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

BECKLEY DIVISION

JAMES SURRATT and ROSE SURRATT, et al.

Plaintiffs,

1. Civil Action No. 5:15-cv-15444

(Consolidated Nos. 5:15-cv-15444, 5:15-cv-15527, 5:15-cv-15534, 5:15- cv-15525, 5:15-cv-15533, 5:15-cv- 15532, 5:15-cv-15530, 5:15-cv-

15529, 5:15-cv-15528, and 5:15-cv-

15526)

PINNACLE MINING COMPANY, LLC;

A Delaware corporation, Defendant.

# PLAINTIFFS’ MOTION TO STRIKE TESTIMONY OF DAVID CLAYMAN, PH.D.

Comes now the Plaintiffs, by counsel, Roger A. Decanio and The Masters Law Firm, lc, and respectfully move the Court to exclude testimony of Defendant’s expert witness Dr. David Clayman. Dr. Clayman was deposed on April 15, 2016.

Dr. Clayman, according to his deposition will be called by the Defense to testify in the field of forensic psychology about the Plaintiffs. He is to assume the evidence put forth by the West Virginia Department of Environmental Protection, the West Virginia Board of Risk and Defendant’s experts are all correct, and that there is no mine caused subsidence under Woosley Road thereby eliminating any causation. By stipulation, Dr. Clayman testified he has taken the facts from Defendants and as of the day of his deposition, April 15, 2017, he has not reached an opinion. The social psychological analysis, according to Dr. Clayman consists of the following parameters:

* 1. Why are the plaintiffs, rigidly adhering to their beliefs that mine related subsidence caused their damages to their homes in the face of evidence to the contrary from the DEP, the West Virginia Board of Risk and Defendant’s experts all tell them otherwise?
	2. Why are the Plaintiffs clinging to their own narrative facts despite overwhelming evidence to the contrary?
	3. What is the emotional perspective of the Plaintiffs as it relates to their factually unfounded beliefs?
	4. What is the force that drives a belief bias among the Plaintiffs? Why are the plaintiffs so biased against mining industry? For example, Dr .Clayman referenced the deposition of Plaintiff, Mike Estep where he testified that he worked in a coal mine. While working, he was required to go through an area with acid mine drainage without any personal protective clothing. The water soaked through his boots and when he came home and he took his boots off, it peeled away a layer of skin. Dr. Clayman cites that as an example of the bias Plaintiffs have against the Defendants.
	5. Why have the Plaintiffs developed a group think? Why do they collectively reject the weight of the evidence against them when there are no supportive facts to substantiate their claims?
	6. Finally, Dr. Clayman testified that he wants to identify the leaders of the Plaintiffs and how they, whoever they happen to be, are in the center of a “concentric circle.” He wants to explore what actions cause ripples among the other Plaintiffs in their group and why follow they follow their lead?

The above is nonsensical, not expert opinion related to the field of psychology and is inadmissible, prejudicial and will not assist the trier of fact as to any issue in this case.

Dr. Clayman admits he came into this case knowing nothing of mine related subsidence or methane gas. Yet he is to explain what drives Plaintiffs’ “cognitive dissidence,” in light of Defendants’ positions. This is prejudicial on multiple grounds and should be excluded. The guiding principals from which this Court should follow are set out in *Franco v. Boston Sci. Corp.,* No. 2:12-CV-02748, 2016 WL 3248505, at \*1–2 (S.D.W. Va. June 13, 2016)

Under Rule 702 of the Federal Rules of Evidence, expert testimony is admissible if the expert is “qualified ... by knowledge, skill, experience, training, or education” and if his testimony is (1) helpful to the trier of fact in understanding the evidence or determining a fact in issue; (2) “based upon sufficient facts or data;” and (3) “the product of reliable principles and methods” that

(4) have been reliably applied “to the facts of the case.” Fed. R. Evid. 702. The Supreme Court has established a two-part test to govern the admissibility of expert testimony under Rule 702: the evidence is admitted if it “rests on a reliable foundation and is relevant.” *Daubert*, 509 U.S. at 597. The proponent of expert testimony does not have the burden to “prove” anything to the court. *Md. Cas. Co. v. Therm-O-Disk, Inc.*, 137 F.3d 780, 783 (4th Cir. 1998). He or she must, however, “come forward with evidence from which the court can determine that the proffered testimony is properly admissible.” *Id.*

The district court is the gatekeeper. “[E]xpert witnesses have the potential to be both powerful and quite misleading,” so the court must “ensure that any and all scientific testimony ... is not only relevant, but reliable.” *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 199 (4th Cir. 2001) (citing *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999); *Daubert*, 509 U.S. at 588, 595).

In carrying out this role, I “need not determine that the proffered expert testimony is irrefutable or certainly correct”—“[a]s with all other admissible evidence, expert testimony is subject to testing by ‘vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.’ ” *United States v. Moreland*, 437 F.3d 424, 431 (4th Cir. 2006) (quoting *Daubert*, 509 U.S. at 596); *see also Md. Cas. Co.*, 137 F.3d at 783 (noting that “[a]ll *Daubert* demands is that the trial judge make a

‘preliminary assessment’ of whether the proffered testimony is both reliable ... and helpful”).

*Daubert* mentions specific factors to guide the court in making the overall reliability determinations that apply to expert evidence. These factors include (1) whether the particular scientific theory “can be (and has been) tested;” (2) whether the theory “has been subjected to peer review and publication;” (3) the “known or potential rate of error;” (4) the “existence and maintenance of standards controlling the technique's operation;” and (5) whether the technique has achieved “general acceptance” in the relevant scientific or expert community. *United States v. Crisp*, 324 F.3d 261, 266 (4th Cir. 2003) (quoting *Daubert*, 509 U.S. at 593–94). Despite these factors, “[t]he inquiry to be undertaken by the district court is ‘a flexible one’ focusing on the ‘principles and methodology’ employed by the expert, not on the conclusions reached.” *Westberry*, 178 F.3d at 261 (quoting *Daubert*, 509 U.S. at 594–95); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999) (“[T]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony.” (citation omitted)); *Crisp*, 324 F.3d at 266 (noting “that testing of reliability should be flexible and that *Daubert*'s five factors neither necessarily nor exclusively apply to every expert”).

