tests Not Identified in Appellants' Pre-Hearing Memorandum, averring that, *inter alia:*

(a) "Appellants neither identified any exhibits within their Pre-Hearing Memorandum, nor attached any exhibits to their Pre-Hearing Memorandum";

(b) "Appellants indicated that they would not offer any scientific tests at the hearing"; and

(c) "With the hearing in this matter scheduled to begin on February 22, 2022—less than two weeks from the filing of this Motion—Appellants' failure to identify the exhibits and scientific tests that they intend to rely on at the hearing has significantly prejudiced Coterra's ability to adequately prepare for the hearing."

Admitted.

81. On February 9, 2022, Mr. Braymer filed the Department's Response in Opposition to Appellants' Motion to Stay Proceedings, averring that, *inter alia,* "it is specifically denied that any conversation that either the AG's Office or the EPA may or may not have with any party to this appeal will have any effect whatsoever on the present appeal."

Ms. Johnson admits to the filing, but denies the conclusions therein. To the contrary, if the Attorney General accepted jurisdiction, it would very likely impact the parties and her clients' ability to obtain relief. Ms. Johnson's pursuit for relief for her clients was multi-dimensional, not confined to the EHB proceeding.[1]

82. By Order dated February 9, 2022, the Motion to Stay Proceedings set forth in paragraphs 74-77 *supra* was denied.

Admitted.

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[1] Although slow to develop, in August 2022, the Chief Deputy Attorney General for the Environmental Crimes Section assigned a prosecutor to investigate.

83. By letter to EHB Judge Bernard A. Labuskes, Jr., dated February 11, 2022, Respondent advised that, *inter alia:*

(a) "Landowners will not be filing separate responses to [the Motions set forth in paragraphs 67-70 and 80 *supra]* but rather, objects *[sic]* to the Coterra Motions to limit evidence"; and

(b) "Landowners will be the only witnesses called at the hearing; all other witnesses in Landowners' pre-hearing memorandum will not be called by Landowners."

Admitted.

84. On February 15, 2022, Ms. Barrette and Mr. Burns filed Intervenor's Motion for Sanctions in the Form of Legal Fees, averring that, *inter alia:*

(a) "[o]n February 3, 2022, Appellants' counsel filed a meritless, frivolous motion to stay the proceedings, and made false claims that some sort of conversations were scheduled between the AG's office, the EPA, and Coterra's counsel" (internal citation omitted); and

(b) "[o]n February 7, 2022, Appellants' counsel sent Coterra's counsel an email demanding that Coterra's counsel withdraw Coterra's motions *in limine,* withdraw as counsel in this appeal, and demanded that Coterra wire-transfer money to Appellants' counsel in an amount equal to what Coterra has paid for legal fees to date in this appeal" (internal citation omitted).

Ms. Johnson admits to the filing, but denies the averments therein. Ms. Johnson recognizes that her word choices could have been more precise at times, but she did not make false claims or file a frivolous motion to stay.

85. By Opinion and Order dated February 17, 2022, the EHB, *inter alia,* granted the Motions set forth in paragraphs 68-69 and 80 *supra* and noted that:

> The appellants' pre-hearing memorandum did not identify any scientific tests, list or attach any exhibits, or name any expert witnesses. Accordingly, the appellants will be precluded from utilizing scientific tests, offering or introducing exhibits, and relying on expert testimony in their case-in-chief at the upcoming hearing on the merits.
>
> In their pre-hearing memorandum, the Appellants do not identify any scientific tests on which they intend to rely. Nor do the Appellants list or attach any exhibits that they propose to utilize at the hearing. Their memorandum also does not identify any expert witnesses that the Appellants will call to testify on their behalf and they seem to say that expert testimony is not necessary in this appeal that involves the disputed question of whether or not gas drilling operations polluted the Appellants' water supply.
>
> Appellants filed a one-page letter on February 11 stating that they would not be responding to the motions in limine... Our Rules, of course, require responses in opposition to a motion to "set forth in correspondingly-numbered paragraphs all factual disputes and the reason the opposing party objects to the motion." 25 Pa. Code § 1021.91(e). Although the Appellants have once again submitted a filing that does not comport with our Rules, we will nevertheless address Coterra's motions on the merits.
>
> Our Rules plainly detail the required contents of a party's pre-hearing memorandum. 25 Pa. Code § 1021.104. Among other things, our Rules require that a pre-hearing memorandum include "[a] list of the exhibits the party seeks to introduce into evidence and a statement indicating whether the opposing party will object to their introduction. A copy of each exhibit shall be attached." 25 Pa. Code § 1021.104(a)(7). Our Pre-Hearing Order No. 2, which schedules the hearing and sets the schedule for filing pre-hearing memoranda, essentially repeats this requirement, advising parties that their pre-hearing memoranda shall contain "[a] list of the exhibits the party seeks to introduce into evidence and a statement indicating whether the opposing party will object to their introduction. Copies of these exhibits shall be attached. All documentary evidence shall be numbered and marked in order to allow for expeditious offering into evidence." (PHO-2 at ¶ 1.H.) In addition to exhibits, a party is required to provide "[a] description of scientific tests upon which the party will rely and a statement indicating whether an opposing party will object to their use." 25 Pa. Code § 1021.104(a)(3). *(See also* PHO-2 at ¶ 1.C (same).) Our Rules include an admonition if a party disregards the requirements for a pre-hearing memorandum, authorizing the Board to impose sanctions that "may include the preclusion of testimony or documentary evidence and the cancellation of the hearing." 25 Pa. Code § 1021.104(b).
>
> Under the Scientific Tests heading of their pre-hearing memorandum, the Appellants state, "None." (PHM at 8.) Under the Exhibits heading, the Appellants do not list any exhibits, nor are

any attached to their memorandum. Among the scientific tests we think would be relevant to the resolution of this appeal are the various water test and sample results of the Appellants' water supply that the parties have discussed and litigated in filings over the course of this appeal. *See Stanley v. DEP,* 2021 EHB 176 (denying Appellants' first motion for summary judgment on the issue of whether triethylene glycol was detected in different water samples taken by the Appellants and the Department). Indeed, both the Department and Coterra have in their pre-hearing memoranda identified water sample and analytical test results of the water supply as scientific tests they are likely to rely upon at the hearing. Further, we think at least some exhibits would be relevant, beginning with the Department determination letter that is the subject of this appeal. In any event, Coterra has moved to preclude the Appellants from offering or introducing any exhibits or scientific tests to prevent unfair surprise at the upcoming hearing.

We have no hesitation granting Coterra's motion in limine on this issue. To hold otherwise would make a mockery of our Rules and would be highly prejudicial to the Department and Coterra.

In terms of expert witnesses, the Appellants do not identify any experts in their pre-hearing memorandum. In fact, the Appellants actually disavow the use of expert testimony in their pre-hearing memorandum, saying that "such testimony is not required to prove pollution from oil and gas operations, particularly in the instant matter." (PHM at 9.) They go on to assert that:

> The notion that an "expert" could make any definitive finding without having all critical information, such as each of the chemicals used by an operator or the impact that prior and current drilling has on the subterranean landscape, is not credible. Further, the use of an expert without taking effects of the subject fracking in relation to the past fracking, including from adjacent wells, particularly given the length that horizontal laterals are drilled. [sic]

(Id.)

