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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

Case No. 12-12900-scc

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In the Matter of:

PATRIOT COAL CORPORATION, et al.,

Debtors.

-----x

United States Bankruptcy Court  
One Bowling Green  
New York, New York

September 11, 2012  
1:33 PM

B E F O R E:  
HON. SHELLEY C. CHAPMAN  
U.S. BANKRUPTCY JUDGE

1 Debtors' Motion for Approval of Patriot's Assumption and  
2 Execution of Certain Agreements with Peabody [ECF No. 443].

3

4 Notice of Application of the Official Committee of Unsecured  
5 Creditors of Patriot Coal Corporation, et al., for an Order  
6 Authorizing and Approving the Employment and Retention of  
7 Kramer Levin Naftalis & Frankel LLP as Counsel, Nunc Pro Tunc  
8 to July 18, 2012 [ECF No. 364].

9

10 Motion of Certain Interested Shareholders for Entry of an Order  
11 Directing the Appointment of an Official Committee of Equity  
12 Security Holders Pursuant to Bankruptcy Code Section 1102(a)(2)  
13 [ECF No. 417].

14

15 Motion of the United Mine Workers of America Pursuant to  
16 28 U.S.C. Section 1412 and Rule 1014, Fed. R. Bankr. Proc., to  
17 Transfer the Case to the Southern District of West Virginia  
18 [ECF Nos. 116, 127].

19

20 Sureties' Motion to Transfer Jointly Administered Cases to  
21 Southern District of West Virginia [ECF No. 287].

22

23 Transcribed by: Clara Rubin

24 eScribers, LLC; 700 West 192nd Street, Suite #607

25 New York, NY 10040; (973)406-2250; operations@escribers.net

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operations@escribers.net | www.escribers.net

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A P P E A R A N C E S :

DAVIS POLK & WARDWELL LLP

Attorneys for Debtors

450 Lexington Avenue

New York, NY 10017

BY: MARSHALL S. HUEBNER, ESQ.

MICHELLE M. MCGREAL, ESQ.

ELLIOT MOSKOWITZ, ESQ.

DAMIAN S. SCHAIBLE, ESQ.

AMELIA T.R. STARR, ESQ.

U.S. DEPARTMENT OF JUSTICE

Office of the United States Trustee

33 Whitehall Street

21st Floor

New York, NY 10004

BY: ANDREA B. SCHWARTZ, ESQ.

SUSAN D. GOLDEN, ESQ.

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KRAMER LEVIN NAFTALIS & FRANKEL LLP  
Attorneys for Official Committee of Unsecured Creditors  
1177 Avenue of the Americas  
New York, NY 10036

BY: ADAM C. ROGOFF, ESQ.  
THOMAS MOERS MAYER, ESQ.  
P. BRADLEY O'NEILL, ESQ.

U.S. DEPARTMENT OF JUSTICE  
United States Attorney's Office  
86 Chambers Street  
New York, NY 10007

BY: NATALIE N. KUEHLER, AUSA

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ANDREWS KURTH LLP

Attorneys for Wilmington Trust Corp., Indenture Trustee  
for 8.25% Bonds, and Creditors' Committee Chair  
450 Lexington Avenue  
New York, NY 10017

BY: PAUL SILVERSTEIN, ESQ.

BROWN RUDNICK LLP

Attorneys for the Ad Hoc Consortium of Senior Noteholders  
Seven Times Square  
New York, NY 10036

BY: ROBERT J. STARK, ESQ.

BROWN RUDNICK LLP

Attorneys for the Ad Hoc Consortium of Senior Noteholders  
One Financial Center  
Boston, MA 02111

BY: ANGELO THALASSINOS, ESQ.

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BUCHANAN INGERSOLL & ROONEY PC

Attorneys for Caterpillar Inc., Caterpillar Financial  
Services Corporation and Caterpillar Global Mining LLC  
1290 Avenue of the Americas  
30th Floor  
New York, NY 10104

BY: KRISTI A. DAVIDSON, ESQ.

ELLENOFF GROSSMAN & SCHOLE LLP

Attorneys for Joy Technologies Inc. d/b/a Joy Mining  
Machinery, P&H Mining Equipment Inc., and Continental  
Crushing & Conveying Inc.  
150 East 42nd Street  
New York, NY 10017

BY: HOWARD J. BERMAN, ESQ.

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JONES DAY

Attorneys for Peabody Energy Corporation

901 Lakeside Avenue

Cleveland, OH 44114

BY: CARL E. BLACK, ESQ.

KENNEDY, JENNIK & MURRAY, P.C.

Attorneys for UMWA

113 University Place

New York, NY 10003

BY: SUSAN M. JENNIK, ESQ.

SERGE AMBROISE, ESQ.

MCKOOL SMITH

One Bryant Park

47th Floor

New York, NY 10036

BY: MICHAEL R. CARNEY, ESQ.

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MEYER, SUOZZI, ENGLISH & KLEIN, P.C.

Attorneys for American Electric Power and Monongahela  
Power

1350 Broadway  
New York, NY 10018

BY: THOMAS R. SLOME, ESQ.

