

EXHIBIT 3

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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In Re:)	Case No. 18-33513-sgj-11
)	
ROCKIES REGION 2006 LIMITED)	Dallas, Texas
PARTNERSHIP and ROCKIES)	May 17, 2019
REGION 2007 LIMITED)	9:30 a.m.
PARTNERSHIP,)	
)	DEBTORS' EMERGENCY MOTION TO
Debtors.)	EXCLUDE EXPERT REPORT AND
)	TESTIMONY [149]
)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

APPEARANCES:

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25 Proceedings recorded by digital sound recording;
transcript produced by transcription service.

1 MR. WEISBART: Good morning, Your Honor. Mark
2 Weisbart with my law office, and also here, Tom Foley and
3 Aaron Arndt of the Foley Bezek firm, here on behalf of Robert
4 Dufresne, Michael Gaffey, Ronald Glickman, Jeffrey Schulein,
5 William McDonald, in their individual capacity and their
6 capacities as trustees and representing themselves as well as
7 a putative class of claims which constitute all of the limited
8 partners of these partnerships.

9 THE COURT: Okay. Thank you and welcome to you all.

10 MR. WEISBART: Thank you.

11 THE COURT: Okay.

12 MR. FOLEY: Good morning, Your Honor. Mr. Foley.
13 Thank you for allowing me the privilege of appearing here.

14 THE COURT: Okay. Certainly. All right. Well,
15 we're here on a Debtors' motion to exclude evidence. I guess
16 I'm first going to ask for confirmation. Am I correct in
17 thinking this is all about the Edwin Moritz expert report and
18 testimony? It's narrowed down to that, correct?

19 MS. WEBB: Yes, Your Honor.

20 THE COURT: Okay. How did you want to proceed?

21 MR. WEISBART: May I comment on that, Your Honor?

22 THE COURT: Okay.

23 MR. WEISBART: That is correct, but in the interests
24 of full disclosure, we want to advise the Court that another
25 issue has come up which will likely involve Mr. Scheig

1 revising his report. Obviously, it's not here today. And
2 that report would entail the issue of whether or not plugging
3 and abandonment costs constitute intangible drilling costs.
4 This has come up in connection with deposition testimony over
5 the past week of two individuals, Karen Nicolaou and Darwin
6 Stump.

7 So, obviously, if the report is revised, we will provide
8 that to opposing counsel. And that is an issue that we would
9 intend to address at trial. Or if they want to file another
10 motion and if the Court sets it for hearing, we'd have to have
11 it heard. But it's not something that was front and center at
12 the time the motions were filed, Your Honor.

13 THE COURT: All right. So I guess you're previewing
14 --

15 MR. WEISBART: I just wanted to --

16 THE COURT: -- this for us all, but we're not going
17 to address anything on it today?

18 MR. WEISBART: That is correct, Your Honor.

19 THE COURT: Okay. All right. Ms. Webb, I guess I
20 have a question about scheduling before you launch into your
21 presentation.

22 Obviously, this Edwin Moritz testimony and report pertain
23 to the motion to dismiss. And what I was going to look up and
24 got sidetracked before I came in here was sequence. We have a
25 hearing on a motion to dismiss when, and then I know

1 confirmation, by agreement, has been sort of abated for a few
2 months because of this motion. But what is the sequence? Was
3 there an agreement that the motion to dismiss will go first,
4 and then if the Debtor lives through that, then it would roll
5 to confirmation? Or is the scheduling contemplated to all be
6 a combined hearing, or what was it?

7 MS. WEBB: Happy to provide a clarification, Your
8 Honor.

9 THE COURT: Okay.

10 MS. WEBB: Yes. Presently set for June 20th and 21st
11 is the LP Plaintiffs' motion to dismiss these Chapter 11
12 cases, --

13 THE COURT: Okay.

14 MS. WEBB: -- as well as the Debtors' application to
15 retain Ms. Nicolaou as responsible party.

16 THE COURT: Okay.

17 MS. WEBB: Those are the two matters that the parties
18 have agreed to litigate first, --

19 THE COURT: Okay.

20 MS. WEBB: -- before we then move to the myriad of
21 other motions that are pending and abated in this case.

22 THE COURT: Uh-huh.

23 MS. WEBB: I believe, per the agreed scheduling order
24 that we entered a few months ago, we set a subsequent status
25 conference I believe in mid-July.