However, because "[a]n expert in a Board appeal can dramatically alter the orientation of the case," *Clean Air Council v. DEP,* 2019 EHB 685, 697, we want to make it clear that the Appellants will not be permitted to call any expert witnesses to testify on their behalf. Our Rules require parties to specifically identify any experts in their pre-hearing memorandum. 25 Pa. Code § 1021.104(a)(4)-(5).

(footnote omitted).

It is admitted that the above is an excerpt of the Opinion and Order.

86. On February 21, 2022, Respondent filed Appellants' Response in Opposition to Intervenor's Motion for Sanctions in the Form of Legal Fees, in which she, *inter alia:*

(a) represented that, "the Department advised Appellants and Appellants' counsel on April 2, 2021 for the first time that (a) TEG was being used at the well sites operated by Cabot during the period in question and while all respective water tests were performed";

(b) represented that, "to this date, Landowners have not made any monetary demands to Coterra";

(c) represented that, "Landowners have yet to make a monetary demand to Coterra";

(d) represented that the EHB "has been nothing but a discriminatory and hostile forum for Landowners and Landowners' counsel since the date Landowners filed their appeal with the Board on February 15, 2021";

(e) represented that the EHB's issuance of the Rule set forth in paragraph 59 *supra* "is another display of the Board's biases against Landowners and Landowners counsel"; and

(f) stated that, "for Attorney Barrette to continue representation of Coterra after Landowners filed their Motion to Disqualify and ethics complaints in good faith, much less after Chief Justice Castille made it clear that Attorney Barrette was unprofessional, unreasonable and took inappropriate actions in furtherance of Coterra's illegal attacks on poor people, people living with disabilities and the elderly *[sic]*."

Admitted.

87. The representation set forth in paragraph 86(a) *supra* is false. As set forth in paragraph 23 *supra,* Mr. Braymer advised Respondent on April 2, 2021, that the DEP "has not been able to detect any TEG in the groundwater. Thus, use of TEG at the well site was assumed, but the issue remaining at hand is that TEG is not appearing in any of the samples taken by the Department."

Denied as stated, as explained above in response to No. 26.

88. The representations set forth in paragraphs 86(d) and 86(e) *supra* are false. The EHB was not "discriminatory," "hostile" or "biased" against Respondent, Ms. Stanley or the Dibbles.

Denied as stated. The accusation was based on objective facts that gave rise to a reasonable perception of differing treatment during the case. As explained above, at the time of the appeal, Ms. Johnson already felt it improper that the DEP failed in its statutory duty to issue a timely Determination Letter, followed by the EHB shifting the burden of proof to her clients. Another concern of Ms. Johnson was that two Buchanan Ingersoll lawyers served on the Rules Committee for the EHB, including one lawyer serving as its Chairman. She was concerned that Coterra had found a friendly forum. She was concerned that the industry and those responsible for enforcing the laws that would protect her clients were too close. Her concerns were the same concerns expressed in the Grand Jury Report. Ms. Johnson's viewpoint was further informed by an opinion letter dated December 16, 2021 by Justice Castille in another case, the 2017 SLAPP lawsuit, in which Justice Castille analyzed a judicial officer's bias and the duty to avoid impropriety and even the *appearance* of impropriety. Although the Castille letter was filed in a differing matter pertaining to a different judicial officer, the content resonated with her and concerned her.

89. On February 21, 2022, Respondent filed Landowners' Memorandum of Law in Opposition to Intervenor's Motion for Sanctions in the Form of Legal Fees, in which she, *inter alia:*

(a) stated that, "Coterra and Attorney Barrette remain aware of the pending criminal charges against Coterra and the pending ethical complaints"; and

(b)represented that, "to this date, Landowners have not made any monetary demands to Coterra."

Admitted.

90. Respondent's representation that there were "pending ethical complaints" against Ms. Barrette is false. As set forth in paragraph 46 *supra*, the Office of Disciplinary Counsel dismissed Ms. Stanley's disciplinary complaint against Ms. Barrette in September of 2021.

Admitted. However, Ms. Johnson believed, based on conversations with her clients, that there was an outstanding complaint at the time.

91. On February 22, 2022, an evidentiary hearing was convened at which time, *inter alia:*

(a) Respondent presented no documentary or testimonial evidence;

(b) Respondent represented that, "[m]y clients never even made a monetary demand upon Coterra";

(c) Ms. Barrette moved for a compulsory nonsuit; and

(d) the DEP joined in Coterra's motion for a compulsory nonsuit.

Admitted.

92. The representations set forth in paragraphs 86(b)(c), 89(b) and 91(b) *supra* are false. By email to Ms. Barrette and Mr. Burns dated February 7, 2022, set forth in paragraph 78 *supra,* Respondent demanded that Coterra "pay[] [Respondent's] legal fees and costs on or before Friday."

Denied, as stated. Ms. Johnson's statement has been misinterpreted. What Ms. Johnson was conveying, which she believed was understood at the time, was that her clients had not demanded compensatory damages. In other words, her message was that the clients were not demanding a specific sum to compensate them for their inconvenience of not being able to utilize the water at their house, or their health issues, or any property damage. Ms. Johnson's legal fees and expenses were in a separate category in her mind and would not

be paid to the Dibbles. She regrets if this was unclear, but the sentiment was to convey her clients' goal was to get help, not money for themselves.

93. On May 9, 2022, Respondent filed Landowners' Reply Brief in Opposition to the Joint Motion of the Department of Environmental Protection and Coterra Energy Corporation for Nonsuit, in which she stated that, *inter alia:*

> The history of ongoing constitutional violations against Landowners by the DEP and the Board in this matter for having the audacity to ask for clean drinking water and medical care includes this Board's punishment of Landowners' free speech against the government by deleting Landowners' filings, claims, and evidence from the docket without notice or an opportunity to be heard on top of not providing Landowners with a fair hearing.
>
> Judge Labuskes violated Landowners' First Amendment rights by both removing and refusing to file Landowners' evidence of the Board's misconduct and the Department's patterns and practices in concert with the oil and gas industry relevant to this matter from the docket without notice or an opportunity to be heard. The Department and the Board's repeated and ongoing violations of Landowners' due process rights have not been sufficient to silence Landowners, and Landowners will especially not sit silently while their evidence is deleted from the docket by a biased judge in retaliation for speaking out against such actions.
>
> Landowners have yet to make a monetary demand to Coterra and the Board has yet to protect Landowners from these SLAPP tactics.
>
> The Board's issuance of its Rule to Show Cause on January 23, 2022 *[sic] sua sponte* was, among other things, an improper use of the Board's authority and discretion and now, looking back, indicative of Judge Labuskes' biases against either Landowners, Landowners' counsel or both.
>
> Judge Labuskes made his bias clear during the hearing when he stated that Landowners had presented "no case at all," notwithstanding the reality of the evidence before him, necessitating his immediate recusal from this matter under the Rules of Judicial Misconduct *[sic],* specifically including Preamble (3), Rules 1.2, 2.2, 2.6, 2.8, and 2.11.
>
> Landowners have not made one monetary demand to Coterra to date and any claims of attempted extortion on the part of Landowners and Landowners' counsel are documented examples of SLAPP tactics used against Landowners and Landowners' counsel.
>
> 81. Landowners are the sole party to produce evidence relevant to this matter, from water testing, well information, copies of violations, credible victims/witnesses, and other supporting evidence to the Board, the sum of which is clearly sufficient to surpass the preponderance of the evidence standard proving that the Department's actions were

unlawful, unreasonable, and arbitrary and that the Department committed a taking of Landowners real property and personal interests.

(internal citation omitted).