MORGAN, LEWIS & BOCKIUS LLP

Attorneys for UMWA Health and Retirement Funds  
1701 Market Street  
Philadelphia, PA 19103

BY: JOHN C. GOODCHILD, III, ESQ.

TODTMAN, NACHAMIE, SPIZZ & JOHNS, P.C.

Attorneys for J.H. Fletcher & Co.  
425 Park Avenue  
New York, NY 10022

BY: JANICE B. GRUBIN, ESQ.



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STITES & HARBISON PLLC

Attorneys for Surety Movants

250 West Main Street

Suite 2300

Lexington, KY 40507

BY: W. BLAINE EARLY, III, ESQ.

WILLIAM T. GORTON, III, ESQ.

STITES & HARBISON PLLC

Attorneys for Surety Movants

400 West Market Street

Suite 1800

Louisville, KY 40202

BY: BRIAN H. MELDRUM, ESQ.

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WEIL GOTSHAL & MANGES LLP

Attorneys for Citibank and Barclays, First-Out DIP Agent

767 Fifth Avenue

New York, NY 10153

BY: MARCIA L. GOLDSTEIN, ESQ.

JOSEPH H. SMOLINSKY, ESQ.

WILLKIE FARR & GALLAGHER LLP

Attorneys for Bank of America N.A., Second-Out DIP Agent

787 Seventh Avenue

New York, NY 10019

BY: ANA M. ALFONSO, ESQ.

MARGOT B. SCHONHOLTZ, ESQ.

UNITED MINE WORKERS OF AMERICA

18354 Quantico Gateway Drive

Suite 200

Triangle, VA 22172

BY: GRANT CRANDALL, ESQ.

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DORSEY & WHITNEY LLP

Attorneys for US Bank

Suite 1500 50 South Sixth Street

Minneapolis, MN 55402

BY: KATHERINE A. CONSTANTINE, ESQ. (TELEPHONICALLY)

MOONEY, GREEN, SAINDON, MURPHY & WELCH, P.C.

Attorneys for UMWA 1974 Pension Trust, et al.

1920 L Street, N.W.

Suite 400

Washington, DC 20036

BY: PAUL A. GREEN, ESQ. (TELEPHONICALLY)

COMMONWEALTH OF KENTUCKY

Attorney for Department for Natural Resources

2 Hudson Hollow

Frankfort, KY 40601

BY: MICHAEL P. WOOD, ESQ. (TELEPHONICALLY)

**PATRIOT COAL CORPORATION, et al.**  
**P R O C E E D I N G S**

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THE COURT: Good afternoon, everyone. Please have a seat.

All right, Mr. Huebner, have a seat, please.

Before we begin today's hearing, there are a few remarks I would like to make that I do not intend to be part of the formal record in these proceedings. I would ask you all to reflect for a moment on the following: We are gathered here today in Lower Manhattan, joined by our fellow citizens in Charleston, West Virginia and St. Louis, Missouri, today, September 11th, 2012. September 11th, as many of you may know, is now officially known as Patriot Day, and it is thus altogether fitting that this case has come on for hearing today.

I would like us all to take a moment, before we begin, to reflect on what September 11th means for each of us and for all of us. All of us here in New York remember exactly where we were and what we were doing eleven years ago this morning. In fact, it was a beautiful -- spectacularly beautiful day, with the sky clear and blue, exactly the way it is today, with the slightest bit of a chill in the air. I personally will never forget the alarming sight of the first plane flying too low over the Hudson River, nor the incomprehensible sight, looking down Fifth Avenue, of the first tower crumbling. I'm sure all of you, wherever you live and work, remember exactly

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1 where you were when you first heard the horrific news of what  
2 had happened here and at the Pentagon and in Shanksville,  
3 Pennsylvania.

4 Many of us know someone who was lost that day or  
5 someone who rushed to Ground Zero, or someone who rushed to a  
6 blood bank or to a fire station, bringing food, anything to  
7 help lessen the pain we were all feeling. But here we are  
8 today eleven years later. Freedom Tower is rising high above  
9 the New York skyline, reaching for the heavens. One of the  
10 great things about working in this building is that I get to  
11 look out my window every day at the Statue of Liberty and see  
12 her standing here in all of her glory, and I think today she's  
13 smiling.

14 Perhaps the greatest tribute of all that we can pay to  
15 the meaning and memory of September 11th is to do exactly what  
16 you are all here to do today: to participate in our great  
17 democracy. The fact that we are all assembled here today, and  
18 in St. Louis and West Virginia, to conduct a respectful and  
19 impassioned dialogue about issues of such great importance, to  
20 discuss among other things the meaning of justice, is indeed a  
21 great tribute to our country, our system of government, and the  
22 enduring strength and resilience of America and Americans.

23 Thank you for listening.

24 All right, on the phone we have a number of parties  
25 whose presence I'd like to reflect. And for those of you

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1 standing here in the courtroom, there is an overflow room here  
2 that I understand has plenty of empty seats. So for your  
3 comfort, you're welcome to walk around to the overflow room;  
4 you won't miss anything.

