# IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

**AT BECKLEY**

**JAMES SURRATT and ROSE SURRATT, et**

**al. (consolidated),**

**Plaintiffs,**

1. **CIVIL ACTION NO. 5:15-CV-15444**

**(consolidated)**

**PINNACLE MINING COMPANY LLC**

**Defendant.**

**DEFENDANT’S MOTION IN LIMINE TO EXCLUDE EVIDENCE REGARDING UNSAMPLED LOCATIONS**

Now comes the defendant, Pinnacle Mining Company, LLC (“Defendant”), by counsel, and moves *in limine* to preclude Plaintiffs from offering evidence or argument that Defendant should have tested samples from two particular mine locations (degasification boreholes identified as 9K-5 and 9K-6). Plaintiffs had a right to request inspections to sample whatever materials they viewed as relevant to their evaluations or their experts’ analyses but failed to do so. Instead, it is anticipated that Plaintiffs will improperly argue that Defendant is hiding evidence, despite never having pursued the same through discovery. Plaintiffs’ failure to perform a complete investigation cannot be mischaracterized under what is, effectively, a spoliation argument.

# BASIC BACGROUND

Plaintiffs’ expert Dr. Yoram Eckstein reviewed a gas chromatograph analysis prepared by Defendant’s expert Gary Hartsog. *See* Y. Eckstein Report, 2/11/2017, at 10, attached as Exhibit

1. This analysis compared the compositions of various gases, by percentage, of a series of gas

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samples from a library of samples from Pinnacle Mine and the Pocahontas No. 3 seam of coal, which the seam currently mined by Defendant, against three known bagged gas samples from the water well at issue in this case (designated the “Woosley Water Well”). The results were normalized for analysis.

Dr. Eckstein opines that emissions from two degas boreholes, 9K-5 and 9K-6, should also have been sampled for analysis. *See id.* at 11. During a hearing before the West Virginia Surface Mine Board, Plaintiff James Surratt’s counsel, also counsel for Plaintiffs in this action, argued the relevance of this information:

That vent from the Pinnacle Number 3 [referring to the 9K-5 degas borehole] and those gob vents are not on this chart, do not have the information of the chemical imprint. Although they were emailed with the methane gas readings, they didn’t have the carbon monoxide, the nitrogen, the oxygen, the methane gas in this chart that was provided to the panel. That is very disconcerting, and I’m going to show that information as well.

*See* SMB hearing transcr. excerpts, 2/13/2017, at 8, attached as Exhibit 2. Subsequently, a sample from the 9K-5 degas borehole was discovered in preparing for the deposition of Defendant’s David Trader, where the document was produced as a deposition exhibit for the record. *See* D. Trader Dep. Transcr., 3/15/2017, Ex. 4, attached as Exhibit 3.

# ANALYSIS

Plaintiffs, their counsel, and their witnesses should not be permitted to offer any testimony or argument regarding any alleged failure to obtain samples for analysis from any particular mine locations. Plaintiffs had a right to request inspections under Fed. R. Civ. P. 34, just as Defendants issued proper notices to Plaintiffs to inspect the allegedly damaged property in this case. Plaintiffs have never asked to inspect any Pinnacle Mine property or sample emissions from any particular locations. Not once. It is thus improper to argue, in essence, that an adverse

inference should be drawn from the failure to take gas samples at any particular locations especially as in this case where one of the samples alleged to be missing was taken but was not sought in discovery.

It is Plaintiffs’ burden to prove their case. If Plaintiffs’ expert is unable to reach a conclusion due to a lack of supporting evidence or believes that evidence is missing, then the Plaintiffs’ options are to either (a) utilize discovery procedures to obtain the information, or (b) not disclose an expert opinion on that issue. What Plaintiffs cannot do is argue that evidence was *concealed* where, as here, it was not. Plaintiffs’ argument to the West Virginia Surface Mine Board, and the anticipated argument to the trier of fact in this case, is effectively a spoliation argument. However, there is no evidence of wrongdoing. In fact, the only error is in Plaintiffs’ failure to either inspect Defendant’s property or ask the right questions in discovery.

Plaintiffs created this situation and cannot salvage their investigation by casting blame on the Defendant for their failures. Again, Plaintiffs never requested to take samples from these locations during discovery, and it would unfair to force Defendant to bear the consequence of Plaintiffs’ dilatory and incomplete investigation.

* 1. **CONCLUSION**

This Court should grant Defendant’s motion and hold that Plaintiffs cannot offer any evidence, testimonial or otherwise, or argument regarding unsampled locations.

# PINNACLE MINING COMPANY, LLC

By Counsel

*/s/ John J. Meadows*

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**Defendant.**

**CERTIFICATE OF SERVICE**

I hereby affirm that on this date, April 17, 2017, I caused the foregoing

# *“*DEFENDANT’S MOTION IN LIMINE TO EXCLUDE EVIDENCE REGARDING

**UNSAMPLED LOCATIONS*”*** to be filed via the CM/ECF electronic filing system and, by virtue of the same, electronic notification will be served as follows:

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