1 THE COURT: Okay.

2 MS. WEBB: And at that time, we agreed to take up the
3 scheduling --

4 THE COURT: Okay.

5 MS. WEBB: -- of those other matters, including the
6 plan and disclosure statement, which, again, we anticipate
7 would need further amendment anyway --

8 THE COURT: Okay.

9 MS. WEBB: -- at this point.

10 THE COURT: All right. Thank you. I just couldn't
11 remember the sequence of all that. All right. You may
12 proceed.

13 MS. WEBB: Well, good morning, Your Honor, and thank
14 you for hearing us on an expedited basis.

15 We're here today on one discrete issue, on Mr. Moritz's
16 expert opinions and his report on alleged damages relevant to
17 the retention of Ms. Nicolaou and whether these cases were
18 filed in bad faith. We believe that they are not and that the
19 Moritz report and related testimony should be excluded from
20 the hearing on the motion to dismiss and Ms. Nicolaou's
21 retention.

22 The Court is no doubt familiar with the standard for
23 admissibility of experts under Federal Rule of Evidence 702.
24 It has three prongs. The expert must be qualified, the expert
25 must be reliable, and the subject matter of his testimony must

1 be relevant to the matters at hand. The LP Plaintiffs bear
2 that burden of proving each element.

3 We're not here today challenging, you know, Mr. Moritz's
4 qualifications or the reliability of his testimony, although
5 we reserve those rights. Rather, we are here today because we
6 believe that the damages testimony that Mr. Moritz would
7 present does not help the Court better understand or determine
8 the issues before it right now, and therefore should be
9 excluded.

10 With respect to Ms. Nicolaou's retention, the LP
11 Plaintiffs contend that Mr. Moritz's damages testimony bears
12 on whether Ms. Nicolaou is a disinterested person as required
13 by Section 327 of the Bankruptcy Code.

14 First, the Debtors are not seeking to retain Ms. Nicolaou
15 under Section 327, but, rather, Section 363, as is normal
16 course for CRO types. And as Your Honor is aware,
17 disinterestedness is not required under Section 363.

18 However, even if we were to apply the disinterestedness
19 standard to Ms. Nicolaou's retention, testimony regarding the
20 magnitude of damages of unliquidated estate claims simply has
21 no bearing on that determination. Now, if the LP Plaintiffs
22 want to argue the fact that Ms. Nicolaou filed bankruptcy with
23 a proposed settlement of claims asserted in the Colorado
24 action and that is evidence of her disinterestedness or lack
25 thereof, then fine. We obviously dispute that, but they

1 certainly have the right to make that showing. But whether
2 the damages associated with those claims are worth a billion
3 dollars, a million dollars, or just a dollar is neither
4 relevant nor helpful to this Court's analysis.

5 Now, with respect to the issue of bad faith filing, the LP
6 Plaintiffs argue that the disparity in the damages number
7 reflected by Mr. Moritz's report and the proposed settlement
8 that was filed in a term sheet on the petition date along with
9 the filing of these cases is evidence that these cases were
10 filed to obtain a litigation advantage. But it's not. The
11 problem is that the LP Plaintiffs seem to be confusing motive
12 and value.

13 Again, the LP Plaintiffs can argue the mere fact that the
14 term sheet was filed on the first day of this case is evidence
15 that the motive behind the filing was to gain a litigation
16 advantage and thus bad faith. We do not dispute that the term
17 sheet was filed on the first day of the case and that term
18 sheet contains a settlement of estate claims. But we do
19 dispute that the amount of alleged damages associated with
20 those claims have anything to do with bad faith or retention.

21 The LP Plaintiffs want to make the hearing on the motion
22 to dismiss and Ms. Nicolaou's retention about the merits of
23 the claims asserted in the Colorado action and how Ms.
24 Nicolaou's proposed settlement of those claims sold the
25 limited partners down the river. However, whether PDC is

1 liable on those claims and whether any settlement of those
2 claims is reasonable under Rule 9019 is not presently before
3 the Court.