Admitted.

94. Respondent's representation that the EHB "punish[ed]" Ms. Stanley and the Dibbles "by deleting Landowners' filings, claims and evidence from the docket without notice or an opportunity to be heard" is false.

Denied. Within a period of 2 days in March 2022, Judge Labuskes *sua sponte* struck a total of four of Ms. Johnson's filings (4 items were struck in total as between the two cases, *Dibble* and *Glahn*) without any advance warning or opportunity to be heard, either before or after. To Ms. Johnson, it appeared that Judge Labuskes singled her out, struck four filings in short order for a reason that did not make sense. She viewed the disparity in treatment as suggesting some level of improper punishment and bias against either her and/or her clients.

95. Respondent's assertion that the EHB "punish[ed]" Ms. Stanley and the Dibbles "by deleting Landowners' filings, claims and evidence from the docket without notice or an opportunity to be heard" has no basis in fact that is not frivolous.

Denied, as explained above in response to No. 94.

96. Respondent's assertion that the EHB "punish[ed]" Ms. Stanley and the Dibbles "by deleting Landowners' filings, claims and evidence from the docket without notice or an opportunity to be heard" has no basis in law that is not frivolous.

Denied, as explained above in response to No. 94.

97. Respondent's representation that the EHB did not provide Ms. Stanley and the Dibbles with "a fair hearing" is false.

Denied. This related to the entirety of the experience before the EHB, as the hearing itself is a cumulation of everything that occurs to that point in time. Keeping in mind that it was Ms. Johnson's argument all along that the DEP did not comply with its statutory mandate to issue a determination letter in 45 days, she began the appellate proceeding with a sense that the process had already been unfair to her clients. This, coupled with information she reviewed, such as the Grand Jury Report and other items, the makeup of the Rules Committee, Justice Castille's letter and Coterra's SLAPP lawsuit against another property owner, reinforced her view of industry advantage and thus, unfairness to her clients. The Judge striking items *sua sponte* from the dockets in March 2022 heightened her concern. At the hearing itself, the Judge's decision not to rule upon the pending Motion for Sanctions at the outset as she requested caused great concern, so much so that her clients chose not to testify. Ultimately, it was Ms. Johnson's opinion that the EHB did not provide a fair hearing as required by administrative agency law, 2 Pa.C.S. §504. The EHB even sanctioned the Dibbles despite no one requesting such relief against her clients. Only a sanction against Ms. Johnson for actions taken by Ms. Johnson was requested.

98. Respondent's assertion that the EHB did not provide Ms. Stanley and the Dibbles with "a fair hearing" has no basis in fact that is not frivolous.

Denied, as explained above in response to No. 97.

99. Respondent's assertion that the EHB did not provide Ms. Stanley and the Dibbles with "a fair hearing" has no basis in law that is not frivolous.

Denied, as explained above in response to No. 97.

100. Respondent's representation that Judge Labuskes is "biased" is false.

Denied, as explained above in response to No. 94.

101. Respondent's assertion that Judge Labuskes is "biased" has no basis in fact that is not frivolous.

Denied, as explained above in response to No. 94.

102. Respondent's assertion that Judge Labuskes is "biased" has no basis in law that is not frivolous.

Denied, as explained above in response to No. 94.

103. Respondent's representations that "Landowners have yet to make a monetary demand to Coterra" and "Landowners have not made one monetary demand to Coterra" are false. By email to Ms. Barrette and Mr. Burns dated February 7, 2022, set forth in paragraph 78 *supra,* Respondent demanded that Coterra "pay[] [Respondent's] legal fees and costs on or before Friday."

Denied, as explained above in response to No. 92.

104. Respondent's representation that the Rule set forth in paragraph 59 *supra* is "indicative of Judge Labuskes' biases against either Landowners, Landowners' counsel or both" is false.

Denied. At the time, Ms. Johnson read the Order, which indicated that sanctions might be imposed, as potential bias.

105. Respondent's representation that "Landowners are the sole party to produce evidence relevant to this matter" is false. As set forth in paragraph 91(a) *supra,* Respondent failed to present any documentary or testimonial evidence during the February 22, 2022 evidentiary hearing.

Ms. Johnson admits that she did not present evidence at the hearing, after conferring with her clients. However, in this passage, she was referring more generally to her previous filings in the matter which she acknowledges were not placed into evidence at the time of the hearing.

106. By email dated May 9, 2022, the EHB said "Judge Labuskes would like to hold oral argument via telephone on Coterra's pending motion for sanctions. Please reply all and provide your availability for the afternoon of May 25, 2022."

Admitted.

107. On May 10, 2022, Respondent filed Landowners' Demand for the Board's Removal of Judge Labuskes, in which she stated that, *inter alia:*

> Judge Labuskes' documented history and violations of Landowners' free speech and due process rights are the most serious violations of constitutional rights in this country and have no room in an American tribunal. Judge Labuskes' ongoing retaliatory misconduct reveals, among other things, that Judge Labuskes is punishing Landowners for exercising their First Amendment rights of free speech against the Department of Environmental Protection and the Environmental Hearing Board.
>
> Judge Labuskes' sudden and urgent desire to hold oral arguments over a phone call regarding Coterra's SLAPP Motion that was filed three months ago within hours of Landowners' filing of the Brief is clearly meant to punish Landowners' *[sic]* and Landowners' counsel for exercising their free speech rights against the DEP and for continuing to seek Judge Labuskes' recusal. Landowners and I will not tolerate it. Oral arguments are not necessary for an impartial fact finder to determine that Coterra's SLAPP Motion was an improper use of these proceedings in an attempt to intimidate and deter Landowners and Landowners' counsel from pursuing this matter in accordance with the patterns and practices of the oil and gas industry to silence victims. In this matter, the government has joined those efforts to silence Landowners.
>
> Landowners repeat their demand that Judge Labuskes file on this docket a copy of his statement of financial interests, together with any interests that Judge Labuskes holds in oil and gas investments, shared positions on charitable boards, or any other interest that could impair Judge Labuskes' obligations to be fair and impartial. This demand is appropriate under the Ethics Act, the Rules of Professional Conduct, the Rules of Judicial Conduct and in equity. Any further communications from Judge Labuskes to Landowners' counsel shall be made publicly through the Board's electronic filing system.
>
> This latest attack on Landowners' free speech rights by Judge Labuskes does not just endanger Landowners' rights and, in fact their lives, it sets an extremely dangerous precedent going forward that Judge Labuskes can call for improper proceedings or remove any pleading or evidence from the docket on a whim. Judge Labuskes does not have the temperament to hold such a sacred position in an American justice system and, as he has not properly recused himself, Judge Labuskes should be removed from this matter. The Board belongs to the people where they can be safe to exercise their First Amendment rights to free speech against the government.

Admitted.

108. Respondent's representation that "Judge Labuskes is punishing Landowners for exercising their First Amendment rights" is false.

Denied, as explained above in response to No. 94 and otherwise. Ms. Johnson, in hindsight, regrets the aggressive tone and language utilized, but her representation was not knowingly false in light of her collective experience in litigating the matter.

109. Respondent's assertion that "Judge Labuskes is punishing Landowners for exercising their First Amendment rights" has no basis in fact that is not frivolous.

Denied, as explained above in response to No. 94 and otherwise. Ms. Johnson, in hindsight, regrets the aggressive tone and language utilized, but her representation was not knowingly false in light of her collective experience in litigating the matter.

