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.

# PLAINTIFFS’ MOTION FOR SANCTIONS AGAINST PINNACLE MINING COMPANY, LLC

Come now the plaintiffs, by counsel, and move this Honorable Court for sanctions against defendant Pinnacle Mining Company, LLC, (hereinafter referred to as “Pinnacle,”) pursuant to Rule Fed. R. Civ. P. 37. In support of this response, plaintiffs state as follows:

Plaintiffs move for sanctions against Pinnacle pursuant to Fed.R.Civ.P. 37(c)(1) for failing to produce a video made of one of plaintiff’s wells which was and is relevant evidence that was in Defendant’s possession and control for over a year and a half. More specifically, this motion centers around Defendant’s failure to produce a video recording made on November 25, 2015, ten (10) days after the methane gas explosion at James Surratt’s father’s house on Woosley Road on November 15, 2015. The video recorder operator was P. Mitchem Cordono, Inc., and the video was made for Pinnacle Mining Company, LLC, as part of an investigation with the West Virginia Department of Environmental Protection as to the cause of the explosion. The video reveals that there are fresh fractures in the well which are migratory pathways for methane

to enter the well and cause the explosion. Plaintiffs submit that these fresh fractures were caused by the Defendant’s activities in the area.[1](#_bookmark0)

Also, defendant made evasive or false representations that defendant did not have the video. Pinnacle had a duty and responsibility to make initial disclosures pursuant to Fed. R. Civ.

P. 26(a)(1)(A)(ii). Rule 26 states in pertinent part as follows:

1. copy--or a description by category and location--of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

Fed. R. Civ. P. 26(a)(1)(A)(ii). Rule 37(a)(4) provides that “an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.” Fed.R.Civ.P. 37(a)(4).

Plaintiffs also made repeated discovery requests for the video, as more fully described in its previously filed pleadings with the Court (Doc. Id. 209), including failing to produce the video in response to Plaintiffs’ first set of interrogatories and requests for production of documents which were served on February 5, 2016, and to which responses were due by March 9, 2016. Plaintiffs assert said discovery included at least two requests broad enough to encompass the video. (*See* **EXHIBIT A** to Plaintiff’s Response in Opposition to Defendant Pinnacle Mining Company LLC’s Motion for Sanctions [Doc. Id. 209]).[2](#_bookmark1) Subsequently, Defendant also failed to produce it in response to actual requests for production of the video

1 The well had been in existence since before the 1960s without any incident whatsoever. The only geological change to the area surrounding this well was the construction of Pinnacle’s pre-mine panel in the summer and fall of 2014. The panel was constructed to prepare for a long-wall mining operation. By October, 2015, the long-wall mine was close to the Surratt house and two de-gas bore holes were constructed by Pinnacle several thousand feet behind the house to remove methane gas from the long-wall gob just prior to the explosion.

2 Plaintiffs submit that Request for Production No. 27 which sought various documents including photos and

videotapes relevant to the property of the Plaintiffs and No. 28 which sought all exhibits which Defendant intends to introduce at trial.

which were attached to Notices for Rule 30(b)(6) Depositions and which were issued on June 24, 2016 [Doc. No. 60], September 7, 2016 [Doc. No. 65], November 1, 2016 [Doc. No. 83],

November 10, 2016 [Doc. No. 87],[3](#_bookmark1); and December 14, 2016 [Doc. No. 91]. Despite these repeated requests, as well as other similar subsequent requests, the Defendant did not produce the video until February 23, 2017, two days after the Plaintiffs’ expert disclosures were due.

In addition to the above formal discovery requests, there were oral conversations about the video as well as an electronic mail exchange in September, 2016. (*See* **Exhibit A.)** Therein, plaintiffs’ counsel stated that “I have asked that your client agree to produce all videos, if not already provided in discovery, including but not limited to Mr. Surratt’s well.” This is but one of plaintiffs’ counsel repeated requests for the video which were made in discovery, in person and via electronic mail. Defense counsel responded: “I think I sent you all videos but we will check.” (*See* **Exhibit A**.)

The Plaintiffs began to question whether the down-hole video of the Surratt well even existed because no video of the well had been previously produced. Defense counsel never contacted plaintiffs’ counsel about the video until it was finally produced on February 23, 2017.