5 On the phone we have -- and it looks like everybody is  
6 in listen-only mode -- Mr. Bardes from Silver Point Capital;  
7 Mr. Brass from Jefferies & Company; Mr. Bringewatt -- my  
8 apologies if I'm mispronouncing anyone's name -- of The Seaport  
9 Group; Mr. Carroll, FTI Consulting; Ms. Chan, Citibank;  
10 Ms. Chan, Aurelius Capital; Ms. Collins, Manier & Herod;  
11 Ms. Constantine, Dorsey & Whitney; Ms. Conte, Brown Rudnick;  
12 Mr. Diamond, DK Partners; Mr. Gibble -- it says "client"; I  
13 don't know who that is -- Ms. Gilman, Wolff & Samson, on behalf  
14 of insurer Lexon Insurance Company; Mr. Gold from Frost Brown  
15 Todd, LLC; Mr. Goldberg from Stutman, Treister; Mr. Green from  
16 Mooney, Green, Saindon, Murphy & someone, from -- it's cut off  
17 here -- from -- on behalf of the UMWA 1974 Pension Trust; Mr.  
18 Gruszka from -- on behalf of Chicago Fundamental Investment  
19 Partners, I believe; Mr. Klein from Cetus Capital; Mr. Levings  
20 from Bank of America; Mr. Miller, Taft, Stettinius & Hollister;  
21 Ms. Padilla, Bank of America; Mr. Poos, Citibank; Mr. Resnick  
22 from the Davis Polk firm; Mr. or Ms. Schiaffino from Global  
23 Hunter Securities, LLC; Mr. Schwartz from CitiGroup;  
24 Ms. Thompson from Barclays Capital; Mr. or Ms. Tiwana from CRT  
25 Capital Group; Mr. Valiska from Willkie Farr; Mr. Wood from the

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1 Commonwealth of Kentucky; and Mr. or Ms. Yerramalli from the  
2 Kramer Levin firm. And all these parties are on listen-only.

3 Is there anyone on the phone in live mode whose  
4 appearance I need to note?

5 All right, thank you.

6 The final housekeeping matter I have is I'd like to  
7 extend our thanks to the clerks of court in St. Louis and West  
8 Virginia for working with Vito Genna and the staff here at One  
9 Bowling Green, for making the arrangements for this video  
10 broadcast today; it took a fair amount of work, but I'm happy  
11 that we were able to do it. And I'd like to emphasize that no  
12 equipment was purchased in order to enable this to occur.  
13 We're simply making use of existing equipment that was in place  
14 in the various courthouses, so that there's no cost to the  
15 estate in conducting this hearing today in this way.

16 All right, I'm now ready to hear from the debtors.

17 MR. HUEBNER: Good afternoon, Your Honor.

18 THE COURT: Good afternoon, Mr. Huebner.

19 MR. HUEBNER: For the record, I am Marshall Huebner of  
20 Davis Polk & Wardwell, here on behalf of Patriot Coal Company  
21 and its ninety-eight debtor subsidiaries. Your Honor, there  
22 are three matters on the agenda. I had intended to offer up  
23 very brief and very radically less eloquent and poignant  
24 opening remarks on both of the topics; I will skip that  
25 entirely except to say that I think you have the thanks of all

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1 the parties in the room for the effort that this Court,  
2 Mr. Genna, and the two other courts took, as well, to make  
3 these proceedings accessible in several of the important  
4 jurisdictions where Patriot stakeholders are. We think it's a  
5 great example of the use of modern technology. We very much  
6 appreciate it.

7 Your Honor, I would also note that there are three  
8 matters on the agenda for today; all three reflect the close  
9 and continued work between the debtors and the creditors'  
10 committee; two are uncontested. Well, technically there's a  
11 fourth because there's a status conference, so there are  
12 actually four matters --

13 THE COURT: Right.

14 MR. HUEBNER: -- all together. What I would like to  
15 do, with the Court's pleasure, is allow my partner Amy Starr,  
16 who has worked day and night on items 1 and 3, to handle those.  
17 Kramer Levin, I assume, would rather handle their own retention  
18 papers than have me handle them. And then we will have a very  
19 brief introduction -- because we're not the movants -- on  
20 procedural matters on venue --

21 THE COURT: Okay.

22 MR. HUEBNER: -- and turn it over to the movants to go  
23 first.

24 THE COURT: All right. That sounds good. Thank you.

25 MR. HUEBNER: So item A.1. on the agenda is the



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1 Peabody transaction, and I yield the podium to Ms. Starr.

2 THE COURT: Okay.

3 MS. STARR: Your Honor, briefly, I'm appearing here --  
4 for the record, Amelia Starr from Davis Polk & Wardwell, on the  
5 Peabody transaction.