110. Respondent's assertion that "Judge Labuskes is punishing Landowners for exercising their First Amendment rights" has no basis in law that is not frivolous.

Denied, as explained above in response to No. 94 and otherwise. Ms. Johnson, in hindsight, regrets the aggressive tone and language utilized, but her representation was not knowingly false in light of her collective experience in litigating the matter.

111. By Opinion and Order dated June 7, 2022, the EHB granted the Motion for Sanctions set forth in paragraph 84 *supra* and noted that, *inter alia:*

> counsel for the Appellants, Lisa Johnson's, egregious behavior unmistakably evincing bad faith, harassment, unwarranted delaying tactics, and outright lying to the Board and opposing counsel, not to mention highly disrespectful, unprofessional conduct in general, compels us to impose a sanction in this case.
>
> ***(As the excerpt of the Opinion cited in the DB-7 is lengthy, it has not been replicated in full herein.)***

Admitted, as to the contents of the Sanctions Opinion, but not as to the conclusions. Ms. Johnson denies that the Sanctions Opinion may be used to prove misconduct.

112. By Opinion and Order dated June 15, 2022, the EHB granted the motion for compulsory nonsuit set forth in paragraphs 91(c)(d) *supra* and noted that, *inter alia:*

The Appellants bear the burden of proof in this appeal. In order to prevail they needed to prove by a preponderance of the evidence that the Department erred when it determined that Coterra's operations did not contaminate their water supply. In order to do that, they needed to show that contaminants entered their water supply as a result of Coterra's operations by way of, for example, a hydrogeologic connection between the gas wells and their water supply. Essentially, the Appellants needed to provide evidence of causation in order to prevail.

(As the excerpt of the Opinion cited in the DB-7 is lengthy, it has not been replicated in full herein.)

Admitted, as to the contents of the Opinion, but not as to the conclusions. Ms. Johnson denies that the Opinion may be used to prove misconduct.

113. On June 17, 2022, Respondent filed Appellants' Petition to Amend the Board's Interlocutory Order Granting Intervenor's Motion for Sanctions in the Form of Legal Fees, in which she stated that, *inter alia:*

1. The Order is Illegitimate, Unenforceable and Violates Landowners' Constitutional Rights. The legitimacy of any Order being premised on a full and fair docket by an impartial forum fails on its face. Landowners continue to document and object to Judge Labuskes' unlawful removal, rejection, or denial of Landowners' proper filings made with the Board. These improper actions violate Landowners and Landowners' counsel's constitutional rights, including 1st Amendment free speech against the government and gross due process violations. Judge Labuskes' actions have rendered the docket illegitimate and the Order therefore unenforceable, as it cannot be supported by an unlawful docket.

2. Punishment of First Amendment Speech Against the Government. The Order is punishment of Landowners and Landowners counsel's right to free speech against the government, including for the following reasons:

    a. The Order identifies the likely beginning of Judge Labuskes' bias towards Landowners and Landowners' counsel when Landowners sought to depose officials in this administration. The subsequent actions taken by Judge Labuskes to deter Landowners from a full and fair process are evident by the filings on the docket, including the deletion, rejection, or improper denial of Landowners' proper filings.

3. Retaliation. Judge Labuskes, in addition to the bias against Landowners (made clear by the extra effort that was made to sanction them and punitively and improperly impugn their and their counsel's characters) and Landowners' counsel, Judge Labuskes has retaliated against Landowners for rightfully questioning his actions in this matter and Landowners' counsel's other matter, *Glahn* as described above. In addition, Landowners' counsel represents the appellants in *Glahn, et. al v. DEP,* 2021 EHB 126. Judge Labuskes similarly

> acted improperly by deleting, rejecting, or improperly denying appellants' filings on this docket as well.
>
> > a. Disciplinary Complaints. Judge Labuskes' retaliation includes the fact that Landowners and Landowners' counsel filed disciplinary complaints with the Pennsylvania Supreme Court Disciplinary Committee against Judge Labuskes on March 14, 2022 (after deleting, rejection *[sic]*, or improperly denying Landowners' filings). Landowner and Landowners' counsel have filed an additional disciplinary complaint against Judge Labuskes related to the Order.

(emphasis in original, footnote and internal citation omitted).

Admitted.

114. Respondent's representation that Judge Labuskes unlawfully removed, rejected or denied Ms. Stanley's and the Dibbles' filings is false.

Denied, as explained above in response to No. 94.

115. Respondent's assertion that Judge Labuskes unlawfully removed, rejected or denied Ms. Stanley's and the Dibbles' filings has no basis in fact that is not frivolous.

Denied, as explained above in response to No. 94.

116. Respondent's assertion that Judge Labuskes unlawfully removed, rejected or denied Ms. Stanley's and the Dibbles' filings has no basis in law that is not frivolous.

Denied. The Authority of the hearing examiners is set forth in 25 Pa.Code §1021.107. There is no express authority to remove a filing from the docket.

117. Respondent's representation that the Order set forth in paragraph 111 *supra* "is punishment of Landowners and Landowners counsel's right to free speech against the government" is false.

Denied. To the contrary, the Sanctions Opinion and Order imposed a sanction upon Ms. Johnson's clients, despite that the Motion for Sanctions requested relief only as to her, as counsel. No action or inaction of the landowners was cited in the Motion for Sanctions. However, the EHB's decision to impose a sanction upon the landowners, based on the actions of counsel, infers that the landowners were punished for nothing other than proceeding with

their appeal and/or following the advice of counsel. As to Ms. Johnson, notwithstanding that Ms. Johnson had only interacted with one of the administrative judges in the course of the proceedings, four judges of the EHB concluded (without evidentiary hearing) that she engaged in dishonesty and bad faith so as to delay the proceedings. This subjective finding was so contrary to Ms. Johnson's actual goal on behalf of her clients, that she concluded the Order was punishment for her aggressive strategy and tone. Ms. Johnson, in hindsight, regrets the aggressive tone and language she utilized at times, but her representation was not knowingly false in light of her collective experience in litigating the matter.

118. Respondent's assertion that the Order set forth in paragraph 111 *supra* "is punishment of Landowners and Landowners counsel's right to free speech against the government" has no basis in fact that is not frivolous.

Denied, as explained above in response to No. 117.

119. Respondent's assertion that the Order set forth in paragraph 111 *supra* "is punishment of Landowners and Landowners counsel's right to free speech against the government" has no basis in law that is not frivolous.

Denied, as explained above in response to No. 117.

120. Respondent's representation that Judge Labuskes is "bias[ed] towards Landowners and Landowners' counsel" is false.

Denied, as explained generally above. By way of further response, Ms. Johnson acknowledges that her aggressive strategy and tone, her occasional failure to comply with the rules (for which she takes responsibility), as well as her demand for recusal, likely did not endear her to the Judge. Accordingly, Ms. Johnson does believe that the Judge became biased against her and her clients.

121. Respondent's assertion that Judge Labuskes is "bias[ed] towards Landowners and Landowners' counsel" has no basis in fact that is not frivolous.

Denied, as explained generally above and in response to No. 120.

122. Respondent's assertion that Judge Labuskes is "bias[ed] towards Landowners and Landowners' counsel" has no basis in law that is not frivolous.

Denied, as explained generally above and in response to No. 120.

In the matter of Glahn and Gorencel v. DEP
EHB Docket No. 2021-049-L

123. In July of 2020, Roger Glahn filed a complaint with the DEP regarding the water supply at a property located in Mehoopany, Pennsylvania.

