# 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 PLAINTIFFS FROM TESTIFYING AS EXPERTS**

Now comes the defendant, Pinnacle Mining Company, LLC (“Defendant”), by counsel, and states as follows in support of its motion *in limine* to preclude Plaintiffs themselves from offering any expert testimony or opinions:

# BASIC BACGROUND

As this Court is well-aware from the voluminous briefing before it, this case involves Defendants’ allegedly negligent mining near Plaintiffs’ residences and the damages that Plaintiffs claim were caused to their properties by said mining. Plaintiffs, during the course of their depositions, testified that they believe that damages to their homes and surrounding lands were caused by Defendant’s mining operations and that methane from the mine and/or as a result of mining activity has been released on or near their properties. Not a single plaintiff has been disclosed as an expert witness (and none them could be qualified to offer expert testimony even if they had been disclosed) anticipated to testify as to such matters as the appropriateness of Defendant’s mining operations, whether Defendant’s mining operations had caused shifts in the

surface and sub-surface to cause subsidence, or whether methane could (or did) migrate from the sub-surface to the surface as a result of Defendant’s mining operations.

Despite their collective attempts to testify that the problems associated with their properties have been caused by Defendant’s mining operations, Plaintiffs have all conceded during the course of testimony that they are not engineers, geologists, hydrologists, or scientists of any kind.

# ANALYSIS

Federal Rule of Evidence 701 "permits lay witnesses to offer an opinion on the basis of relevant historical or narrative facts that the witness has perceived." *Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200, 203 (4th Cir. 2000). The rule does not, however,

"permit a lay witness to express an opinion as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness." *Id*.

The 2000 Amendments, and case law, make it clear that Fed. R. Evid. 701 prohibits witness testimony that is “based on scientific, technical, or other specialized knowledge” and that such testimony “is governed by the standards of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules." Fed. R. Evid. 701 (advisory committee's note). See also *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1214 (10th Cir. 2011) (“Rule 701 ‘does not permit a lay witness to express an opinion as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness.'’”) (quoting *Randolph v. Collectramatic, Inc*., 590 F.2d 844, 846 (10th Cir. 1979)); *Lifewise Master Funding v. Telebank*, 374 F.3d 917, 929 (10th Cir. 2004) (“When the subject matter of proffered testimony constitutes 'scientific, technical, or other specialized knowledge,' the witness must be qualified as an expert under Rule 702."); *Ingram v. ABC Supply Co*., 2010

U.S. Dist. LEXIS 3015 (D. S.C. 2010) (“Under Fed. R. Evid. 701, as amended in 2000, testimony ‘based on scientific, technical or other specialized knowledge,’ as those terms are used in Fed. R. Evid. 702, must be given by witnesses who qualify as experts under Fed. R. Evid. 702. ‘The advisory committee notes state that the purpose of the amendment is to prevent evasion of the . . . the disclosure requirements of Rule 26 by 'the simple expedient of proffering an expert in lay witness clothing.’ *Brandon v. Village of Maywood,* 179 F. Supp. 2d 847, 859 (N.D. Ill. 2001) (citing Fed. R. Evid. 701, advisory committee notes).”); *Cuyahoga Metro. Hous. Auth. v. United States*, 60 Fed. Cl. 481 (2004) (“But, assuming *arguendo* that his declaration could be viewed as meeting the personal knowledge requirement of Rules 701(a), the court believes that Mr. Morton, nonetheless, based his conclusions on ‘scientific, technical, or other specialized knowledge within the scope of Rule 702.’”)

In this case, any testimony regarding engineering, geological, or hydrological principles, whether related to the stability of the wrongfully mined area at issue, causation of alleged subsidence, methane migration, and issues related to water tables, or the appropriateness of any remedies necessary or proper as a result of the wrongful mining at issue in this case, requires expert testimony. That is testimony that none of the individual plaintiffs are qualified to offer. Even if these witnesses were somehow qualified to opine about engineering, geological, or hydrological principles (again, they are not at all), they were never disclosed as expert witnesses, as is unequivocally required by Fed. R. Civ. P. 26(a)(2). *See e.g*., *Campbell v. United States*, 470 Fed. Appx. 153 (4th Cir. 2012) (unpublished) (“we have previously held, and as the language of Rule 37(c)(1) evidences, the Federal Rules impose an ‘automatic sanction’ of exclusion of a party's expert witness for failure to adhere to the expert witness requirements set forth in Rule 26(a).”) (citation omitted); *Poulis-Minott v. Smith,* 388 F.3d 354, 358 (1st Cir. 2004) (stating that

directive of 26(a)(2)(A) is mandatory); *Hamburger v. State Farm Mut. Auto. Ins. Co.,* 361 F.3d 875, 882 (5th Cir. 2004) ("the expert designation requirement of rule 26(a)(2)(A) applies to all testifying experts"); *Musser v. Gentiva Health Servs.,* 356 F.3d 751, 756 (7th Cir. 2004) ("*all* witnesses who are to give expert testimony. . . must be disclosed under Rule 26(a)(2)(A)") (emphasis in original): *Lohnes v. Level 3 Communs., Inc.,* 272 F.3d 49, 59 (1st Cir. 2001) (explaining that Rule 26(a)(2)(A) "mandates that, in the course of pretrial discovery, 'a party shall disclose to other parties the identity of any person who may be used at trial to present [expert opinion evidence].'"); *Applera Corp. v. MJ Research Inc.,* 220 F.R.D. 13, 18-19 (D. Conn. 2004) ("'employee experts' . . . unambiguously fall within [Rule] 26(a)(2)(A)'s requirement that they be identified to [Defendant] as expert witnesses"). None of the five experts EG Oil seeks to exclude was disclosed in accordance with Rule 26(a)(2)(A).”)

* 1. **CONCLUSION**

This Court should grant Defendant’s motion and hold that Plaintiffs cannot themselves offer any expert testimony or opinions, include about their beliefs as to causation, insofar as they are not qualified to do and have not been identified as individuals who would be providing expert testimony.

Respectfully submitted,

# PINNACLE MINING COMPANY, LLC

By Counsel

*/s/ John J. Meadows*

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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 PLAINTIFFS FROM

**TESTIFYING AS EXPERTS*”*** 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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*/s/ John J. Meadows*