6 THE COURT: Okay.

7 MR. HUEBNER: This is an uncontested matter. There  
8 has been an agreement between Patriot and Peabody with respect  
9 to the assumption of several agreements and the termination and  
10 entry into a new coal agreement in the third instance. Copies  
11 of all of the agreements have been provided to Your Honor, as  
12 well as to the creditors' committee, and the DIP lenders, and  
13 the U.S. Trustee. We have worked very extensively with all the  
14 parties-in-interest, in particular the UCC, to reach an  
15 arrangement that has their -- that they are comfortable with  
16 and support. And we submitted a revised order to Your Honor  
17 yesterday reflecting the changes that had been made. There are  
18 no objections to the order.

19 Just for the purposes of completeness of the record,  
20 Your Honor, I would like to note that --

21 THE COURT: The revised order contains the language,  
22 what I'll call the allocation reservation of rights?

23 MS. STARR: That's correct, Your Honor.

24 THE COURT: Okay.

25 MS. STARR: It includes one section that just makes it

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1 clear that the only entities that are taking on obligations are  
2 indeed the parties to the agreements.

3 THE COURT: Right.

4 MS. STARR: And then there were some changes to the  
5 reservation-of-rights section just to make sure that it was  
6 quite clear that everybody's rights were being reserved in  
7 all --

8 THE COURT: Okay.

9 MR. HUEBNER: -- all respects.

10 THE COURT: All right. And who's here today on behalf  
11 of the creditors' committee, please? Didn't see you back  
12 there.

13 MR. ROGOFF: Good afternoon, Your Honor. Adam Rogoff,  
14 Kramer Levin, on behalf of the creditors' committee.

15 THE COURT: All right, and you've reviewed this,  
16 Mr. Rogoff, and the committee has no objection?

17 MR. ROGOFF: That is correct, Your Honor.

18 THE COURT: All right, thank you.

19 Does anyone else wish to be heard with respect to the  
20 debtors' request for an order approving Patriot's assumption  
21 and execution of certain agreements with Peabody?

22 MS. STARR: Your Honor, I'd like to add just one  
23 thing.

24 THE COURT: Sure. Go ahead.

25 MS. STARR: Yeah. For the purposes of completeness of

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1 the record, there were three payments made by Patriot to  
2 Peabody within the ninety-day preference period that will be  
3 impacted by the assumption of the DTA throughput agreement.  
4 Patriot has reviewed those payments carefully; they total about  
5 803,000 dollars. They were made in the ordinary course, and a  
6 careful review confirms that. And my understanding is there's  
7 no issue with the UCC.

8 THE COURT: All right. Mr. Rogoff, I'm asking you  
9 specifically again with respect to that last point. You were  
10 aware of those facts?

11 MR. ROGOFF: Those facts were disclosed to us, Your  
12 Honor, and in fact we discussed with debtors' counsel about  
13 putting that onto the record so that the Court and parties were  
14 aware that these payments had been made; they're being made  
15 under the three contracts that are proposed to be assumed, so  
16 obviously the assumption has an impact on those potential  
17 preference claims. The debtor has represented to us its belief  
18 that those payments were made in the ordinary course of  
19 business and, as a result, would not be subject to actual  
20 preference recovery. And based upon that representation made  
21 on the record and the full completeness of the record of the  
22 transaction, we don't have any objection.

23 THE COURT: All right.

24 All right, does anyone else wish to be heard with  
25 respect to this motion?

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1 All right, we'll enter the revised form of order that  
2 we receive later today.

3 MS. STARR: Thank you, Your Honor.

4 THE COURT: Thank you. Okay.

5 MR. ROGOFF: Good afternoon, Your Honor, again. Adam  
6 Rogoff, Kramer Levin, on behalf of my firm as proposed counsel  
7 for the creditors' committee. I know there's a busy calendar  
8 today, so I was not going to go through our motion papers. I  
9 would note, as Your Honor may recall, that I believe earlier  
10 this week an order was entered approving Cole Schotz as our --

11 THE COURT: Yes.

12 MR. ROGOFF: -- conflicts counsel. We spent time with  
13 the Office of the United States Trustee coordinating both our  
14 proposed retention as well as the, now, retention of Cole  
15 Schotz as our conflicts counsel. I don't know if Your Honor  
16 has any specific questions concerning my firm and the role that  
17 it is going to be having in these cases. I'm happy to answer  
18 any questions Your Honor may have.

19 THE COURT: All right. Let me hear from the  
20 U.S. Trustee. Ms. Schwartz, good afternoon.

21 MS. SCHWARTZ: Good afternoon, Your Honor. Andrea  
22 Schwartz for Tracy Hope Davis, the United States Trustee. Your  
23 Honor, sitting to my right is Susan Golden from my office, and  
24 also in the courtroom today is the United States Trustee, Tracy  
25 Hope Davis.

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1 Your Honor, as Your Honor has now seen me in a couple  
2 of hearings, I'm now taking a look at some of the retention  
3 applications. So as we do in typical practice, committee  
4 counsel wants us to make sure that, if we have any issues, we  
5 talk about them in advance of putting them before -- in advance  
6 of them putting them before the Court. So that's really where  
7 it's at. And --

8 THE COURT: I'm sorry, I'm not understanding what  
9 you're saying. Are you -- do you have a concern with respect  
10 to the Kramer Levin retention?