In addition, at the deposition of Gary Hartsog, an expert witness for defendant, Pinnacle, on April 13, 2017, (*See* **Exhibit B**, pp. 61, 62) he testified that he reviewed the video in question in December, 2015 or in January, 2016. Shortly after Mr. Hartsog looked at the video he reported his findings to defense counsel. Consequently, the video was made by the Defendant and provided to Mr. Hartsog. He and the defendant and then counsel were aware of this video on

3 The only Request for Production was for the following production: “Produce a copy of any and all downhole video-recording(s) made in any of the water wells of the plaintiffs including, but not limited to, the well(s) of James Surratt.”

December 25, 2015. This video contains scenes/photographs harmful to defendant’s case and helpful to plaintiffs’ case.

The video was withheld and not produced to plaintiffs until February 23, 2017, after the expert disclosure deadline on February 21, 2017. Plaintiffs’ expert, Dr. Yoram Eckstein’s report indicated that he would like to view the video, but as of the date of the report, he had not been given a copy. Dr. Eckstein finally saw the video and found its significance that supports plaintiffs’ contention that the methane gas subject in this case, came from Pinnacle’s coalbed seam. Defendant deposed Dr. Eckstien on April 10, 2017, and examined him on the “down hole” video. Pinnacle now has moved to exclude Dr. Eckstien and for sanctions based on plaintiffs’ expert not disclosing his use of the video! Based on defense counsel’s actions, their motion should be denied and instead sanctions should be ordered against defendant.

# Discussion of Law

United States Magistrate Judge James E. Seibert has explained:

[Federal Rule of Civil Procedure 37](http://www.westlaw.com/Link/Document/FullText?findType=L&amp;pubNum=1004365&amp;cite=USFRCPR37&amp;originatingDoc=Ie64533dd1c1611e39ac8bab74931929c&amp;refType=LQ&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.Search)) provides sanctions for conduct abusive of the discovery process. In particular, and the only one relevant to the instant conduct, subsection (c) provides that “if a party fails to provide information or identify a witness as required by Rule 26(a) or (e) ... the court, on motion and after giving an opportunity to be heard,” can impose sanctions ranging from reasonable expenses, including attorney’s fees, to rendering default judgment. [FED.R.CIV.P.](http://www.westlaw.com/Link/Document/FullText?findType=L&amp;pubNum=1004365&amp;cite=USFRCPR37&amp;originatingDoc=Ie64533dd1c1611e39ac8bab74931929c&amp;refType=LQ&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.Search)) [37(c)(1)(A)-(C).](http://www.westlaw.com/Link/Document/FullText?findType=L&amp;pubNum=1004365&amp;cite=USFRCPR37&amp;originatingDoc=Ie64533dd1c1611e39ac8bab74931929c&amp;refType=LQ&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.Search)) In turn, Rule 26(a) deals with required initial disclosures, and Rule 26(e) requires supplemental disclosure to any initial discovery *or* previous response to a discovery request “if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process.” [FED.R.CIV.P. 26(e)(1).](http://www.westlaw.com/Link/Document/FullText?findType=L&amp;pubNum=1004365&amp;cite=USFRCPR26&amp;originatingDoc=Ie64533dd1c1611e39ac8bab74931929c&amp;refType=LQ&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.Search)) Further, [Rule 26(g)](http://www.westlaw.com/Link/Document/FullText?findType=L&amp;pubNum=1004365&amp;cite=USFRCPR26&amp;originatingDoc=Ie64533dd1c1611e39ac8bab74931929c&amp;refType=LQ&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.Search)) requires attorneys to make a reasonable inquiry before answering or objecting to discovery requests. If the Court finds improper certification, it “must impose an appropriate sanction,” which “may include an order to pay the reasonable expenses, including attorney’s fees.” [FED.R.CIV.P. 26(g)(3).](http://www.westlaw.com/Link/Document/FullText?findType=L&amp;pubNum=1004365&amp;cite=USFRCPR26&amp;originatingDoc=Ie64533dd1c1611e39ac8bab74931929c&amp;refType=LQ&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.Search)) If a party “impedes, delays, or frustrates the fair examination” of a deponent during a deposition, the court “may impose an appropriate sanction,” including the reasonable expenses and attorney’s fees incurred. [FED.R.CIV.P. 30(d)(2).](http://www.westlaw.com/Link/Document/FullText?findType=L&amp;pubNum=1004365&amp;cite=USFRCPR30&amp;originatingDoc=Ie64533dd1c1611e39ac8bab74931929c&amp;refType=LQ&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.Search))