Admitted.

124. On May 10, 2021, Respondent filed a Notice of Appeal in the EHB against the DEP on behalf of Mr. Glahn and Donna Gorecel, asserting that, *inter alia,* "it has been 238 days since the request for an investigation, the Department has not issued a determination letter."

Admitted.

125. On August 27, 2021, the DEP, through counsel, filed a Commonwealth of Pennsylvania, Department of Environmental Protection's Motion to Dismiss, averring that, *inter alia,* "Appellants have not identified any Department action in their Notice of Appeal to which the Board's jurisdiction may attach."

Admitted.

126. On September 24, 2021, Respondent filed a Response in Opposition to the Pennsylvania Department of Environmental Protection's Motion to Dismiss Appeal, averring that, *inter alia,* "the Commonwealth committed an unconstitutional taking because, among other things, the Department failed

in its obligations as trustee under PEDF III, the effects of which have placed all Pennsylvanians in harm's way from drinking polluted water to being killed by facilities used in oil and gas operations."

Admitted.

127. On November 12, 2021, the EHB issued an Opinion and Order on Motion to Dismiss, which, granted the Motion set forth in paragraph 125 *supra* and noted that, *inter alia:*

> we can evaluate a takings *[sic]* in the context of a Department action, but here all we have is inaction from the Department.
>
> The Department's inaction on the Appellants' water supply complaint undoubtedly does real harm to the Appellants. Should the Department need a reminder, its inaction here is not merely taking its time to review a permit application and possibly delaying a project, but it is a daily deprivation of usable water to ordinary citizens of the Commonwealth. However, even though the Department's inaction has not triggered this Board's jurisdiction, this does not mean the Appellants are without legal recourse. First, there is no doubt that a complainant may appeal *the conclusion* of the Department's investigation of a water supply contamination claim under the Oil and Gas Act. The Department's investigation appears to still be ongoing. The Department tells us in its reply brief that SWN Production has submitted a report to rebut the Department's presumption. The Department says that it will at some point make an "ultimate determination" on SWN's rebuttal report and the Appellants "will be free to appeal from that decision," whenever that may be.
>
> More immediately, nothing precludes the Appellants from pursuing a private cause of action against the Department or SWN. Indeed, Subsection (f) of the water supply provision of the Oil and Gas Act states, "Nothing in this section shall prevent a landowner or water purveyor claiming pollution or diminution of a water supply from seeking any other remedy at law or in equity." In its papers, the Department repeatedly makes the point that the Board does not have jurisdiction over a mandamus action. We are not sure if this is an invitation to the Appellants to file a mandamus action against the Department in an appropriate forum, but the avenue appears open.

(emphasis in original, footnote and internal citations omitted).

Admitted. By way of further response, one Judge dissented. The Commonwealth Court affirmed, but shared the EHB's disapproval of the prolonged inaction. Glahn v. Dep't of Env't Prot. (Env't Hearing Bd.), 2023 Pa. Commw. LEXIS 98, *12 (2023).

128. On November 22, 2021, Respondent filed an Appellants' Petition for Reconsideration of the Board's Order on the Department's Motion to Dismiss, in which she asserted that, *inter alia,* "[t]he

Board stalled the matter for six months on its docket and the Board's own inaction constitutes additional takings claim *[sic]"* (emphasis removed).

Admitted.

129. This Petition for Reconsideration failed to address any of the criteria for reconsideration of EHB decisions set forth in 25 Pa. Code § 1021.152.

Admitted.

130. Respondent's assertion that "the Board's own inaction constitutes additional takings claim *[sic]"* has no basis in fact that is not frivolous.

Denied. The factual basis for this assertion was the DEP's failure to comply with its 45 day statutory mandate to issue a Determination Letter in combination with the EHB's failure to enforce the statute against the DEP.

131. Respondent's assertion that "the Board's own inaction constitutes additional takings claim *[sic]"* has no basis in law that is not frivolous.

Denied. Ms. Johnson's "takings" argument was novel, but not factually or legally frivolous. Ms. Johnson argued that the DEP's failure to uphold its duties and obligations pursuant to the Act diminished the landowner's property and personal interests, constituting an unconstitutional "taking" under the Environmental Rights Amendment. A "taking" theory was recognized in Litz v. Md. Dep't of the Env't, 131 A.3d 923 (Md. 2016). In *Litz*, the Maryland Court specifically observed: "it is not frivolous to hypothesize that state, county, and municipal agencies may have duties to step in to protect the public health." *Id.* at 934 (emphasis supplied). In Litz, the Maryland Court of Appeals held that government inaction in the face of an affirmative duty to act can give rise to a taking in the form of inverse condemnation. The Litz case was footnoted in the *Glahn* Opinion (Glahn Op. nt. 4, Exh. II). See also, Joseph Belza, *Inverse Condemnation and Fracking Disasters: Government Liability for the Environmental Consequences of Hydraulic Fracturing Under a Constitutional Takings Theory, 44 B.C. Envtl. Aff.* L. Rev. 55 (2017). See the Board's rule on takings from its practice procedure manual: "The Board has the authority to rule on the constitutionality of actions. Marshall v. DEP, 2019 EHB 352, 354 ("It is this Board's responsibility to determine in the first instance whether a Departmental action has resulted in an unconstitutional taking.")

132. On December 9, 2021, the EHB issued an Opinion and Order on Petition for Reconsideration, which denied the Petition set forth in paragraph 128 *supra* and noted that, *inter alia:*

(a) "[n]one of the Appellants' arguments in their petition address the criteria for granting reconsideration laid out in our rules"; and

(b) "despite the fact that our ruling hinged on jurisdiction or the lack thereof, the Appellants do not cite any law or otherwise even argue that this Board should have jurisdiction over Departmental inaction or that we missed some body of law that would support our jurisdiction over this appeal."

Admitted.

133. Respondent did not seek the EHB's recusal at any time while this matter was pending.

Admitted.

134. On December 21, 2021, Respondent sent a Notice of Intent to Sue to then Governor Thomas Wolf in which she referenced the matters set forth in paragraphs 4-133 *supra* and stated that, *inter alia:*

> This Notice of Intent to Sue the Pennsylvania Environmental Hearing Board is being sent to you pursuant to applicable laws, rules and regulations, including 42 Pa.C.S.A. § 5522, 42 Pa.C.S.A. § 8522(b)(10) (relating to exceptions to sovereign immunity) and 42 Pa.C.S.A. § 8542(b)(9) (relating to exceptions to governmental immunity).

Admitted.

135. 42 Pa.C.S. § 8522(b)(10) and 42 Pa.C.S. § 8542(b)(9) allow for the imposition of liability upon Commonwealth parties for negligence resulting in sexual abuse and, accordingly, are inapplicable to Respondent's dispute with the EHB.

Admitted. The referenced citations were an inadvertent error. No one in response to the notice expressed any confusion about the intent, as the significance was that notice be given, as a prerequisite to the mandamus and declaratory judgment action that was subsequently filed.