4 After the Court denies the motion to dismiss, if a
5 contested hearing on settlement if necessary, that will be a
6 time to argue over sufficiency of the settlement. That is the
7 hearing where the LP Plaintiffs can put on Mr. Moritz or any
8 other expert that they want to show how the Debtors cannot
9 meet the standards of Rule 9019. And that would be
10 appropriate. But it's not appropriate today. It's just not
11 the right time.

12 And speaking of time, as a practical matter, we presently
13 have a day and a half scheduled for the hearings on the motion
14 to dismiss and Ms. Nicolaou's retention, two and half days if
15 we have to utilize the overflow day this Court has generously
16 provided for us on June 24th. There is no doubt that the LP
17 Plaintiffs will want to put on testimony from Ms. Nicolaou and
18 from a representative of PDC. In addition, they want to put
19 on solvency testimony from a second expert, Mr. Scheig,
20 despite the Debtors' willingness to stipulate that they are
21 not insolvent as of the petition date, as defined in the
22 Bankruptcy Code.

23 Mr. Moritz's report is lengthy and technical. The Debtors
24 anticipate that it would take a full day for Mr. Moritz to
25 give his direct testimony and to be thoroughly cross-examined.

1 Excluding his testimony now will avoid the cost and resources
2 associated with testimony that will have no bearing on this
3 Court's ultimate decision to dismiss these cases or to approve
4 the retention of a professional. The marginal weight, if any,
5 Mr. Moritz's testimony would have is not proportionate to the
6 time that would be necessary to fully develop that testimony,
7 and would ultimately be unhelpful.

8 In short, Your Honor, Mr. Moritz's testimony would be a
9 time-consuming diversion, would not assist you in reaching
10 your decision on the pending motions, and therefore should be
11 excluded from the hearings on the motion to dismiss and Ms.
12 Nicolaou's retention.

13 THE COURT: Okay. Thank you.

14 MS. WEBB: Thank you.

15 THE COURT: All right. PDC, I saw, filed a joinder,
16 yesterday, I think it was. I usually hear friendlies first
17 and then the opposition. Do you want to add anything?

18 MR. MORFEY: Just very briefly, Your Honor. Mike
19 Morfey on behalf of PDC.

20 I think that the arguments put forth by Ms. Webb on behalf
21 of the Debtors, we obviously second those arguments. To us,
22 this is just a matter of keeping our eye on the ball right
23 now, and the ball is retention and the motion to dismiss the
24 bankruptcy. Not saying we're never going to get to these
25 issues, but the issues should not be addressed at this time

1 because they just don't have any relevance to the issues that
2 are pending. So we second the motion.

3 THE COURT: All right. Thank you. All right. Mr.
4 Weisbart, will you make the argument?

5 MR. WEISBART: Well, I have a couple exhibits I'd
6 like to present to the Court.

7 THE COURT: All right. You may. Do you have an
8 extra for the intern? Thank you.

9 All right. Mr. Weisbart, I'm going to ask you right off
10 the bat this question. I started out by asking Ms. Webb to
11 clarify scheduling. And the reason I did that was because my
12 initial reaction after reading the papers was, wow, I can see
13 how Mr. Moritz is going to be highly relevant with regard to a
14 motion to approve a compromise or with regard to the plan
15 confirmation standards more generally. You know, is your
16 client, are your clients getting enough value, is the plan
17 proposed in good faith, et cetera, et cetera. But if we're
18 doing the motion to dismiss first, separately, not at the same
19 hearing as confirmation, I'm frankly a little perplexed about
20 relevancy.

21 MR. WEISBART: Your Honor, that's the whole point of
22 my presentation, --

23 THE COURT: Okay.

24 MR. WEISBART: -- and I'm happy to address it. And
25 with the Court's indulgence, I'm going to take a little time.

1 This is really a trial argument, relevancy, and it should
2 normally -- it would normally be considered in the context of
3 the trial of the case. So I need to spend some time going
4 through the background of this whole case.

5 Your Honor, the issue raised by the exclusion motion is
6 whether the Gustavson expert report -- and Gustavson
7 Associates is the entity.

8 THE COURT: Uh-huh.

9 MR. WEISBART: Ed Moritz is the fellow who did the
10 report at Gustavson.

11 THE COURT: Uh-huh.

12 MR. WEISBART: So I may use those interchangeably.

13 THE COURT: All right. Uh-huh.

14 MR. WEISBART: Would be relevant at the hearing on my
15 clients' motion to dismiss the case and our objection to the
16 employment application of Karen Nicolaou.