[Title 28 U.S.C. § 1927](http://www.westlaw.com/Link/Document/FullText?findType=L&amp;pubNum=1000546&amp;cite=28USCAS1927&amp;originatingDoc=Ie64533dd1c1611e39ac8bab74931929c&amp;refType=LQ&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.Search)) gives the court the power to impose sanctions on an attorney who “multiplies the proceedings in any case unreasonably and vexatiously,” and provides that any counsel found to engage in such conduct may be required to “satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred.” Finally, there is the Court’s inherent power to sanction. “Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates. These powers are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” [*Chambers v. NASCO, Inc.,* 501 U.S. 32, 43 (1991)](http://www.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1991102989&amp;pubNum=780&amp;originatingDoc=Ie64533dd1c1611e39ac8bab74931929c&amp;refType=RP&amp;fi=co_pp_sp_780_43&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.Search)&amp;co_pp_sp_780_43) (internal quotes and cites omitted). However, “[b]ecause of their very potency, inherent powers must be excercised with restraint and discretion,” with the primary aspect of their use being the “ability to fashion an appropriate sanction for conduct which abuses the judicial process.” [*Id.* at 44–45.](http://www.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1991102989&amp;originatingDoc=Ie64533dd1c1611e39ac8bab74931929c&amp;refType=RP&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.Search))

*Clay v. Consol Pennsylvania Coal Co., LLC*, Civil Action No. 5:12CV92, 2013 WL 4854746, at

\*7 (N.D.W.Va. Sept. 11, 2013) (Order adopting the Report & Recommendation). *See also In re Jemsek Clinic, P.A.*. 850 F.3d 150, 156-57 (4th Cir. 2017) (“Federal courts have the inherent power to sanction this type of conduct. The courts’ inherent powers exist to preserve the integrity of the judicial process and the resources needed to resolve disputes in an orderly and expeditious manner—two indispensable assets in any nation dedicated to the rule of law. *See* [*Chambers v.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1991102989&amp;pubNum=0000708&amp;originatingDoc=I8dd9bd9000d911e792ccd0392c3f85a3&amp;refType=RP&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.Search))[*NASCO, Inc.*, 501 U.S. 32, 43–46, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)](http://www.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1991102989&amp;pubNum=0000708&amp;originatingDoc=I8dd9bd9000d911e792ccd0392c3f85a3&amp;refType=RP&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.Search)); [*United States v.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1993231664&amp;pubNum=0000506&amp;originatingDoc=I8dd9bd9000d911e792ccd0392c3f85a3&amp;refType=RP&amp;fi=co_pp_sp_506_457&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.Search)&amp;co_pp_sp_506_457)

[*Shaffer Equip. Co.*, 11 F.3d 450, 457–59 (4th Cir. 1993)](http://www.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1993231664&amp;pubNum=0000506&amp;originatingDoc=I8dd9bd9000d911e792ccd0392c3f85a3&amp;refType=RP&amp;fi=co_pp_sp_506_457&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.Search)&amp;co_pp_sp_506_457). And it is well established that a federal court may wield its inherent sanctioning powers ‘when a party “shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order.” ’ [*Chambers*, 501 U.S. at](http://www.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1991102989&amp;pubNum=0000708&amp;originatingDoc=I8dd9bd9000d911e792ccd0392c3f85a3&amp;refType=RP&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.Search)) [46, 111 S.Ct. 2123](http://www.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1991102989&amp;pubNum=0000708&amp;originatingDoc=I8dd9bd9000d911e792ccd0392c3f85a3&amp;refType=RP&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.Search)) (quoting [*Hutto v. Finney*, 437 U.S. 678, 689 n.14, 98 S.Ct. 2565, 57 L.Ed.2d](http://www.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1978139499&amp;pubNum=0000708&amp;originatingDoc=I8dd9bd9000d911e792ccd0392c3f85a3&amp;refType=RP&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.Search))

[522 (1978)](http://www.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1978139499&amp;pubNum=0000708&amp;originatingDoc=I8dd9bd9000d911e792ccd0392c3f85a3&amp;refType=RP&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.Search))).”).