In the matter of Glahn and Gorencel v. DEP

EHB Docket No. 2021-126-L

136. By letter dated December 27, 2021, Respondent filed another Notice of Appeal in the EHB against the DEP on behalf of Mr. Glahn and Ms. Gorencel, in which she asserted that, *inter alia:*

> Mr. Glahn and Ms. Gorencel rightly believe that the Board, among other things, harbors biases against them due to their age, sophistication and socioeconomic status throughout the pendency of their initial appeal at 2021 EHB 049.
>
> In candor to the tribunal, Mr. Glahn and Ms. Gorencel have sent a notice of intent to sue the EHB to the administration as the unconstitutional and improper precedents set by the Board cannot stand. Mr. Glahn and Ms. Gorencel request that the Board voluntarily recuse itself and immediately request that the Commonwealth Court take jurisdiction. If the Board does not voluntarily recuse itself, Mr. Glahn and Ms. Gorencel will take the steps necessary to seek such recusal as is mandatory under, and without limitation, Applicable Laws. It is difficult to imagine a less appropriate forum to hear this appeal.

Admitted. To clarify, the letter enclosed the Notice of Appeal.

137. Respondent's representation that the EHB "harbors biases against [Mr. Glahn and Ms. Gorencel] due to their age, sophistication and socioeconomic status" is false.

Denied.

138. Respondent's assertion that the EHB "harbors biases against [Mr. Glahn and Ms. Gorencel] due to their age, sophistication and socioeconomic status" has no basis in fact that is not frivolous.

Denied. Mr. Glahn and Ms. Gorencel were 68 years old and living with disabilities and limited financial means, particularly when compared to those of the oil and gas industry. In the *Glahn* Opinion (EHB Dkt. 2021-049), the EHB's solution to a recognized pollution problem created by the oil and gas company was for the property owners to pursue a private action or mandamus action, which was not within her clients' means.

139. Respondent averred in the Notice of Appeal set forth in paragraph 136 *supra* that, *inter alia:*

(a) "[a]ppealing to the Board is a specific remedy for Appellants and those similarly situated. The Board knows that Mr. Glahn, Ms. Gorencel, and other landowners do not have the funds, contacts or time to have a firm on retainer and ask them to spend hours drafting a mandamus action or other pleadings in other forums, *all so the Board does not have to participate in such matters"* (emphasis in original, footnote omitted); and

(b)"[n]either the Board or the Department has any sense of urgency to protect people or the environment. The denials, delays and obstruction of the Board and the Department alone constitute takings and dangers to the Commonwealth."

Admitted.

140. Respondent's assertion that "the denials, delays and obstruction of the Board and the Department alone constitute takings" has no basis in fact that is not frivolous.

Denied, as explained above in response to No. 130 and 131.

141. Respondent's assertion that "the denials, delays and obstruction of the Board and the Department alone constitute takings" has no basis in law that is not frivolous.

Denied, as explained above in response to No. 130 and 131.

142. On March 14, 2022, Respondent filed a Motion for a Rule to Show Cause in which she stated that, *inter alia:*

> The Department, through its legal counsel and the abuse of these proceedings, continues to intimidate, harass, and retaliate against Landowners for pursuing their claims against the Department. Most recently, the Department, in violation of its statutory and mandatory obligations, terminated Landowners' sole source of fresh drinking water, incredulously claiming that the Department is legally entitled to deprive residents of the Commonwealth fresh drinking water in Landowners' situation.
>
> Landowners are keenly aware of the Department's malice towards them, which malice started in July 2020 when the Department initially concealed the water pollution from Landowners, and knowingly allowed Landowners to unwittingly drink such contaminated water. The Department intentionally concealed the fact that Landowners were entitled to clean water deliveries from July 2020 and that, pursuant to Applicable Laws, Landowners remain entitled to such deliveries to-date *[sic]*. The Department continues to conceal the severity of the danger Landowners are in by attacking Landowners and Landowners' counsel to deter them from pursuing their claims, all as in congruence with the patterns and practices of the Department and the industry and their lawyers.
>
> Landowners move the Board to issue a Rule to Show Cause to the Department for responses as to the Board granting Landowners judgment by default and whether Attorneys Braymer and Despenes should be disqualified from this matter and reported to the Disciplinary Board of the Supreme Court of Pennsylvania.

Admitted.

143. Respondent's assertion that the Department of Environmental Protection "continues to intimidate, harass, and retaliate against" Mr. Glahn and Ms. Gorencel has no basis in fact that is not frivolous.

Denied. The DEP's lengthy inaction well beyond the statutory timeframe for a determination, particularly in the face of known pollution in this case, constituted the basis for these assertions. Ms. Johnson regrets certain word choices, as pushing, but not exceeding the boundary of zealous advocacy.

144. By Order dated March 14, 2022, the EHB struck this Motion from the docket.

Admitted.

145. By letter to Judge Labuskes dated March 14, 2022, Respondent said:

> The purpose of this letter is to request that the Board provide an opinion as to its removal of Landowners' Motion for a Rule to Show Cause pursuant to the Board's Order at Dkt. 7. The Board provided no rationale for taking such an extreme action to remove Landowners' pleading, in which Landowners pursue their lawful rights.

Admitted.

146. By letter to the EHB dated March 15, 2022, Respondent said:

> The purpose of this letter is to inform the Board that Landowners' *[sic]* will be filing a motion demanding the recusal of Judge Labuskes from this matter and their matter pending before the Board at 2022013. The Board, through Judge Labuskes' improper and unlawful orders, has repeatedly violated Landowners' constitutional rights, and specifically their rights to be heard.
>
> Landowners have been subject to the improper orders of the Board since May 2021. In fact, upon filing this appeal, Landowners included a request for the Board to recuse itself due to the misconduct Landowners' *[sic]* have experienced throughout this process. *See attached.* The Board's actions towards Landowners culminated in Judge Labuskes *unilaterally and with no discussion* removing the attached Landowners' Motion for a Rule to Show Cause on March 14, 2022. *See attached.*
>
> Landowners demand that Judge Labuskes file on this docket a copy of his statement of financial interests, together with any interests that Judge Labuskes holds in oil and gas investments, shared positions on charitable boards, or any other interest that

could impair Judge Labuskes' obligations to be fair and impartial. This demand is appropriate under the Ethics Act, the Rules of Professional Conduct, and in equity.

This latest attack on Landowners' due process rights by Judge Labuskes does not just endanger Landowners' rights and, in fact their lives, it sets an extremely dangerous precedent going forward that Judge Labuskes can remove any pleading from the docket on a whim. Landowners will fully avail themselves to their rights at law and in equity to seek Judge Labuskes' recusal and all other remedies at law or in equity. The Board belongs to the people.

(emphasis in original).

Admitted.

147. By Order dated March 16, 2022, the EHB struck the letters set forth in paragraphs 145-146 *supra* from the docket.

Admitted.

148. On June 26, 2022, Respondent filed a Notice of Withdrawal of Appeal.

Admitted.

149. By her conduct as alleged in Paragraphs 4 through 148 above, Respondent violated the following Rules of Professional Conduct and Rule of Disciplinary Enforcement:

(a) RPC 1.1, which provides that, "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation";

(b) RPC 1.3, which provides that, "[a] lawyer shall act with reasonable diligence and promptness in representing a client";

(c) RPC 3.1, which provides, in pertinent part, that, "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous";

(d) RPC 3.2, which provides that, "[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client";

(e) RPC 3.3(a)(1), which provides that, "[a] lawyer shall not knowingly make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer";

(f) RPC 3.5(d), which provides that, "[a] lawyer shall not engage in conduct intended to disrupt a tribunal";

(g) RPC 4.1(a), which provides that, "[i]n the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person";

(h) RPC 4.4(a), which provides, in pertinent part, that, "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person";

(i) RPC 8.2(a), which provides, in pertinent part, that, "[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the... integrity of a judge, adjudicatory officer or public legal officer";

(j) RPC 8.4(c), which provides that, "[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation";

(k) RPC 8.4(d), which provides that, "[i]t is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice"; and

(l) Pa.R.D.E. 402(c), which provides, in pertinent part, that, "all proceedings involving allegations of misconduct by or disability of an attorney shall be kept confidential."