17 As to the dismissal motion, our principal assertion is
18 that the bankruptcy cases were filed in bad faith, primarily
19 to settle litigation claims against the Debtors' general
20 partner on the cheap. The Gustavson report establishes the
21 true value of the pending suit at almost 16 times the amount
22 proposed by the Debtors. The Debtors assert, as you've heard,
23 that the value of these claims is relevant only in the context
24 of determining the fairness of the proposed settlement if the
25 cases are not dismissed.

1 I would like to focus first on the standard. Relevance is
2 governed by Rule 401 of the Federal Rules of Evidence, which
3 provides that evidence is relevant if it has a tendency to
4 make a fact more or less probable than it would be without the
5 evidence and the fact is of consequence in determining the
6 action.

7 Testimony by an expert witness is governed by Rule 702.
8 The standard of review to determine relevancy of expert
9 reports in this circuit is well-established and
10 extraordinarily liberal. The threshold for admissibility is
11 extremely low. And with the Court's indulgence, I'll -- I'd
12 like to present a case, a Fifth Circuit case.

13 THE COURT: All right.

14 MR. WEISBART: This is the *RX Solutions, Incorporated*
15 case. And as the Court can see, it was filed April 17, 2019.
16 And I would refer the Court to Pages 10 and 11, --

17 THE COURT: Okay.

18 MR. WEISBART: -- which discusses the standards of
19 admissibility. And I highlighted some of the notations under
20 these standards. And this is also the same standards that are
21 essentially set forth in our objection. But just to point to
22 a few:

23 "To be relevant, the expert's reasoning or
24 methodology must be properly applied to the facts in
25 issue. When performing this analysis, the court's

1 main focus should be on determining whether the
2 expert's opinion will assist the trier of fact.
3 Assisting the trier of fact means the trial judge
4 ought to insist that a proffered expert bring to the
5 jury more than the lawyers can offer in argument. As
6 the court has noted, however, the helpfulness
7 threshold is low. It is principally a matter of
8 relevance."

9 And then on the second page, or, excuse me, Page 11, we
10 highlighted the following:

11 "While the district court must act as a
12 gatekeeper to exclude all irrelevant and unreliable
13 expert testimony, the rejection of expert testimony is
14 the exception rather than the rule."

15 Now, let me -- to put this whole thing in context, I need
16 to spend a little time addressing the background leading to
17 the bankruptcy cases, Your Honor. Prior to bankruptcy, my
18 clients filed suit in Federal District Court in Denver,
19 Colorado against PDC Energy, Inc. as a putative class
20 claimant, asserting both direct claims on behalf of limited
21 partners and derivative claims on behalf of the Debtors. The
22 suit was -- and PDC is the general partner. Okay. Suit was
23 brought against PDC and certain of its officers and directors.
24 The Debtors were named as nominal parties.

25 The suit alleges that PDC, as managing general partner,

1 breached its fiduciary duty to the limited partners and
2 partnerships and violated terms of the partnership agreements.
3 In particular, the partnerships were formed to drill oil and
4 gas wells in the Wattenberg Field outside Denver, Colorado.
5 The suit alleges PDC failed to assign certain prospects
6 involving spacing units to the partnerships. After drilling
7 wells, PDC drilled horizontal wells near or within the spacing
8 units of the prospects. In addition, PDC failed to re-frack
9 or recomplete the partnerships' wells as they had promised
10 under applicable agreements.

11 As a result of drilling the horizontal wells, reserves
12 attributable to the partnerships' vertical wells and spacing
13 units were lost, and the wells were adversely affected by
14 pressure declines. Due to PDC's conduct, the partnerships and
15 the individual limited partners suffered massive damages. To
16 calculate the damages arising from PDC's conduct, the limited
17 partners retained Gustavson to undertake an analysis. That
18 analysis formed the Gustavson report, which is identified as
19 Exhibit A in our exhibits, Your Honor.

20 The report identifies the value of the claims held
21 derivatively by the partnerships as well as the direct claims
22 of the limited partners. The amount of the damages, as
23 reflected on Page 2 of the report, is \$91.31 million.