The Fourth Circuit has discussed the standard for excluding evidence under Fed.R.Civ.P. 37(c)(1) in *Southern States Rack and Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592 (2003). In *Southern States*, the Court explained:

In relevant part, [Rule 37(c)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&amp;pubNum=1004365&amp;cite=USFRCPR37&amp;originatingDoc=Ib667274189c011d98b51ba734bfc3c79&amp;refType=LQ&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.DocLink)) provides that “[a] party that without substantial justification fails to disclose information required by [Rule 26(a)](http://www.westlaw.com/Link/Document/FullText?findType=L&amp;pubNum=1004365&amp;cite=USFRCPR26&amp;originatingDoc=Ib667274189c011d98b51ba734bfc3c79&amp;refType=LQ&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.DocLink)) or [26(e)(1),](http://www.westlaw.com/Link/Document/FullText?findType=L&amp;pubNum=1004365&amp;cite=USFRCPR26&amp;originatingDoc=Ib667274189c011d98b51ba734bfc3c79&amp;refType=LQ&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.DocLink)) or to amend a prior response to discovery as required by [Rule 26(e)(2),](http://www.westlaw.com/Link/Document/FullText?findType=L&amp;pubNum=1004365&amp;cite=USFRCPR26&amp;originatingDoc=Ib667274189c011d98b51ba734bfc3c79&amp;refType=LQ&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.DocLink)) is not, unless such failure is harmless, permitted to use as evidence at a trial ... any witness or information not so disclosed.” Of importance here, [Rule 26(e)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&amp;pubNum=1004365&amp;cite=USFRCPR26&amp;originatingDoc=Ib667274189c011d98b51ba734bfc3c79&amp;refType=LQ&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.DocLink)) requires a party to supplement its experts’ reports and deposition testimony when the party learns of new information. If the party fails to do so, the court may exclude any new opinion offered by the expert. *See* [*Tenbarge v. Ames Taping*](http://www.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1999193487&amp;pubNum=506&amp;originatingDoc=Ib667274189c011d98b51ba734bfc3c79&amp;refType=RP&amp;fi=co_pp_sp_506_865&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.DocLink)&amp;co_pp_sp_506_865)[*Tool Sys., Inc.,* 190 F.3d 862, 865 (8th Cir.1999).](http://www.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1999193487&amp;pubNum=506&amp;originatingDoc=Ib667274189c011d98b51ba734bfc3c79&amp;refType=RP&amp;fi=co_pp_sp_506_865&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.DocLink)&amp;co_pp_sp_506_865)

The language of [Rule 37(c)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&amp;pubNum=1004365&amp;cite=USFRCPR37&amp;originatingDoc=Ib667274189c011d98b51ba734bfc3c79&amp;refType=LQ&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.DocLink)) provides two exceptions to the general rule excluding evidence that a party seeks to offer but has failed to properly disclose:

(1) when the failure to disclose is “substantial[ly] justifi[ed],” and (2) when the nondisclosure is “harmless.” Here, in concluding that Byrnes’ undisclosed third opinion should be excluded, the district court applied the following five-factor test for determining whether nondisclosure of evidence is substantially justified or harmless: “ ‘(1) the surprise to the party against whom the witness was to have testified; (2) the ability of the party to cure that surprise; (3) the extent to which allowing the testimony would disrupt the trial; (4) the explanation for the party’s failure to name the witness before trial; and (5) the importance of the testimony.’ ” [*Rambus,* 145 F.Supp.2d at 726](http://www.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=2001518894&amp;pubNum=4637&amp;originatingDoc=Ib667274189c011d98b51ba734bfc3c79&amp;refType=RP&amp;fi=co_pp_sp_4637_726&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.DocLink)&amp;co_pp_sp_4637_726) (quoting [*Burlington Ins. Co. v. Shipp,* 215 F.3d 1317, 2000 WL 620307, at \*4 (4th Cir. May 15, 2000)](http://www.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=2000351043&amp;pubNum=0000999&amp;originatingDoc=Ib667274189c011d98b51ba734bfc3c79&amp;refType=RP&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.DocLink)) (per curiam) (unpublished table decision)).

Southern States argues that the district court erred by excluding Byrnes’ third opinion in the absence of any finding that Southern States acted in bad faith. We find Southern States’ argument unavailing. [Rule 37(c)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&amp;pubNum=1004365&amp;cite=USFRCPR37&amp;originatingDoc=Ib667274189c011d98b51ba734bfc3c79&amp;refType=LQ&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.DocLink)) does not require a finding of bad faith or callous disregard of the discovery rules. While [Rule](http://www.westlaw.com/Link/Document/FullText?findType=L&amp;pubNum=1004365&amp;cite=USFRCPR37&amp;originatingDoc=Ib667274189c011d98b51ba734bfc3c79&amp;refType=LQ&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.DocLink)) [37(c)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&amp;pubNum=1004365&amp;cite=USFRCPR37&amp;originatingDoc=Ib667274189c011d98b51ba734bfc3c79&amp;refType=LQ&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.DocLink)) requires the nondisclosure to be “without substantial justification” and harmful, neither of these requirements suggests that the nondisclosing party must act in bad faith or otherwise culpably.

