# 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 PINNACLE MINING COMPANY LLC’S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SANCTIONS**

Comes now the Defendant, Pinnacle Mining Company, LLC (“Pinnacle” or “Defendant”), by counsel, and, pursuant to Fed. R. Civ. P. 37(c)(1), and states as follows in support of its motion to preclude Plaintiffs from offering Yoram Eckstein, Jack Spadaro, and Dean Dawson as expert witnesses in this matter.

# NECESSARY BACKGROUND

1. Plaintiffs served their Rule 26(a)(2) expert witness disclosures on February 22, 2017 (Docket Entry No. 118).[1](#_bookmark0)
2. Also on February 23, 2017, Defendant timely served Plaintiffs with its responses to Plaintiffs’ ***untimely*** third set of written discovery requests.[2](#_bookmark1)

1 Defendant moved to strike Plaintiffs’ disclosures as untimely. (Docket Entry No. 136). The Court decided that there appeared to be justified confusion over this disclosure deadline in light of other filings and the Amended Scheduling order and declined to strike Plaintiffs’ disclosures as untimely. (Docket Entry No. 146.) The Court, however, did not otherwise comment on the sufficiency of Plaintiffs’ disclosures, and directed the parties to cooperate on completing responsive and rebuttal expert report deadlines. (Id.) In response to the Court’s Order, the parties communicated by email on March 13, 2017, and agreed that Defendant would have until March 17, 2017 to serve its responsive expert disclosures, and that rebuttal reports from experts would be due by March 24, 2017. *See* **Exhibit A.**

2 *See* **Exhibit B**. Defendants received these requests by mail on January 25, 2017. The Amended Scheduling Order ordered that all written discovery be ***completed*** by February 21, 2017. (Docket Entry

1. As part of its responses to Plaintiffs’ third set of written discovery, Defendant provided a video taken at the Surratt water well. See Exhibit B.
2. On March 8, 2017, Defendants filed a motion to compel discovery from Plaintiffs. (Docket Entry No. 142.)
3. The Magistrate Judge held a conference on Defendant’s motion on March 17, 2017, and issued an order directing Plaintiffs to provide additional information to Defendant’s counsel by close of business on March 20, 2017. (Docket Entry Nos. 149-50.)
4. Plaintiffs failed to comply with the Magistrate Judge’s requirements and another conference was held with the Magistrate Judge on March 27, 2017.
5. During that conference, it was brought to the Magistrate Judge’s attention that Plaintiffs had failed to include required information in its expert disclosures, including lists of prior testimony, publications, and compensation.
6. The Magistrate Judge again ordered Plaintiffs to comply with both this Court’s orders and the rules of civil procedure. (Docket Entry Nos. 175-76.) In addition, an additional week was provided for the parties to attempt to complete deposition in this case, including numerous expert witness depositions. (Id.)
7. On March 28, 2017, Plaintiffs served amended expert disclosures that included, among other things, lists of testimony for Dean Dawson and Jack Spadaro. (Docket Entry No. 179; *see also* Spadaro List, attached hereto as **Exhibit C** and Dawson List, attached hereto as **Exhibit D**.)

No. 81), which meant that Plaintiffs were required to serve any written discovery requests more than 30 days in advance of that deadline to ensure that the responses were completed in compliance with the Court’s order, inasmuch as Defendant was allowed 30 days under the applicable discovery rule to respond. While Plaintiffs’ requests were untimely, Defendants nonetheless responded early.

1. Mr. Dawson was deposed on April 3, 2017, less than two weeks before dispositive motions deadline. During the course of his deposition, Mr. Dawson testified that he a number of his cases in which he had offered testimony as an expert had been left off of his testimony list.[3](#_bookmark2)
2. Mr. Spadaro was deposed on April 4, 2017.[4](#_bookmark3) During the course of his testimony, Mr. Spadaro admitted that he too has testified well over one hundred times in his role as a paid expert. Moreover, that each of every case in which he had been retained since 2005 was for plaintiffs, including a number of cases for these Plaintiffs’ attorneys. In fact, Mr. Spadaro earned over $700,000 in 2016 alone based on litigation work for plaintiffs, and no less than $350,000 per year while working for plaintiffs since 2011.
3. The Spadaro List that was produced to Defendant on March 28, 2017, indicated that it was for “completed” cases and was dated “as of April 2016.”
4. During questioning, Mr. Spadaro admitted that he had an updated list and produced from a folder a list of cases “as of February 2017.” *See* **Exhibit F**.
5. Mr. Spadaro testified that the term “completed” in his list only included cases that had settled or were done with the appeals process. He further admitted that he had testified dozens of times in the last three or four years but had failed to include that testimony in either his March 28, 2017 list or his spontaneous April 4, 2017, list.
6. Included among those missing cases was a matter that went to trial and the jury found for the defendant (the party that did not retain Mr. Spadaro) and at least one instance in