24 In January 2018, weeks -- just a few weeks after the suit
25 was filed, PDC contacted Karen Nicolaou for the purpose of

1 settling the litigation through the bankruptcy process. Ms.
2 Nicolaou was installed by PDC in May of 2018 as the
3 partnerships' exclusive representative. She and PDC then
4 entered into a contrived agreement, which is reflected in the
5 term sheet that is attached to her declaration marked as
6 Exhibit B. Under the term sheet, she agreed to settle all
7 claims held by the partnerships against PDC, those involved in
8 the Denver litigation as well as any and all other claims that
9 the Debtors may have against PDC, and assign the partnerships'
10 oil and gas properties to PDC for the combined total of
11 \$762,600.

12 In addition, she agreed to propose a reorganization plan
13 that provides an opt-out settlement to the limited partners on
14 their claims. Under this proposal, all direct claims of the
15 limited partners against PDC would be settled on a combined
16 basis of up to \$5,280,000, paid directly by PDC, but only to
17 those limited partners who did not opt out.

18 These provisions of the term sheet are incorporated into
19 the plan and the disclosure statement filed shortly after the
20 cases were filed.

21 Notably also, PDC has set up a \$3 million war chest to
22 fund Ms. Nicolaou and her attorney's fees and costs in seeking
23 approval of the plan and disclosure statement and fighting any
24 limited partners to contest them.

25 As noted, we have filed our motion to dismiss the case and

1 an objection to the employment of Ms. Nicolaou. The dismissal
2 motion asserts two bases for dismissal. First, Ms. Nicolaou
3 lacked the authority to file the bankruptcy cases. This is a
4 -- this is largely a legal issue involving an interpretation
5 of the partnership agreement and applicable West Virginia law.

6 Secondly, as mentioned, we contend the cases are filed in
7 bad faith, primarily for the purpose of controlling and
8 eliminating the suit and insulating PDC and its officers and
9 directors from additional claims of the limited partners in
10 acquiring the oil and gas property.

11 Obviously, today is not the time to cover all the factual
12 assertions supporting our claims. Suffice it to say it will
13 be shown at trial that this sham settlement was the result of
14 estate exercise, and Ms. Nicolaou was acting solely for the
15 benefit of PDC while ignoring the interests of the limited
16 partners.

17 In her the deposition, she acknowledges that she conducted
18 no detailed damage or litigation analysis of the Denver suit.
19 And under Tab C are excerpts of that -- highlighted excerpts
20 reflecting that. And she conducted absolutely no
21 investigation into any other claims which could be asserted
22 against PDC.

23 It will be clear to the Court at trial the proposed
24 settlement with PDC, which is the primary motivating factor
25 for filing these cases, is grossly inadequate and designed to

1 buy a global release on the cheap.

2 In sharp contrast is the Gustavson report, which is highly
3 relevant and crucial to establishing bad faith and Ms.
4 Nicolaou's lack of independence. First, it demonstrates the
5 type of analysis that should have been undertaken by a truly
6 independent fiduciary and highlights the lack of any
7 meaningful due diligence conducted by Ms. Nicolaou. It
8 specifically values the claims and assesses the damages that
9 the partnerships and limited partners have against PDC in the
10 Denver litigation.

11 Secondly, the gross disparity between the Moritz damage
12 model and the PDC sham settlement, \$91.6 million and \$5 to \$6
13 million, underscores the motive behind the filing of the case,
14 that being to eliminate the Denver litigation and any other
15 potential claims against PDC and its officers and directors
16 for virtually no consideration. Under the applicable Fifth
17 Circuit standards I've cited, the Gustavson report and Mr.
18 Moritz's testimony will clearly bring something more than the
19 lawyers can offer in argument and will assist you, Your Honor,
20 as trier of fact.

21 The report specifically demonstrates that the proposed PDC
22 transaction is a sham, and together with other evidence that
23 will be presented a trial, it highlights the true proper
24 motive and intent behind filing the case.

25 Now, let me address some of the Debtors' arguments. The

1 Debtors argue that this is strictly a 9019 issue, going solely
2 to the value of PDC's proposal, and therefore the Moritz
3 report should not be considered as part of the dismissal
4 motion, yet they cite no authority for that proposition.

5 Secondly, they argue that the existence of the Moritz
6 report does not have a tendency to make the existence of a
7 fact more or less probable than it would be without the
8 evidence. Obviously, the report makes more probable the fact
9 that, one, the proposed settlement is a sham; and two, the
10 case was filed for an improper purpose.