The alleged violations constitute conclusions of law to which no response is necessary.

REQUEST TO BE HEARD IN MITIGATION

In accordance with Rule 208(b)(4), Pa.R.D.E. and §89.54(c), D.Bd. Rules, Ms. Johnson requests to be heard in mitigation and, in support thereof, respectfully represents:

A. Background

1. The instant Petition is limited to Ms. Johnsons' representation in two matters before the Environmental Hearing Board (EHB).

2. At the time of Ms. Johnson's representation, she was not experienced in civil or administrative litigation of the nature presented in the cases at issue.

3. Ms. Johnson had no prior experience practicing before the Environmental Hearing Board.

4. Ms. Johnson's past relevant experience was that of a transactional lawyer for the oil and gas industry, which gave her some practical advantage in respect to the subject matter.

5. From that experience, she became aware that the oil and gas companies had been extremely aggressive in litigation against landowners and their lawyers.

6. Ms. Johnson also perceived attempts by the industry to intimidate landowners and their counsel and suppress governmental involvement in any landowner complaints.

7. As illustration, in 2017, just days after the U.S. Agency for Toxic Substances and Disease Registry ("ATSDR") visited Dimock, Pennsylvania to examine the groundwater, Cabot (now, Coterra), sued a landowner in Dimock whose water had been contaminated, seeking not only

compensatory damages, plus $5 million in punitive damages. (Susquehanna Co. Dkt. 2017-936). Ms. Johnson viewed that action as a SLAPP lawsuit.

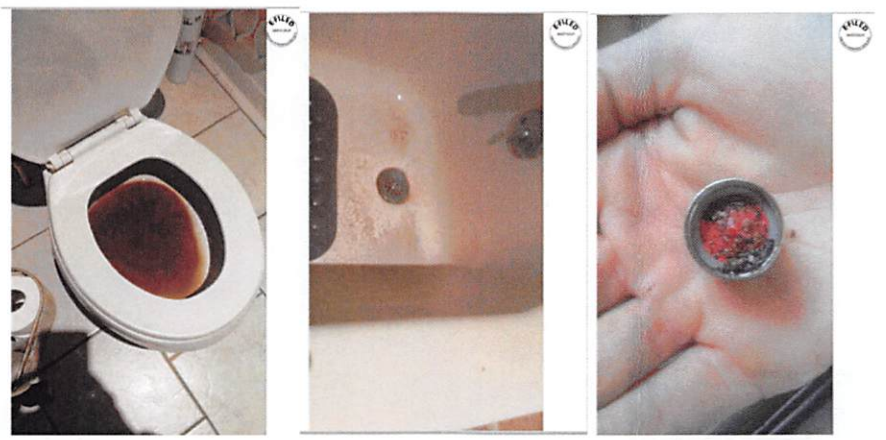
8. Ms. Johnson found herself litigating against the same firm, and in fact, the same lawyer, who filed the SLAPP lawsuit. It weighed on her in respect to her approach to the litigation.

9. Ms. Johnson felt a need to approach the litigation aggressively and at times pushed, but did not exceed, the bounds of zealous advocacy.

10. Because Ms. Johnson practiced as a solo practitioner at the time of the representation at issue, she did not have the benefit of extra help, a break in the intensity or a sounding board.

11. During the litigation, she experienced stress and anxiety.

12. However, Ms. Johnson continued on as she found the goal of restoring the quality of her clients' drinking water to be of paramount importance. As illustration of why, one need look no further than the state of the water at the Dibble property following oil and gas activities:



13. During the *Dibble* litigation before the EHB, in recognition that help and greater expertise was necessary and would be beneficial to both Ms. Johnson and her clients, Ms. Johnson made inquiries to determine if another group or lawyer would be interested in the representation. However, she was not successful.

14. Ms. Johnson believed that absent her continued representation, her clients would have had no lawyer assisting them.

15. Ms. Johnson had no interest in delaying either matter and did not take any action to cause delay, as to do so would have been contrary to her clients' goals and interests.

16. Ms. Johnson worked very hard to prepare her clients' cases, but learned that practice before the EHB was more formal, demanding and intense than she anticipated from the outset.

17. Ms. Johnson was not sufficiently experienced at formal discovery or in preparing and presenting a case in an evidentiary context.

18. Further, given Ms. Johnsons' lack of experience with litigation matters, Ms. Johnson did not necessarily articulate her thoughts in as precise or articulate manner as was warranted.

19. At times, Ms. Johnson acknowledges not technically following the rules of the EHB, such as when she failed to file a Memorandum or failed to consult with counsel to obtain counsel's position prior to filing a motion. Ms. Johnson was still learning and digesting the rules.

20. To Ms. Johnson's credit, despite not being paid on an hourly basis, she pursued her clients' interests with great vigor and enthusiasm and advanced significant costs.

21. The EHB Sanctions Order and Opinion in the *Dibble* case made harsh and incorrect judgments as to Ms. Johnson's subjective motivations based on filings, not testimony, and without giving her any benefit of the doubt or an evidentiary hearing. Only oral argument was offered, which she rejected at the time, perhaps unwisely so with the added benefit of reflection.

22. The Petition quotes extensively from the Sanctions Order and Opinion, as well as the filings of other counsel in the underlying cases. Ms. Johnson asserts that neither the Sanctions Opinion or the advocacy of her adversaries may be used to prove misconduct.

23. Ms. Johnson certainly exhibited zeal, but it was not misplaced. She was at all times attempting to protect her clients. She did not demonstrate any inability to accept legal rulings. She denied no rights to any person involved in the proceeding. She appealed certain rulings, consistent with her clients' rights.

24. At no time did Ms. Johnson engage in dishonesty or deception.

25. Ms. Johnson has thoroughly and completely cooperated with ODC throughout its investigation in this matter.

26. As to the *Dibble* case, Ms. Johnson candidly and in good faith acknowledged that her representation before the EHB ultimately fell short of the expectations of Rule 1.1.

27. Ms. Johnson has candidly and in good faith acknowledged room for professional development consistent with her obligations pursuant to RPC 1.1.

28. Ms. Johnson recognized a need to attain a better balance that does not risk overstepping the bounds of zealous advocacy.

29. In her first 15 years of practice, she exhibited the strong ethics, skills and the successful traits expected of a lawyer, including in high pressure circumstances.

30. Since the representation at issue, Ms. Johnson's advocacy and professionalism has significantly improved.

31. Since the Sanctions Order and Opinion in the *Dibble* case, Ms. Johnson renewed her efforts to find assistance and has since collaborated with other lawyers on environmental cases.

32. In a different matter before the EHB, Ms. Johnson, along with co-counsel, engaged in comprehensive pre-hearing practice and in 2023, fully participated in an in-person hearing that spanned 7 full days and 4 half days. There were no motions for sanctions against either counsel, joint filings were made with professional cooperation, and the Prehearing Memorandum filed by Ms. Johnson was thorough, detailed and compliant with the rules of procedure, inclusive of identification of facts, witnesses, expert witnesses and exhibits. At the conclusion on April 28, 2023, Judge Labuskes, as well as the EHB assistant counsel, thanked all counsel for their exhibited advocacy and professionalism.