3 *See* Dawson Depo. Transcript Excerpts, attached hereto as **Exhibit E**, at pp. 43-50 (testifying that expert testimony related to cases in Mingo and Wyoming Counties were missing (*id*. at pp. 43-44), two cases from the Bucci firm in Charleston was missing (*id*. at pp. 45-46, 47-48), and a case for the Johnstone and Gabhart firm was missing. (*Id*. at pp. 47.))

4 The undersigned counsel has requested expedited transcripts for Mr. Spadaro. Relevant transcript pages will be provided as promptly as possible.

which an administrative panel found Mr. Spadaro’s testimony was “speculative and did not include any reasonable calculations or analysis.” See **Exhibit G**.

1. In fact, Mr. Spadaro admitted that of the dozen or so times he had testified at trial he had been discounted as a witness by the court at least three different times and that the only reason he knew of these instances is because Defendant’s counsel had made him aware of the decisions.
2. Mr. Spadaro also admitted that the information contained in his list of cases was not consistent or uniform. For example, certain entries omit dates and case numbers, and it is not clear from any of the entries whether the testimony was by way or deposition, trial, or both.
3. The next day, April 5, 2017, at 4:58 p.m., Plaintiffs’ submitted a “supplemental” expert report by Mr. Eckstein. This report contained new findings and opinions (but not in the form of rebuttal to any other opinions), – 41 days past this Court’s expert witness disclosure deadline and without any agreement for such a late disclosure. See **Exhibit H**.[5](#_bookmark4)
4. This “supplemental” report, in addition to new opinions about mining and methane, indicates that Mr. Eckstein is now preparing to testify about the growth of yellow-green algae based on his review of the water well video ***that had been in Plaintiffs’ possession for 41 days***.[6](#_bookmark5) Such anticipated testimony, which has never been mentioned in any expert report prior to

this, will necessitate the location of a microbiologist or similar scientist – something which had

5 Again, at no time did the parties stipulate or agree that Plaintiffs would be permitted to submit supplemental expert reports. See Exhibit B. Regardless, even if the agreement shown in Exhibit B applied to both sides (and it did not), Plaintiffs’ disclosure was still untimely, insofar as even the rebuttal report date that the parties stipulated to was for March 24, 2017 – 12 days before Plaintiffs submitted Mr. Eckstein’s non-rebuttal report.

6 Counsel for Defendant deposed Mr. Eckstein on April 10, 2017, the very day of the filing of this motion. During the course of that deposition, Mr. Eckstein testified that he had only been provided this video by Plaintiffs’ counsel a week ago. This means that Plaintiffs’ counsel held onto this video for five weeks before providing it to Mr. Eckstein!

never been contemplated as necessary to this case - to evaluate and rebut Mr. Eckstein’s untimely conclusions.

1. During his April 10, 2017, deposition, Mr. Eckstein also testified that (1) two recent publications were missing from the list that was provided to Defendant’s counsel, and (2) three to four instances of testimony, fewer than four years old, involving coal mining and/or

groundwater issues were missing from that same list and that those had been deleted from his

records because of a lack of space and purported electronic housekeeping needs.

# ANALYSIS

1. **Mr. Eckstein must be excluded as a witness based on his “supplemental” report**
2. Just days before Mr. Eckstein’s deposition, and ten days before the dispositive motion deadline in this case, Plaintiffs offered a “supplemental” expert report, based on information that Plaintiffs’ counsel possessed for 41 days (during most of which he sat on the information).[7](#_bookmark6) If this information was of such importance to his opinions, the well water video