11 As to the employment application, the report highlights
12 bias and lack of disinterestedness, particularly when combined
13 with other facts that will be presented at trial, including
14 the fact that Ms. Nicolaou undertook no investigation into the
15 suit, and payment of her fees is contingent on her support of
16 PDC's position.

17 Next, the Debtors argue that since there has been no
18 finding of liability against PDC, the presentation of damages
19 evidence -- the presentation of damages evidence is premature.
20 This obviously makes little sense. In determining if a
21 bankruptcy case is filed as a litigation ploy to settle a
22 pending suit for a nominal sum, the value of the claims being
23 settled would be front and center.

24 In its reply filed the other night, Debtors also argue
25 that the factors to consider on a motion to dismiss for bad

1 faith are well-settled and do not include the alleged value of
2 litigation claims or releases and we have cited no specific
3 cases addressing the value of litigation claims in connection
4 with a bad faith filing analysis.

5 First, under the totality of circumstances test
6 articulated by the Fifth Circuit in the *Little Creek* case,
7 there is no specific limitation on the factors to consider and
8 which may be relevant to a particular case. One looks to the
9 totality of the circumstances surrounding the filing of the
10 case to determine if the case was filed in good faith.

11 Secondly, I would direct the Court to an Eighth Circuit
12 case, *Cedar Shore Resort v. Mueller*, 235 F.3d 375, a December
13 2000 case. And if I may I approach, Your Honor?

14 THE COURT: You may.

15 MR. WEISBART: This case adopt -- this case adopted
16 the *Little Creek* standards and identified the motivation of
17 settling a derivative suit quickly as one of the elements of
18 bad faith.

19 In this case, Cedar Shore Resort, Inc. filed for
20 bankruptcy protection after it was served with a shareholder
21 suit. After considering the evidence, the bankruptcy court
22 found that Cedar Shore's primary motivation in filing Chapter
23 11 was to protect itself from a shareholder -- from the
24 shareholder action, and dismissed its petition for bad faith.
25 The circuit court affirmed the decision.

1 A significant factor in finding bad faith was the limited
2 investigation of the derivative claims which was conducted,
3 and I quote, "in an admittedly cursory manner and were settled
4 for a very low amount." And that's Page 6 of 7 on the case I
5 handed you, Judge.

6 This is precisely what happened here and precisely why the
7 Gustavson report is relevant. Ms. Nicolaou conducted no
8 material investigation related to the value or merits of the
9 claim, and is now attempting to settle for a very low amount.

10 Additionally, Debtors argue that excluding the report will
11 save the estate the burden and expense of conducting expert
12 discovery. I would note that Mr. Moritz's deposition is
13 scheduled next -- for next Thursday, the 23rd. As I
14 mentioned, PDC has set aside a \$3 million reserve for the
15 benefit of its attorneys and Ms. Nicolaou to fight anyone who
16 opposes them. Simply put, there is no expense being borne by
17 the partnerships.

18 And I understand that Ms. -- that PDC, through Ms.
19 Nicolaou, has hired their own oil and gas expert to evaluate
20 the report. In that regard, at the end of the day, the report
21 will be fully vetted before the Court at trial, and the Court
22 can place what weight it wants on the report and Mr. Moritz's
23 testimony. But to try to exclude this report in isolation of
24 and outside the context of the other evidence at trial flies
25 in the face of the Fifth Circuit precedent I mentioned, and in

1 particular, that the rejection of an expert testimony is the
2 exception rather than the rule.

3 I can't tell you if it's going to take a day of testimony.
4 I don't know. It might take less.

5 So, let me summarize, though. First, the standard for
6 admissibility is extremely liberal and the threshold is
7 extremely low as it pertains to the admissibility of expert
8 reports.

9 Secondly, the Gustavson report is directly relevant to the
10 issue of whether this case was filed in bad faith, to take
11 control of my clients' lawsuit, eliminate all other claims
12 against PDC, and settle these claims quickly and for a very
13 low amount.

14 Third, there is case authority directly on point
15 demonstrating that the valuation of litigation claims is a
16 factor to consider under the totality of circumstances test,
17 which is the Fifth Circuit test.