11 MS. SCHWARTZ: I know of no concern with respect --

12 MR. ROGOFF: Right.

13 MS. SCHWARTZ: -- to the Kramer Levin retention.

14 MS. SCHWARTZ: Yeah, if I can. I believe Ms. Schwartz  
15 is addressing something I was going to bring up in a moment,  
16 Your Honor, which concerns just the general status of the  
17 financial advisors for the committee. But for the record, we  
18 have worked closely with the Office of the United States  
19 Trustee with respect to any questions on Kramer Levin's  
20 retention. We provided certain clarifications. I provided a  
21 certain supplemental declaration. I'm not aware that there are  
22 any issues that the Office of the United States Trustee --

23 THE COURT: Okay.

24 MR. ROGOFF: -- has for Kramer Levin.

25 MS. SCHWARTZ: No objection, Your Honor.

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1 MR. ROGOFF: I'll --

2 THE COURT: All right.

3 MR. ROGOFF: I'll address in a moment what I believe  
4 Ms. Schwartz was hinting towards.

5 THE COURT: All right, but if there's nothing else on  
6 before me today, I'm not sure we do need to address that. Do  
7 we? Is there a reason we need to?

8 MR. ROGOFF: I had just wanted to provide Your Honor  
9 with a brief update. As Your Honor, I believe, recalls from a  
10 prior hearing, we had reported that the committee has selected  
11 Houlihan Lokey as its investment banker, a strategic investment  
12 bank in these cases, and Mesirow for discrete purposes to act  
13 as a financial advisor. We are working on those papers. We  
14 are very cognizant of some of the remarks that Your Honor made  
15 at the last hearing about identifying the basis and the  
16 coordination that both firms are going to be having.

17 What I had wanted to let Your Honor know is that we  
18 had originally had September 24th as a reserve date for those  
19 applications, through your chambers, but in discussions of the  
20 timing with the Office of the United States Trustee, we've  
21 agreed to put those matters over and not file our papers, so  
22 that it can be heard in connection with the October 11th  
23 hearing date.

24 I just wanted to report the status of the fact that we  
25 are working on these papers, that we are having discussions

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1 with the U.S. Trustee's office. Ultimately at some point when  
2 we file these papers, Your Honor, we will ask for nunc pro tunc  
3 back to the date of the engagement, but we thought it would be  
4 useful to continue dialoguing with the Office of the United  
5 States Trustee over any questions they may have on the proposed  
6 engagements, prior to filing any papers.

7 THE COURT: Okay. All right. I appreciate that.

8 All right, would anyone else like to be heard on the  
9 application for approval of the retention of Kramer Levin as  
10 counsel to the unsecured creditors' committee?

11 All right, we'll enter that later today. Thank you,  
12 Mr. Rogoff.

13 MR. ROGOFF: Thank you, Your Honor.

14 THE COURT: Mr. Huebner, I think you had said four  
15 matters. I'm only counting three.

16 MR. HUEBNER: Your Honor, it was the Peabody  
17 agreement --

18 THE COURT: Right.

19 MR. HUEBNER: -- Kramer Levin retention --

20 THE COURT: Right.

21 MR. HUEBNER: -- the status conference on the --

22 THE COURT: On the --

23 MR. HUEBNER: -- equityholders --

24 THE COURT: On the equityholders.

25 MS. STARR: Yes.

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1 MR. HUEBNER: And I think there's something about  
2 venue that we're going to be addressing after that.

3 THE COURT: Oh, you're counting the venue motion.

4 MR. HUEBNER: Exactly. A total of four, Your Honor.  
5 I apologize if I was confusing.

6 THE COURT: All right, I thought you meant four other  
7 matters. All right, so then let's move onto the status  
8 conference on the motion for the appointment of an equity  
9 committee.

10 MS. STARR: Hi. Amelia Starr again for the debtor  
11 Patriot. I don't know if counsel for the equityholders --  
12 counsel for the equityholders is here.

13 So you want to start?

14 MR. CARNEY: Good afternoon, Your Honor.

15 THE COURT: Good afternoon.

16 MR. CARNEY: I'm Michael Carney from McKool Smith, and  
17 I represent five Patriot Coal shareholders regarding their  
18 request that this Court appoint an equity committee. And I  
19 wanted to note that the interested shareholders -- we have  
20 filed the required 2019 statement on September 6th. And I just  
21 wanted to, for the record, present to the Court that the  
22 fundamental reason we filed the motion is because, despite the  
23 company's current liquidity problems, we believe that the  
24 company isn't insolvent, certainly --

25 THE COURT: All right, Mr. Carney --



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1 MR. CARNEY: Yes.

2 THE COURT: -- let me -- in the interest of efficiency  
3 here today, I have read the motion, so I'm aware of the basis  
4 for the motion. What I'd like to understand today is what the  
5 parties' intentions are with respect to completion of the  
6 briefing on the motion and the conduct of any discovery that  
7 you believe needs to be taken in advance of the hearing. We  
8 currently have you on the calendar for September 24th, which is  
9 a date that works for the Court if it continues to work for all  
10 the parties.