7 This is clearly improper. *See, e.g*., *Luke v. Family Care & Urgent Med. Clinics*, 323 F. App'x 496, 500 (9th Cir. 2009) (“Nor does Rule 26(e) create a loophole through which a party who submits partial expert witness disclosures, or who wishes to revise her disclosures in light of her opponent's challenges to the analysis and conclusions therein, can add to them to her advantage after the court's deadline for doing so has passed. Rather, ‘[s]upplementation under the Rules means correcting inaccuracies, or filling the interstices of an incomplete report based on information that was not available at the time of the initial disclosure.’ *Keener v. United States,* 181 F.R.D. 639, 640 (D.Mont.1998).”); *Sierra Club v. Cedar Point Oil Co.,* 73 F.3d 546, 569 (5th Cir.1996) (the purpose of supplementing an expert report is not to extend the expert disclosure deadline). Certainly, Mr. Eckstein could have supplemented his report well in advance of April 5, 2017. *Jones Creek Inv'rs, LLC v. Columbia Cty., Georgia*, 2014 WL 12618171, at \*3 (S.D. Ga. Oct. 29, 2014) (“Far from granting a broad license to supplement expert reports at will in circumvention of court-imposed deadlines, Rule 26(e) authorizes supplementation of expert reports only when necessary to correct material errors or omissions caused by inadvertence or the receipt of new information that was unavailable at the time of the initial report.”); *Coles v. Perry,* 217 F.R.D. 1, 3 (D.D.C.2003) (“[[Rule] 26(e)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&amp;pubNum=1004365&amp;cite=USFRCPR26&amp;originatingDoc=I4a91ee41421f11ddb595a478de34cd72&amp;refType=LQ&amp;originationContext=document&amp;transitionType=DocumentItem&amp;contextData=(sc.DocLink)) does not grant a license to supplement a previously filed expert report because a party wants to. ”); *Akeva L.L.C. v. Mizuno Corp.,* 212 F.R.D.

306, 310 (M.D.N.C.2002) (“To construe supplementation to apply whenever a party wants to bolster or submit additional expert opinions would [wreak] havoc [on] docket control and amount to unlimited expert opinion preparation.”).

could have been requested by Plaintiffs prior to their untimely January 25, 2017 discovery requests and 14 months after they filed their lawsuits. Is Defendants now expected to somehow defend against this new information and conclusion? How? By spending the time and money to go out and retain yet another expert a week before dispositive motions are due? Simply put, and as this Court knows, Defendant is simply out of time to effectively deal with this untimely disclosure.

1. Rule 26(a)(2), scheduling orders, and Rule 37(c)(2) were designed to protect against untimely disclosures, unfair surprise, and trial by ambush and a party that has failed to provide information required by Rule 26(a) or 26(e) “is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or harmless.” Fed. R.Civ. P. 37(c)(1). Rule 37(c) “gives teeth” to the requirements of Rule 26(a) and Rule 26(e) and courts are given a particularly wide latitude to issue sanctions under Rule 37(c)(1). *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.,* 259 F.3d 1101, 1106 (9th Cir.2001) (holding district court did not abuse its discretion in excluding testimony of defendant's only damages expert as a sanction).
2. Generally, the exclusion penalty is “self-executing” and “automatic.” *Hoffman v.*

*Constr. Protective Servs., Inc.,* 541 F.3d 1175, 1180 (9th Cir.2008) (noting Rule 37(c)(1)'s exclusion sanction provides a strong inducement for disclosure of material and affirming district court's preclusion of undisclosed damages evidence).

1. These requirements are not trivial and the failure to comply with them is to be taken seriously. *Manneh v. Inverness Medical Innovations, Inc.,* 2010 WL 3212129 at \*2 (S.D.Cal.2010) (finding failure to disclose certain documents and witness not harmless where

opposing party was unable to prepare its defense). *See also*, *Tucker v. Ohtsu Tire Rubber Co.,* 49 F.Supp.2d 456, 460 (D.Md.1999) (“[A] party who delays supplementing Rule 26(a)(2)(B) expert disclosures until [the last minute], absent compelling reasons for doing so, should not expect the Court automatically to permit the expert to testify at trial about the newly disclosed information, for such action would condone ‘trial by ambush.’ ”)

1. The exclusion of an expert's testimony for failure to comply with the disclosure requirements is an available sanction even in the absence of a showing of bad faith or wilfulness. *Yeti,* 259 F.3d at 1106.
2. This is not the first time that Plaintiffs have withheld information and failed to comply with this Court’s orders and directives
3. Mr. Eckstein’s 41 day late disclosure based on information that Plaintiffs had possessed for those same 41 days was not justified, much less substantially justified. And, as noted, it can hardly be said at this point that it was harmless.
4. Mr. Eckstein should not be permitted to testify at trial[8](#_bookmark7) and this Court should promptly rule on this instant motion since Mr. Eckstein’s deposition is currently set for Monday, April 10, 2017.

