# 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 INADMISSIBLE RULE 404(B) EVIDENCE**

Now comes the defendant, Pinnacle Mining Company, LLC (“Defendant”), by counsel, and moves *in limine* to preclude Plaintiffs from offering evidence or argument founded upon evidence inadmissible under Fed. R. Civ. P. 404(b). For cause, Defendant states that Plaintiffs, their counsel, and their witnesses have made frequent references to prior instances to support their assertions, falling squarely within the prohibition of the Rules, and it is anticipated Plaintiffs may attempt to offer similar evidence or argument at trial.

# BASIC BACGROUND

Plaintiffs and their witnesses or counsel have made various assertions throughout this litigation that the Pinnacle Mine, generally, is unsafe and/or has a propensity for creating conditions that would facilitate subsidence or methane migration. For instance, Plaintiffs’ expert Jack Spadaro states in his February 19, 2017 report, “Mine Safety and Health Administration [MSHA] records reveal that from January 2014 until November 2015 Pinnacle Mining Company had been placed on a special inspection schedule because of excessive frequency of methane releases and ventilation violations that could cause an explosion. . . . MSHA inspects the

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Pinnacle Mine every two to five days on a ‘spot inspection’ program.” *See* Spadaro Report, 2/19/2017, at 2, attached as Exhibit 1. This opinion improperly distorts a general regulatory requirement to imply that Pinnacle Mine has a propensity for creating dangerous conditions, or that Defendant is under close watch by regulators due to an assumed history of behavior. This is untrue. But it is also improper under Fed. R. Evid. 404(b).

Similar inappropriate themes emerged throughout discovery, all of which are improper evidence and argument at trial. *See, e.g.*, Ex. 2, D. Trader, Dep. Transcr. excerpts, 3/15/2017, at 42 (“But have you ever heard that Pocahontas 3 was notoriously a gassy mine?”); *id.* at 107 “I am, however, going to ask you were you ever aware that Pinnacle Mine had been cited for methane violations that can lead to explosions and then, therefore, were on spot inspections every two to five days for excess methane?”); *id.* at 109 (“[A]re you aware if MSHA had issued more violations than any other mine in the local area?”).

Finally, Plaintiffs testified during their depositions about a violation issued to Defendant in regard to the timing of pre-mining notifications. For example, Plaintiff Kristin Hatfield testified, “To the best of my knowledge, I think the mines was issued a – some kind of – they got in trouble for not sending them out when they were supposed to, to the best of my knowledge.” Ex. 3, K. Hatfield, Dep. Transcr. excerpts, 2/14/2017, at 61-62. Of course, whether or not Defendant provided sufficient advance notice to one of the residents is irrelevant to whether its activities have actually caused damage.

# ANALYSIS

Evidence regarding prior incidents or conditions at Pinnacle Mine are inadmissible under Fed. R. Evid. 404(b) and 403. “Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in

accordance with the character.” Fed. R. Evid. 404(b)(1). Arguments that Pinnacle Mine is on “spot inspection” status for assumed prior misconduct1 fall squarely within this prohibition on the use of evidence. Likewise, arguments that Pinnacle Mine has a propensity for methane liberation as a “gassy” mine are irrelevant.

The question is whether Pinnacle Mine liberated methane into a water well *in this case*, not whether it has liberated methane in the past into the face of the mine, underground, hundreds of feet below any strata where shallow water well aquifers in Woosley Hollow were drilled. Arguments about unspecified prior “methane violations” are particularly inappropriate, as they also cannot be discussed unless the “violation” document is admitted into evidence, so that its contents cannot be mischaracterized. *See* Fed. R. Evid. 1002 (best evidence rule).

Finally, Plaintiffs’ testimony regarding a violation with respect to pre-mining notifications is irrelevant. Whether Defendant served sufficient advance notice has no bearing on whether its activities ultimately caused any damage, and testimony or argument on this issue could serve only the improper purpose of attempting to establish a propensity for misconduct. Rule 404(b) calls for the exclusion of such evidence. Moreover, it would have a prejudicial effect, predisposing the trier of fact to believe that Defendant must have done “something wrong” in this case due past violations.

* 1. **CONCLUSION**

This Court should grant Defendant’s motion and hold that Plaintiffs cannot offer any evidence, testimonial or otherwise, or argument regarding inadmissible Rule 404(b) evidence.

1 Again, it is denied that “spot inspections” at a mine imply a history of violations. Yet, it is clear from Mr. Spadaro’s testimony and counsel’s arguments that records of regular inspections – which imply only that the mine, in fact, *is* safe – will be used for the improper purpose of implying that Defendant has a propensity for allowing unsafe conditions related to methane or subsidence.

# PINNACLE MINING COMPANY, LLC

By Counsel

*/s/ John J. Meadows*

John J. Meadows (WV State Bar ID No. 9442) Peter J. Raupp (WV State Bar ID No.

10564) 707 Virginia Street, East

**STEPTOE & JOHNSON PLLC** Chase Tower, Seventeenth Floor

**Of Counsel** Post Office Box 1588 Charleston, WV 25326-1588

Telephone: (304) 353-8154

Facsimile: (304) 353-8180 John.Meadows@steptoe-johnson.com Peter.Raupp@steptoe-johnson.com

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**CERTIFICATE OF SERVICE**

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

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

**INADMISSIBLE RULE 404(B) EVIDENCE*”*** to be filed via the CM/ECF electronic filing system and, by virtue of the same, electronic notification will be served as follows:

Roger A. Decanio, Esquire The Masters Law Firm 181 Summers Street

Charleston, WV 25301

 rad@themasterslawfirm.com

*Counsel for Plaintiffs*

 */s/ John J. Meadows*