11 MR. CARNEY: Well, let me address that. We -- because  
12 we don't believe we can get or present to the Court a complete  
13 picture of -- a complete picture that the debtors are solvent  
14 or not hopelessly insolvent, we do plan to ask for additional  
15 discovery, which is primarily related to coal reserves, cost,  
16 pricing, certain agreements with suppliers, and other matters.  
17 And much of the information needed has not been made public,  
18 and we believe it should be easily available to be produced by  
19 the company and should have already been prepared.

20 So to that end, we are going to ask for limited  
21 discovery. And we have had discussions with debtors' counsel,  
22 and we are currently working with formatting a written  
23 discovery plan that we will submit, I hope next week, to  
24 counsel for the debtors so we can come to an agreed discovery  
25 schedule and briefing schedule. And to that end, we would ask

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1 that, and both the debtors and the interested shareholders  
2 believe that, there's no need to go forward on September 14th  
3 with their objection deadline or the hearing on the 24th. And  
4 we'd like to set a hearing on our motion, which we'll  
5 supplement for discovery we receive, on -- towards the end of  
6 October, with briefing to be done in conjunction with the  
7 Court's case management procedures entered.

8 THE COURT: Whose view is that that that's the  
9 appropriate timing?

10 MR. CARNEY: The timing was something we were to  
11 discuss with the debtors, but we did agree with the debtors  
12 that the September 14th deadline should be pushed as well as --

13 THE COURT: When you say "September 14th" --

14 MR. CARNEY: That was the objection deadline to the  
15 motion.

16 THE COURT: The objection deadline.

17 MR. CARNEY: And the hearing on the motion was set for  
18 the 24th, and we also believe that should be pushed out to  
19 sometime in October.

20 THE COURT: But who's the "we" in that statement?

21 MR. CARNEY: The interested shareholders. And we will  
22 work with the debtors to formulate a written discovery plan --

23 THE COURT: All right, well --

24 MR. CARNEY: -- which we plan to submit next week.

25 THE COURT: -- you're all here today, so I'd like to

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1 clarify what the schedule is going to be, today, and what the  
2 scope of discovery is going to be, today, because I understand  
3 the relevance of everything that you said, but, by its terms,  
4 it's exceedingly broad.

5 MR. CARNEY: Um-hum.

6 THE COURT: So while we're here and we have counsel  
7 for the debtors here and the committee as well, which I  
8 believe -- or I would assume is going to formulate a view on  
9 your motion, I'd like to get the schedule set.

10 MS. STARR: Yeah, Your Honor --

11 THE COURT: Go ahead.

12 MS. STARR: Amelia Starr. I think that that's -- what  
13 counsel said is not quite reflective of the discussion.

14 THE COURT: All right, what's --

15 MS. STARR: I did have a discussion with them. It's  
16 the position of the defendants that discovery shouldn't be  
17 necessary here. This should be something that can be briefed  
18 and decided based on the public record. We did -- I did say  
19 that -- and they described generally to me the types of  
20 discovery they're seeking. I have not seen any request, but I  
21 told them that in general our view was that that would not be  
22 appropriate, that that is geared towards doing some kind of  
23 valuation of the company and that type of approach is totally  
24 inappropriate at an equity committee stage. And indeed,  
25 courts -- Kodak, Williams, et cetera -- rejected similar

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1 requests.

2 I did state that we would not categorically preclude  
3 any discovery. Some limited discovery could be possible.

4 It's -- unfortunately, I can't react to a discovery request I  
5 haven't seen, so I'm not in a position to state exactly what  
6 our view is on the discovery that they may want to take.

7 So our request would be, Your Honor, if there's going  
8 to be discovery permitted, that the schedule be moved, because  
9 we shouldn't be required to respond to a motion that is going  
10 to be changed and altered if they get discovery.

11 So I think that, Your Honor, there may be some utility  
12 in allowing them -- either Your Honor's going to permit  
13 discovery, and I don't know whether Your Honor will permit  
14 discovery here --

15 THE COURT: Well, I can't -- I'm proceeding in a  
16 vacuum as well, because all I have is the very broad  
17 description that Mr. Carney just put on the record of what the  
18 discovery is. The usual procedure would be for them to  
19 propound the discovery, for you to have a meet-and-confer to  
20 the extent that you don't agree, and then to pick up the phone  
21 and call us if you didn't agree. I'm not sure that -- probably  
22 the right answer lies somewhere in between the two positions  
23 that you've taken today. But what I don't want to be the case  
24 is that this lingers. I think it should be acted on sooner  
25 rather than later.

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1 MS. STARR: Absolutely, Your Honor.

2 MR. CARNEY: Yes and, Your Honor, we're not going --  
3 we will not be seeking extensive or obtrusive discovery, and we  
4 do plan -- we're talking with our advisors now as to what kind  
5 of requests are appropriate. And we plan to submit to counsel  
6 for the debtors a discovery plan with scope and briefing  
7 schedule next week. The earlier the better.