# Messrs. Dawson, Spadaro, and Eckstein must be excluded because of their failure to comply with Rule 26(a)(2)(B)

1. Rule 26(a)(2)(B) demands that an expert witness “***must*** contain” certain

information. Included, in subsection (v) is a requirement that the witness ***must*** provide “a list of

all other cases in which, during the previous 4 years, the witness testified as an expert at trial or

8 Mr. Eckstein’s untimely “supplemental” report is grounds enough to, at the very least, preclude him from testifying about the substance of this report. However, as mentioned, *supra*, and addressed in greater detail, *infra*, Mr. Eckstein’s improper exclusion of publications and testimony is grounds to automatically exclude his testimony altogether.

by deposition.” The rule, in effect since 1993, does not permit an expert to omit certain testimony.

1. It is well recognized that “[t]he obvious purpose of providing the list of prior cases is to enable opposing counsel to obtain prior testimony of the expert.” *Coleman v. Dydula,*

190 F.R.D. 316, 318 (W.D.N.Y.1999). *See also, Hicks v. Dairyland Ins. Co*., 2009 WL 2243794, at \*7 (D. Nev. 2009) (“The court agrees with the rationale of the decisions which have held that the obvious purpose for requiring a list of prior testimony is to enable opposing counsel to obtain prior testimony, eliminate unfair surprise to the opposing party, and to conserve resources.”); *Bethel v. U.S., ex rel. Veterans Admin. Med. Ctr. of Denver, Colorado*, 2007 WL 1732791, at \*6 (D. Colo. 2007) (“one of the most important purposes of the testimonial history requirement of Rule 26(a)(2)(B) is to allow the opposition to obtain prior testimony of an expert and, potentially, to identify inconsistent positions taken in previous cases for use in cross- examination.”).

1. Courts also recognize that certain information regarding the case’s disclosed must be provided and that the burden cannot be shifted to the party being provided the list to decipher less than complete disclosures. See e.g., *Anderson v. Caldwell Cty. Sheriff's Office*, 2011 WL 2418509, at \*1 (W.D.N.C. 2011) (“list of cases must at a minimum include the name of the court or administrative agency where the expert previously testified, the names of the parties, the case number, and whether the testimony was provided at trial or at a deposition.”); *Hicks,* 2009 WL 2243794, at \*7 (“an expert witness may not shift the burden of researching prior testimony to the discovering party by providing sketchy or inaccurate information. . . . Case numbers are not provided for the vast majority of cases listed, and it appears that inaccurate or incomplete case numbers were provided in the supplemental disclosure.”).
2. As discussed, *supra*, “the sanction of exclusion is automatic and mandatory unless the sanctioned party can show that its violation of Rule 26(a) was either justified or harmless.” *Salgado v. General Motors Corp*., 150 F.3d 735, 742 (7 Cir. 1998) citing Finley v. Marathon Oil Co., 75 F.3d 1225, 1230 (7 Cir., 1996). See also, *Norris v. Murphy*, 2003 WL 21488640, at \*2 (D. Mass. June 26, 2003)
3. And it is well-understood that the failure to accurately provide a complete testimony list is rarely justified or harmless. This is especially true when dealing with well- seasoned experts. For example, in *Palmer v. Rhodes Mach*., 187 F.R.D. 653, 657 (N.D. Okla. 1999), the District Court stated that

A ‘one warning’ exception to the rule is not contemplated by the rule. Such an exception in this case would be to the disadvantage of this Plaintiff. The federal rule has been in existence since 1993. Assuming Dr. Framjee did not know of the requirements of the rule, certainly defense counsel knew of the rule prior to employing Dr. Framjee. A simple inquiry by defense counsel prior to his retention would have averted this situation. Defendant's counsel asserts that failure to provide the list is harmless, while arguing, at the same time, that Plaintiff's real motivation to obtain the list is to share it with other Plaintiffs' lawyers who have wanted this illusive list for years. The Court questions how the failure to provide such coveted information can be harmless. From the list of cases Plaintiff can determine the number of independent medical examinations performed by Dr. Framjee, the percentage of Dr. Framjee's work which is for plaintiffs or defendants, and what Dr. Framjee's yearly income is from such examinations. Plaintiff's counsel wishes to contact attorneys in other cases in which Dr. Framjee's deposition was taken. The Court concludes that the failure to disclose the information is not “harmless” as contemplated by the rules.