With respect to relevance, the second part of the analysis, *Daubert*

further explains:

Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful. The consideration has been aptly described by Judge Becker as one of fit. Fit is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes.... Rule 702's helpfulness standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.

*Daubert*, 509 U.S. at 591–92 (citations and quotation marks omitted).

*Franco v. Boston Sci. Corp.*

The Court should preclude Dr. Clayman from testifying because it fails the second test as described in *Franco.* The expert testimony of Dr. Clayman does not relate to any issue in this

case and therefore is not relevant. The questions that will be presented to this Court and a jury are as follows:

* + 1. Whether the mining operations of Pinnacle caused methane to migrate to James Surratt’s well and triggered an explosion, causing fear among this small Wyoming County community
		2. Whether the mining operations of Pinnacle caused mine related subsidence and damaged Plaintiffs homes.

The evidence in this case rests on questions of geology, mine engineering, and hydrogeology. The Plaintiffs’ unsupported bias toward the mining industry and/or their “cognitive dissidence” is totally irrelevant. Dr. Clayman’s testimony has nothing to do with soil mechanics whatsoever. By starting his social psychological analysis at the assumption that Defendant possesses the only geological scientific position is usurping the role of the trier of fact.

The proposed testimony of Dr. Clayman is further misleading and will not be helpful to a jury. Not only is his testimony not scientifically connected to this case but his parameters upon which he is to testify rests on the assumption that the Defendant’s positions are correct and to then explain why the Plaintiffs are so recalcitrant in failing to believe them. This will confuse the jury into thinking that one is emotionally and mentally flawed in rejecting Defendants’ argument, thereby leading the jury to believe any conclusions to the contrary is outside the bonds of normal people. His testimony is not scientifically pertinent to the inquiry at issue and therefore fails to meet the helpfulness standard required under Rule 702. *Franco.* Dr. Clayman’s testimony will also be prejudicial because the relevancy, if any, will be substantially outweighed

by unfair prejudice pursuant to Fed. R. Civ. P. Rule 403. The Court in *Franco* recognized that any testimony that confuses and misleads the jury may be excluded by Rule 403. *Id.*

Finally, and more importantly, Dr. Clayman testified he does not know what his ultimate opinions will be at trial. Plaintiffs are placed at a disadvantage at trial to counter an expert’s testimony who cannot even fully articulate his opinions. Under Rule 26, expert reports must contain ‘a complete statement of all opinions the witness will express and the basis and reasons for them.’ *Tyree v. Boston Sci. Corp.,* 54 F. Supp. 3d 501, 527 (S.D.W. Va. 2014), as amended (Oct. 29, 2014) citing Fed.R.Civ.P. 26(a)(2)(B)(i)). Dr. Clayman testified at his deposition that he had no opinions. He sat through three of Plaintiffs’ depositions and has not gotten a chance to read the rest or view their videotaped testimony. All of Plaintiffs’ and Defendant’s experts have testified about their reports and their opinions except Dr. Clayman. Since he has no opinions and cannot fully articulate them to the Plaintiffs at his deposition, he should be excluded under Rule 26.

For these reasons the plaintiffs request that the Court grant their motion and exclude Dr.

David Clayman’s testimony.

JAMES SURRATT and ROSE SURRATT, et al.

By Counsel

/s/ Roger A. Decanio Marvin W. Masters

West Virginia State Bar No. 2359 Roger A. Decanio

West Virginia State Bar No. 8146 The Masters Law Firm, lc

181 Summers Street

Charleston, West Virginia 25301

***Counsel for Plaintiff***

(304) 342-3106

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

**BECKLEY DIVISION**

**JAMES SURRATT and ROSE SURRATT, et al.**

**Plaintiffs,**

**v. Civil Action No. 5:15-cv-15444**

**(Consolidated Nos. 5:15-CV-15444, 5:15-cv-15527, 5:15-cv-15534, 5:15- cv-15525, 5:15-cv-15533, 5:15-cv- 15532, 5:15-cv-15530, 5:15-cv-15529,**

**5:15-cv-15528, and 5:15-cv-15526)**

# PINNACLE MINING COMPANY, LLC;

**A Delaware corporation,**

**Defendant.**

**CERTIFICATE OF SERVICE**

I, Roger A. Decanio, counsel for plaintiffs, do hereby certify that on the 17th day of April, 2017, I electronically filed “Plaintiffs’ Motion To Strike Testimony Of David Clayman, Ph.D.” and a Certificate reflecting service of same with the Clerk of the Court using CM/ECF system, which will send notification of such filing to the following CM/ECF participant:

John J. Meadows (W.Va. Bar No. 9442) Peter J. Raupp (W.Va. Bar No. 10546) Steptoe & Johnson PLLC

707 Virginia Street East 8th Floor Post Office Box 1588

Charleston, West Virginia 25326-1588

*Counsel for Defendant*

/s/ Roger A, Decanio, Esquire Marvin W. Masters

West Virginia State Bar No. 2359 Roger A. Decanio

West Virginia State Bar No. 8176 The Masters Law Firm lc

181 Summers Street

Charleston, West Virginia 25301 (304) 342-3106/(304) 342-3189 fax

RAD@themasterslawfirm.com

F:\5\986\MOL005.docx