In addition, excluding evidence only when the nondisclosing party acted in bad faith would undermine the basic purpose of [Rule 37(c)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&amp;pubNum=1004365&amp;cite=USFRCPR37&amp;originatingDoc=Ib667274189c011d98b51ba734bfc3c79&amp;refType=LQ&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.DocLink)): preventing surprise and prejudice to the opposing party, *see* [*Thibeault v. Square D Co.,* 960](http://www.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1992065851&amp;pubNum=350&amp;originatingDoc=Ib667274189c011d98b51ba734bfc3c79&amp;refType=RP&amp;fi=co_pp_sp_350_246&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.DocLink)&amp;co_pp_sp_350_246) [F.2d 239, 246 (1st Cir.1992)](http://www.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1992065851&amp;pubNum=350&amp;originatingDoc=Ib667274189c011d98b51ba734bfc3c79&amp;refType=RP&amp;fi=co_pp_sp_350_246&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.DocLink)&amp;co_pp_sp_350_246) (noting that “the focus of a preclusion inquiry is mainly upon surprise and prejudice, including the opponent’s ability to palliate the ill effects stemming from the late disclosure”). And, requiring proof that the nondisclosing party acted in bad faith would improperly shift the burden of proof away from that party on the exclusion issue. *See* [*Wilson v. Bradlees of New*](http://www.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=2001420679&amp;pubNum=506&amp;originatingDoc=Ib667274189c011d98b51ba734bfc3c79&amp;refType=RP&amp;fi=co_pp_sp_506_21&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.DocLink)&amp;co_pp_sp_506_21)[*England, Inc.,* 250 F.3d 10, 21 (1st Cir.2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=2001420679&amp;pubNum=506&amp;originatingDoc=Ib667274189c011d98b51ba734bfc3c79&amp;refType=RP&amp;fi=co_pp_sp_506_21&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.DocLink)&amp;co_pp_sp_506_21) (“[I]t is the obligation of the party facing sanctions for belated disclosure to show that its failure to comply with [[Rule 37(c)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&amp;pubNum=1004365&amp;cite=USFRCPR37&amp;originatingDoc=Ib667274189c011d98b51ba734bfc3c79&amp;refType=LQ&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.DocLink)) ] was either justified or harmless ”); *accord* [*Finley v. Marathon*](http://www.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1996051376&amp;pubNum=506&amp;originatingDoc=Ib667274189c011d98b51ba734bfc3c79&amp;refType=RP&amp;fi=co_pp_sp_506_1230&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.DocLink)&amp;co_pp_sp_506_1230)

[*Oil Co.,* 75 F.3d 1225, 1230 (7th Cir.1996).](http://www.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1996051376&amp;pubNum=506&amp;originatingDoc=Ib667274189c011d98b51ba734bfc3c79&amp;refType=RP&amp;fi=co_pp_sp_506_1230&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.DocLink)&amp;co_pp_sp_506_1230)

Further, we believe that the five factors articulated in *Rambus* are helpful in determining whether a party’s nondisclosure of evidence was substantially justified or harmless. Four of these factors—surprise to the opposing party, ability to cure that surprise, disruption of the trial, and importance of the evidence— relate mainly to the harmlessness exception, while the remaining factor— explanation for the nondisclosure—relates primarily to the substantial justification exception. *We therefore hold that in exercising its broad discretion to determine whether a nondisclosure of evidence is substantially justified or harmless for purposes of a* [*Rule 37(c)(1)*](http://www.westlaw.com/Link/Document/FullText?findType=L&amp;pubNum=1004365&amp;cite=USFRCPR37&amp;originatingDoc=Ib667274189c011d98b51ba734bfc3c79&amp;refType=LQ&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.DocLink)) *exclusion analysis, a district court should be guided by the following factors: (1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the nondisclosing party’s explanation for its failure to disclose the evidence.*

*Southern States Rack and Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d at 595-97 (footnotes omitted; emphases added).[4](#_bookmark2) *See also Hoyle v. Freightliner, LLC*, 650 F.3d 321, 329-30 (4th Cir. 2011) (discussing five factor test set forth in *Southern States Rack and Fixture* for Rule 37(c)(1) sanctions); *Wilkins v. Montgomery*, 751 F.3d 214, 221-23 (4th Cir. 2014) (same).