B. The Dibble Matter

33. When Ms. Johnson agreed to represent her clients in the Dibble case, she informed them she was not a litigator and initially, was not doing litigation, but merely assisting them as the DEP investigated, which was well within her competencies.

34. Ms. Johnson was aware of a growing body of recent litigation attempting to enforce Pennsylvania's Constitutional right to clean water.

35. Ms. Johnson expected a level of cooperation with the DEP and a shared goal of providing assistance to landowners in addressing their water pollution.

36. The Oil and Gas Act (53 Pa.C.S. §3218) mandates that the DEP investigate within 10 days and make a determination within 45 days, which, in part, serves to protect the due process of landowners requesting an investigation and determination.

37. The DEP's statutory obligation is of key importance to explaining Ms. Johnson's strategy and mindset at the time, as she found it unfathomable that the DEP would ignore its statutory duty, and by extension, that the EHB would not hold the DEP accountable.

38. It is not only legislatively required, but appropriate that the DEP investigate, as the time and expense to do so is considerable, well beyond the financial means of many landowners, including Ms. Johnson's clients.

39. When the DEP closed its investigation in the *Dibble* matter, it left the property owners with an egregiously untimely determination finding that their water was polluted, which they already knew, but without any further assistance or remedy.

40. Rather than abandon her clients, Ms. Johnson filed an appeal before the Environmental Hearing Board.

41. Ms. Johnson approached the matter as one involving legal issues between the landowners and the DEP.

42. Ms. Johnson believed and argued that it was the DEP's burden to perform the investigative work, including any necessary testing and research, and to do so on a timely basis pursuant to the Oil and Gas Act.

43. Although Ms. Johnson viewed the matter as a narrow dispute between the landowners and the DEP, Coterra intervened in the matter, intensifying the litigation.

44. During the process, Ms. Johnson became disillusioned of the notion that the DEP was independent or that its goal was to protect the landowners.

45. A Grand Jury Report No 1. dated February 27, 2020 was released to the public in June 2020 and reviewed by Ms. Johnson at that time. The Report was lengthy and critical of the DEP in many respects.

46. Of particular significance, the Grand Jury Report identified multiple deficiencies in respect to the transparency of the industry's disclosure of chemicals used in the hydraulic fracturing process. See, 58 Pa.C.S. §3222.1(b)(3)(4) (c) & (d). (GJ Rpt. Pg. 16-18). Coterra's

claim not to be utilizing TEG rang hollow to Ms. Johnson in light of this Report in combination with the private laboratory testing obtained by her clients.

47. TEG was the subject of much debate in the case, but was not the only substance of concern to Ms. Johnson's clients. The Grand Jury Report found that produced water is more contaminated and will typically contain high levels of Iron and Manganese. (GJ Rpt. Pg. 14-15). Iron and Manganese were found in the Dibbles' water at elevated levels, as well as the identification of several bacteria.

48. Also of interest to Ms. Johnson, according to the Grand Jury Report, many homeowners reported first experiencing contamination of their drinking wells during the drilling process, including brown and rust-colored water with sediment. (GJ Rpt. pg. 27). Ms. Johnson's clients experienced brown and rust-colored water with sediment (see pictures above), which coincided with the oil and gas activities on nearby property.

49. The Grand Jury Report also found undue deference by the DEP to the industry and undue indifference to landowners.

50. Ms. Johnson was concerned as to the impact of Coterra's intervention and aggression.

51. Ms. Johnson became aware that two Buchanan Ingersoll lawyers served on the Rules Committee for the EHB, including one lawyer serving as its Chairman.

52. Ms. Johnson also obtained Judge Castille's Opinion letter in the SLAPP lawsuit, commenting on the cozy relationship between the industry and those responsible for enforcing the laws.

53. Ms. Johnson acknowledges that additional focused discovery directed to Coterra, particularly as to the chemicals utilized at the applicable sites, should have been entertained by her at the time.

54. Ms. Johnson was diligent in collecting, reviewing and even filing information for the purposes of advancing her clients' matter. She expected the EHB to consider the voluminous amount of information that she filed.

55. She had never previously put together evidence for presentation at a hearing and did not anticipate a formal process before an administrative agency, given that individuals appear before the EHB without lawyers.

56. Ms. Johnson acknowledges that her language should have been more precise and at times, her tone, less accusatory.

57. At the hearing itself, Ms. Johnson's conduct and words were respectful of other counsel and the administrative law judges. She was not disruptive in any way. She requested that the Judge take up the pending motion for sanctions first. When that request was refused, she asked for a recess, which was granted. She then advised of her clients' decision not to proceed with testimony.

58. Ms. Johnson's accusations against the Judge stemmed from a combination of factors, as explained above. Ms. Johnson has since appeared before the same Judge in another matter with equally strong passion, but with a concerted effort at rule compliance and professionalism.

59. Ms. Johnson regrets the extent to which her actions and advice to her clients led to a sanction against her clients in this matter, which she appealed on their behalf.

C. Glahn

60. Mr. Glahn and Ms. Gorencel were in their 70s, were in a rural area, lacked sophistication (compared to the industry), and were retired and believed to be of modest means.

61. In addition, Mr. Glahn had a health condition that, for reasons of privacy, Ms. Johnson will not reveal in this public filing. However, his health condition factored into the exigency of the matter and Ms. Johnson's approach.

62. In *Glahn*, the pollution had been confirmed and causation by the fracturing activities presumed due to the property being within zone of presumption.

63. Unlike the *Dibble* case where the appeal followed the DEP's egregiously tardy Determination Letter, in the *Glahn* case, Ms. Johnson filed an appeal because the DEP had not issued a Determination Letter after approximately 10 months and the appeal presented a potential opportunity to force the DEP to comply with its statutory obligations under the Oil and Gas Act.

64. At issue in the *Glahn* case was the EHB's own jurisdiction. The DEP argued that the EHB lacked jurisdiction because the DEP had not yet issued a Determination Letter. Ms. Johnson found it legally preposterous that the DEP could simply evade review by the EHB by not complying with its own statutory mandate, which is what she argued at its essence.

65. By split decision, the EHB determined that it lacked jurisdiction. Recently, the Commonwealth Court affirmed.

66. The main issue presented in the *Glahn* case was a substantial one.

67. Ms. Johnson's "takings" claim was novel, but not frivolous. Lawyers are not to be discouraged from attempting to expand developing areas of the law.

WHEREFORE, Petitioner prays that your Honorable Board appoint, pursuant to Rule 205, Pa.R.D.E., a Hearing Committee to hear testimony and receive evidence in support of the foregoing charge(s) and upon completion of said hearing to make such findings of fact, conclusions of law and recommendations for disciplinary action as it may deem appropriate.

Respectfully submitted,

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VERIFICATION

I, LISA ANN JOHNSON, hereby verify the statements set forth in the foregoing ANSWER TO THE PETITION FOR DISCIPLINE AND REQUEST TO BE HEARD IN MITIGATION are true and correct to the best of my knowledge, information and belief. I understand that false statements made herein are subject to the penalties of 18 Pa. C.S.A. Section 4904 relating to unsworn falsifications to authorities.

Date: September 15, 2023

Lisa Ann Johnson

CERTIFICATE OF SERVICE

I, hereby certify that a true and correct copy of the foregoing ANSWER TO PETITION FOR DISCIPLINE AND REQUEST TO BE HEARD IN MITIGATION has been forwarded to the following, via: First Class, U.S. Mail, this 14th day of September, 2023:

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