1. Similary, in *Carrillo v. B & J Andrews Enterprises, LLC*, 2013 WL 420401, at

\*3–5 (D. Nev. 2013), the District Court stated that

Based on his own prolific experience, the expert knows of the necessity of providing sufficient, accurate disclosures.

Nevertheless, the Rule 26(a)(2)(B) were so out of date that they failed to list the expert's approximately 40 most recent times he testified at trial or was deposed as an expert. Any surprise claimed by Plaintiff's counsel is disingenuous at best. Counsel is an experienced trial attorney and is aware of the disclosure requirements. Indeed, the expert has previously testified on several different occasions on behalf of Plaintiff's counsel's clients. . . .

The information was missing at the time of disclosure. This is not an instance where the expert testified or was deposed in a case subsequent to the initial disclosure. The approximately 40 cases that were not disclosed until after the expert's deposition, and one week before the close of discovery, were known at the time of the initial disclosure. Consequently, the Court finds that the disclosure of the supplemental information does not render the initial failure harmless. Plaintiff also argues that Defendant can show no prejudice from the insufficient disclosures and ‘provides absolutely no authority to support its position that a disclosure which contains a [curriculum vitae] and list of cases that is a couple of years old warrants the exclusion of an expert witness.’ The Court confesses itself somewhat surprised at Plaintiff's position that there is no authority for the position that exclusion is an appropriate sanction for failure to provide an accurate list of cases. A cursory review of cases just from the District of Nevada show several cases where this exact remedy has been applied. *See Oliva v. National City Corp.* 2010 WL 1949600 (D.Nev.) (striking experts for failure to provide accurate disclosures and supplemental information); *Hicks*

*v. Dairyland Ins. Co.,* 2009 WL 2243794 (D.Nev.) (striking expert for failure to provide accurate list of prior cases); *Elgas,* 179

F.R.D. 296 (striking expert for failure to provide a complete list of cases). The Court also rejects Plaintiff's argument that the disclosure failures are not prejudicial and agrees with the rationale set forth in *Hicks v. Dairyland Ins. Co.,* 2009 WL 2243794 (D.Nev.)

*See also Hicks,* 2009 WL 2243794, at \*7 (“It strains credulity to believe that an expert who has submitted a report indicating he has testified one hundred nine times in the last four years would not keep billing records and client files from which he could gather accurate case numbers.”).

1. Mr. Dawson and Mr. Spadaro have testified hundreds of times as expert witnesses, and Mr. Eckstein is no stranger to being an expert witness. They have been retained by Plaintiffs’ counsel’s firm before. They cannot claim ignorance of the rule as a justification to

failing to comply with the rule’s requirements. Nor can Plaintiffs claim that they failure to disclose such a significant number of cases is harmless.

1. For the foregoing reasons, Mr. Dawson, Mr. Spadaro, and Mr. Eckstein should not be permitted to testify at trial.

# CONCLUSION

The incomplete and untimely disclosures by Yoram Eckstein, Dean Dawson, and Jack Spadaro require that they be excluded as witnesses in this case. Their failures to comply with this Court’s orders and Rule 26 are not justified and are not harmless. There is no more time for discovery or to remedy these wrongs. If these men are permitted to testify, the only party that will be punished as a result of their failure to comply with these mandatory requirements is Defendant. That would turn Rules 26(a)(2) and 37(c)(1) on their heads.

# PINNACLE MINING COMPANY, LLC

By Counsel

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**Defendant.**

**CERTIFICATE OF SERVICE**

I hereby affirm that on this date, April 10, 2017, I caused the foregoing ***“*DEFENDANT PINNACLE MINING COMPANY LLC’S MEMORANDUM OF LAW IN SUPPORT OF**

**ITS MOTION FOR SANCTIONS*”*** to be served on counsel of record by electronic mail and by depositing a true and accurate copy of the same in the regular United States Mail, first class, postage prepaid, in an envelope addressed as follows:

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