In the present case, the Defendant lacks any substantial justification for not timely producing the video in discovery and the error was not harmless to the Plaintiffs. Such video contains relevant evidence which Plaintiffs believe is helpful to their claims and harmful to the Defendant’s defenses. Defendant’s failure to timely produce the video may very well be due to their knowledge that Plaintiffs’ contention is true, i.e., that the video helps Plaintiffs’ claims and hurts the Defendant’s defenses. Certainly, Plaintiffs’ experts could have benefited from having such video in advance of forming their opinions in this case. Moreover, in a twist of irony, Plaintiffs’ need to have one or more of their experts supplement their opinions due to the late

4 The Court also contrasted the exclusion of evidence under Fed.R.Civ.P. 37(c)(1) with sanctions issued under Fed.R.Civ.P. 37(b), the latter of which involves the consideration of different factors including, but not limited to, whether the non-complying party acted in bad faith and whether less drastic sanctions would have been effective. *Southern States Rack and Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d at 597-98.

production of the video has led, at least in part, to the Defendant filing its motion for sanctions; thereby, requiring Plaintiffs to have to respond to and defend such motion for sanctions.

Plaintiffs do not seek to exclude the video from evidence in this case because it is not only relevant but helpful to their claims. However, Rule 37(c) provides alternative remedies and states, in relevant part:

***(1) Failure to Disclose or Supplement.*** If a party fails to provide information or identify a witness as required by [Rule 26(a)](http://www.westlaw.com/Link/Document/FullText?findType=L&amp;pubNum=1000600&amp;cite=USFRCPR26&amp;originatingDoc=NA31111F0B96511D8983DF34406B5929B&amp;refType=RB&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.Folder%2Acid.4df8432dc1464b4da4e07b0a327738f8%2Aoc.UserEnteredCitation)&amp;co_pp_8b3b0000958a4) or [(e),](http://www.westlaw.com/Link/Document/FullText?findType=L&amp;pubNum=1000600&amp;cite=USFRCPR26&amp;originatingDoc=NA31111F0B96511D8983DF34406B5929B&amp;refType=RB&amp;originationContext=document&amp;vr=3.0&amp;rs=cblt1.0&amp;transitionType=DocumentItem&amp;contextData=(sc.Folder%2Acid.4df8432dc1464b4da4e07b0a327738f8%2Aoc.UserEnteredCitation)&amp;co_pp_7fdd00001ca15) the party 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 is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

1. may order payment of the reasonable expenses, including attorney’s fees, caused by the failure;
2. may inform the jury of the party’s failure; and
3. may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

Fed.R.Civ.P. 37(c)(1)(A)-(C).

Sanctions listed under Rule 37(b)(2)(A) include:

1. directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
2. prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
3. striking pleadings in whole or in part;
4. staying further proceedings until the order is obeyed;
5. dismissing the action or proceeding in whole or in part;
6. rendering a default judgment against the disobedient party[.] Fed.R.Civ.P. 37(b)(2)(A)(i)-(vi).

Plaintiffs respectfully request that Your Honorable Court award appropriate sanctions pursuant to such Rules. Should the Court grant Plaintiffs’ motion for sanctions, and award

appropriate sanctions, including reasonable attorney fees and costs and expenses. Plaintiffs will submit appropriate affidavits and any other relevant documents in accordance with the dictates of the Court.

# Conclusion

For all of the foregoing reasons, Plaintiffs respectfully request that Your Honorable Court grant Plaintiffs’ motion for sanctions and award appropriate sanctions against the Defendant and grant any other relief deemed appropriate or necessary by the Court.

JAMES SURRATT and ROSE SURRATT, et al.

By Counsel

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

**BECKLEY DIVISION**

**JAMES SURRATT and ROSE SURRATT**

**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 24th day of April, 2017, I electronically filed “**Plaintiff’s Motion for Sanctions Against Pinnacle Mining Company, LLC**” with the Clerk of the Court using CM/ECF system, which will send notification of such filing to the following CM/ECF participant:

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