18 And fourth, the report is also relevant to the employment
19 application as it demonstrates bias and Ms. Nicolaou's lack of
20 disinterestedness, particularly when combined with the other
21 facts that will be presented at trial.

22 THE COURT: Okay.

23 MR. WEISBART: Thank you.

24 THE COURT: Just a couple of very big-picture
25 questions that may or may not -- the answers may or may not be

1 meaningful to me, but help me think through this. When this
2 case was filed -- I realize you came in a month or two after
3 the fact -- I was told that the wells were down to just a few,
4 their lifespan was diminishing, and we had large plugging
5 liabilities. Is your case-in-chief on the motion to dismiss
6 going to refute that?

7 MR. WEISBART: Yes. One of the issues I mentioned
8 about Mr. Scheig's testimony will be that the plugging and
9 abandonment liabilities are not truly obligations of the
10 partnership. They're obligations of the general partner.

11 Secondly, the general partner is a publicly-traded
12 corporation worth two-plus billion dollars and is fully
13 capable of funding and paying and has been paying plugging and
14 abandonment costs. So we think there is plenty of cash
15 available to meet those costs, and it's its obligation and
16 duty to meet those costs.

17 There are probably some other -- a few other arguments I'm
18 missing here, but those -- those go to that issue. And so the
19 plugging and abandonment costs exist no matter what. With or
20 without this bankruptcy, with or without this term sheet, the
21 general partner, assuming what you said, that there is *de*
22 *minimis* value, will have to be paid by the general partner and
23 is not a basis for filing this case.

24 THE COURT: Okay. So, do you think this Eighth
25 Circuit case is your best case, the most factually analogous

1 case you have?

2 MR. WEISBART: Well, I think the -- first of all, the
3 reply -- a reply was filed two nights ago.

4 THE COURT: Uh-huh.

5 MR. WEISBART: And I never understood, because it's
6 not real clear in the Local Rules, whether you can file a
7 reply to a response. But the reply specifically pointed out
8 that we haven't cited a case. And so we did a little research
9 and found this case. It's the Eight Circuit case. But it
10 applies the Fifth Circuit standard, and it clearly shows that,
11 yes, the value of the litigation goes directly to the merits
12 of the issue of bad faith when the assertion of bad faith is
13 based on a litigation tactic.

14 And I don't think -- without -- without this case, I think
15 that's still -- what I'm trying to say is I don't think we
16 need this case, but it demonstrates on all fours that, yes, it
17 is relevant because the standard -- just simply the totality
18 of the circumstances standard would allow us to present this
19 evidence.

20 THE COURT: Okay. All right. Thank you.

21 MR. WEISBART: Thank you.

22 THE COURT: Ms. Webb, you get the last argument, the
23 last word.

24 MS. WEBB: Thank you, Your Honor. I'll be brief.

25 First off, opposing counsel stated that this is really a

1 trial argument. It's not really an appropriate time to be
2 making this argument. I'll just point Your Honor to the fact
3 that relevance is one of the three standards for admissibility
4 of an expert report.

5 And to the extent that opposing counsel is suggesting that
6 you can just let this evidence in and then you can make a
7 weight or credibility determination after the fact, that would
8 actually -- that actually goes against the standard for
9 admissibility of expert testimony under *Daubert* and Rule 702
10 and would actually be error. Relevance is part of the
11 admissibility inquiry. It's not about weight or credibility.
12 So now is the appropriate time. And, again, trying to
13 streamline things for when we do have hearings on these two
14 matters.

15 Opposing counsel handed you a couple of cases today. I
16 think that the Fifth Circuit case is consistent with the
17 standard that we presented Your Honor, that in order to be
18 admissible, expert opinions must be helpful. And here, we're
19 simply presenting the fact that Mr. Moritz's damages testimony
20 isn't ultimately going to help you decide whether these cases
21 were filed in bad faith or whether Ms. Nicolaou should be
22 retained here.

23 Mr. Weisbart spent a good amount of time talking about the
24 analysis that Ms. Nicolaou did or did not perform prior to
25 filing this case. They are going to have their opportunity to

1 talk to Ms. Nicolaou about that investigation that she
2 performed as much as they want. They've already taken my
3 client's deposition. I understand that they went into that in
4 depth at her deposition. They'll be able to present that
5 testimony here at trial.