8 THE COURT: All right. You do have a hearing date on  
9 October 11th currently scheduled, which is a full thirty days  
10 from today. So what I would suggest is that we pencil that  
11 date in for the moment, that you propound the discovery as soon  
12 as possible, and see how far you get on a production and  
13 agreement, and we can revisit the issue of whether or not the  
14 October 11th date remains reasonable.

15 MS. STARR: Thank you, Your Honor.

16 MR. CARNEY: Thank you, Your Honor.

17 THE COURT: All right?

18 Anyone else wish to be heard on this issue?

19 All right, thank you both. Keep my chambers informed  
20 as to your progress or lack thereof, okay?

21 MR. CARNEY: Certainly, Your Honor.

22 THE COURT: Thank you.

23 MS. STARR: Yes, Your Honor.

24 THE COURT: Thank you.

25 MR. HUEBNER: Your Honor, I think that that brings us

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1 to the sole contested matter on for today. As I am not the  
2 movant, I will do nothing other than address, at least for  
3 right now -- hopefully I'll have rather a bit to say later --  
4 procedural matters that all parties and all the courtrooms  
5 understand what was worked out among the primary parties in  
6 terms of evidence and the stipulation that was filed on the  
7 docket, and then I will simply sit down and allow the movants  
8 to go in whatever order they have agreed to among themselves.  
9 Your --

10 THE COURT: Or that I tell them to proceed in.

11 MR. HUEBNER: I apologize, Your Honor. Of course that  
12 goes without saying.

13 THE COURT: Thank you.

14 MR. HUEBNER: I apologize for not flagging that. In  
15 fact, I'll pretty much do anything the Court tells me to do. I  
16 can sit down now.

17 Your Honor, as the Court knows, there are multiple  
18 parties to this complex venue dispute. And we have actually  
19 worked very hard -- in particular, frankly, my colleague Elliot  
20 Moskowitz, to whom I think we all owe a debt of gratitude -- to  
21 be able to reach consensus on a stipulation of facts; this is  
22 because in this case, as I think you'll hear the parties say,  
23 there's not actually fundamental disagreement about the facts.  
24 There may be very virulent disagreement about what those facts  
25 signify, but in order to have to a much more streamlined

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1 hearing and avoid the need for, other than of course the  
2 Court's own questions and other things that may develop, the  
3 core parties to the matter agreed that in lieu of having the  
4 witnesses either go on by direct or be cross-examined, that we  
5 were actually all comfortable allowing each of the parties'  
6 declarations and each of the exhibits filed by the debtors, the  
7 United States Trustee, the official committee of unsecured  
8 creditors, the surety movants, and the United Mine Workers, to  
9 simply -- we all agree that that's all admissible and that,  
10 unless the Court has questions for which we specifically feel  
11 the need to cross-examine the witnesses, that there would in  
12 fact be no cross-examination of the witnesses and no need, at  
13 least from the parties' perspective -- obviously, as always,  
14 the Court's pleasure is different -- to put witnesses on the  
15 stand.

16 People worked --

17 THE COURT: But let me ask you a question,  
18 Mr. Huebner. And I've read the stipulation, which is pretty  
19 brief, and I understand that that's a supplement to the  
20 declarations and exhibits that have been put on the docket, but  
21 there's a burden of proof on this motion, correct?

22 MR. HUEBNER: There most certainly is, Your Honor.

23 THE COURT: All right. So that as we're proceeding,  
24 if we identify factual issues that aren't covered by the  
25 record, what happens?

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1 MR. HUEBNER: Well, Your Honor, now I need to blend my  
2 role as initial procedural spokesman to advocate. Our view, as  
3 you will hear later today or tomorrow when I speak, is that the  
4 burden of proof is unquestionably on the movants. We have  
5 stipulated that this is the factual record for this hearing.  
6 And our view, in fact, is going to be very passionately that  
7 they have utterly failed to meet their factual burden and that  
8 this is --

9 THE COURT: All right, but --

10 MR. HUEBNER: -- the record on which --

11 THE COURT: -- if I have questions for the debtor, the  
12 answers to which don't reside in the factual record, then what?

13 MR. HUEBNER: Well, Your Honor, we don't have the  
14 burden of proof, and so our view is we will answer, of course  
15 it goes without saying, any and every question the Court puts  
16 to us, but since the only burden is on the movants, factual  
17 deficiencies seem to be rather asymmetrical.

18 THE COURT: Well, I'm not -- I hear you, but that's  
19 not the point that I'm trying to make. In other words, if I  
20 have factual questions, the lawyers can't give me testimony,  
21 right?

22 MR. HUEBNER: That's correct, Your Honor. The  
23 stipulation, I believe, expressly provides, and we certainly  
24 worked it out with chambers and all the parties to the  
25 stipulation agreed, that any of the witnesses that were



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1 proffered along with the motions will get right up on the stand  
2 if the Court says, "I have questions." And in that specific  
3 event, if any of the other parties feel that cross-examination  
4 limited to the issues raised by the Court is appropriate,  
5 they're freed from their no-cross-examination promise. So  
6 exactly what Your Honor contemplates, which is, "I, the Court,  
7 may have questions and are these witnesses all here right now?"  
8 Ours certainly is, and was always going to be, and I assume  
9 that the same is true for the movants as well.