6 What the ultimate number is at the end of the day just
7 doesn't matter to what investigation she did or didn't do.
8 That testimony is going to be elicited here. What those
9 claims are worth, it's just -- it's a red herring. It's not
10 -- like I said, it's conflating the ultimate issue here.

11 And finally, Your Honor, I skimmed this Eighth Circuit
12 case that I was just presented with. I think that opposing
13 counsel takes the one line that they're pointing to out of
14 context. From what I can tell, there was no presentation of
15 or attempt to present an expert to opine about his lengthy
16 analysis and damages related to these claims. So, to me, this
17 is -- it is what it is, but I don't think it ultimately wins
18 the day or carries the argument for opposing counsel.

19 So, with that, there were a lot of statements made about
20 this case and what you're going to hear at the trial on the
21 motion to dismiss and Ms. Nicolaou's retention. I'm not going
22 to get into any of that other than to say that we dispute
23 those characterizations and that there are two sides to every
24 story. And we ask Your Honor to keep your eye on what's
25 actually at issue here, is whether this expert report is

1 ultimately relevant to the matter at hand, whether these cases
2 were filed in bad faith and whether Ms. Nicolaou should be
3 retained.

4 Thank you.

5 THE COURT: All right. Well, I appreciate the very
6 fine arguments. It's not simple, the analysis here, but I am
7 going to grant the Debtors' motion to exclude the expert
8 report and testimony of Mr. Moritz and his firm solely in
9 connection with the motion to dismiss.

10 I absolutely acknowledge that the Fifth Circuit and most
11 every court has stated that a liberal test or standard should
12 be applied under Rule 401 governing relevance, and I think
13 you've all, you know, accurately stated the law here today.
14 But, bottom line, I don't think this particular testimony is
15 going to be helpful to the Court in connection with the motion
16 to dismiss because it's all about the amount of damages these
17 limited partner plaintiffs may have, the size of their claims.
18 I think that will be highly relevant in connection with the
19 plan treatment, the proposed settlement, and I will eventually
20 hear from Mr. Moritz. But with regard to the motion to
21 dismiss, you know, I've heard lack of authority. The legal
22 argument is one of the grounds. And then, of course, I
23 recognize the second major ground is bad faith/improper
24 purpose.

25 While that's admittedly a broad totality-of-the-

1 circumstances analysis, I don't think whether the litigation
2 has value of one dollar versus a million dollars versus a
3 hundred million dollars or more, I don't think that is going
4 to be absolutely helpful to the Court in deciding if the bad
5 faith/improper purpose is demonstrated here or not.

6 So, that is the ruling of the Court. Ms. Webb, if you
7 could upload an appropriate form of order, run it by opposing
8 counsel, please, and give them a reasonable chance to respond,
9 but I don't think the order really needs to say very much at
10 all.

11 So I will stay tuned for the next matter. Absent some
12 sort of contest on this new issue Mr. Weisbart raised this
13 morning, I guess I won't see you again until June?

14 MS. WEBB: Well, Your Honor, just for fulsome sake,
15 this is the first time that I'm hearing about this matter, so
16 obviously the Debtors reserve all of our rights to seek the
17 Court's relief.

18 We do have a status conference set before Your Honor on
19 May 29th to resolve any potential open discovery issues.

20 THE COURT: Okay.

21 MS. WEBB: And we already have one matter set for
22 that time. I anticipate we'll probably see some more.

23 THE COURT: All right.

24 MR. WEISBART: I would agree with that.

25 THE COURT: All right. Thank you. I'll see you the

1 29th.

2 THE CLERK: All rise.

3 (Proceedings concluded at 10:41 a.m.)

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CERTIFICATE

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I certify that the foregoing is a correct transcript from the digital sound recording of the proceedings in the above-entitled matter.

23

/s/ Kathy Rehling

05/17/2019

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Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

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PROCEEDINGS

3

WITNESSES

-none-

EXHIBITS

-none-

RULINGS

Debtors' Emergency Motion to (i) Exclude Expert Report
and Testimony of Edwin C. Moritz, (ii) Exclude Portions
of Expert Report and Testimony of Gregory E. Scheig,
and (iii) Limit Scope of Evidence for Hearing on Motion
to Dismiss (149) - *Granted*

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END OF PROCEEDINGS

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