10 THE COURT: All right, well, why don't we wait and see  
11 what develops as we go. So just one more time can you list,  
12 Mr. Huebner, exactly what it is that the parties view as the  
13 record? I have the stipulation; I have a binder that we  
14 received today that consists of: the first affidavit of  
15 Mr. Schroeder; the PCX Enterprises petition; the Beaver Dam --  
16 Patriot Beaver Dam Holdings petition; the notice of filing a  
17 revised list of creditors; the 10-Q for the period ending June  
18 30th. In addition to that, there is a declaration that was  
19 filed by the UMWA, and I believe there was a direction --  
20 declaration filed by the sureties, and I believe that there  
21 were two declarations filed by the Office of the United States  
22 Trustee, which were largely for the purpose of introducing, I  
23 think, documentary evidence.

24 MR. HUEBNER: Yeah, I think that's right, Your Honor.

25 THE COURT: Is that -- that's the waterfront?

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1 MR. HUEBNER: Yeah. I mean, I'm guessing, from the  
2 easel, which is not ours, Your Honor, that people may have  
3 demonstratives or other things that are not actually evidence.  
4 And then certainly we will be mentioning some other things in  
5 the docket, of which we think the Court --

6 THE COURT: Okay.

7 MR. HUEBNER: -- can just take judicial notice, but  
8 there's no other evidence that I know of. But, again, I'm only  
9 one party. I believe that you've listed all the declarations.  
10 And there are associated exhibits to the declarations. I know  
11 nothing else, but, again, I'm only one party.

12 THE COURT: All right, well, you may -- you all may  
13 hear me today ask repeatedly for references to the record in  
14 support of what I hear -- what I'm assuming I'm going to hear  
15 in terms of factual allegations.

16 So, yes, good afternoon. Someone's standing.

17 MS. JENNIK: Good afternoon, Your Honor. Susan  
18 Jennik, Kennedy, Jennik & Murray, for the UMWA. In addition to  
19 the declaration of Mr. Buckner, the union had also submitted  
20 and attached exhibits to the actual --

21 THE COURT: Yes.

22 MS. JENNIK: -- motion papers.

23 THE COURT: Yes.

24 MS. JENNIK: And so it is our understanding that those  
25 exhibits are part of the record as well.

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1 MR. HUEBNER: Yeah, again, we'll have things to say  
2 about the exhibits. I think there was a generic coal industry  
3 brochure, but we have no problem with the union saying, "Here's  
4 a coal industry brochure," Your Honor.

5 THE COURT: Understood.

6 All right, thank you, Ms. Jennik.

7 All right.

8 MR. HUEBNER: So with that, Your Honor --

9 THE COURT: I'm ready when you are.

10 MR. HUEBNER: -- I -- the only -- I guess the last  
11 question is a mechanistic one, which is, should each party,  
12 Your Honor, move each of their own things or, by virtue of  
13 the --

14 THE COURT: I think that --

15 MR. HUEBNER: -- acknowledgement of the stip, are all  
16 the --

17 THE COURT: -- in light of the representations that  
18 you've made and in the absence of my hearing any objection from  
19 anybody in the room, those are all now part of the record.

20 MR. HUEBNER: Okay, thank you very much, Your Honor.

21 THE COURT: All right? Thank you.

22 MR. HUEBNER: So I will now sit down.

23 THE COURT: Okay. I think it's appropriate to hear  
24 from Ms. Jennik first on behalf of the UMWA. Let me do this.  
25 Ms. Jennik, stay there. But before we get started, there were

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1 approximately fifty parties who filed pleadings in connection  
2 with the various motions. So let's take a moment to go over  
3 who expects or desires to be heard. So we're going to hear  
4 from the UMWA. Who's here on behalf of the sureties today?

5 MR. MELDRUM: Good afternoon, Your Honor. Brian  
6 Meldrum from Stites & Harbison, representing the surety  
7 movants.

8 THE COURT: I'm sorry, give me your last name again.

9 MR. MELDRUM: It's Meldrum, M-E-L-D-R-U-M.

10 THE COURT: All right, thank you.

11 MR. MELDRUM: And if it pleases the Court, Judge, part  
12 of my presentation will actually be given by my partner  
13 Mr. Early, who's an environmental specialist.

14 THE COURT: All right, very well. Thank you.

15 All right, and then we have the Office of the United  
16 States Trustee. Ms. Schwartz?

17 MS. SCHWARTZ: Yes, Your Honor. I'll be speaking on  
18 behalf of the United States Trustee. And also, just so that  
19 Your Honor knows, we have identified some issues with respect  
20 to those joinders that were filed, which I'll address in my  
21 presentation.

22 THE COURT: When you're speaking of joinders, are you  
23 speaking of joinders to your motion and the UMWA's motion, or  
24 joinders to the debtors' position?

25 MS. SCHWARTZ: Joinders filed in opposition, Your

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1 Honor.

2 THE COURT: Thank you. Now, I also have joinders to  
3 the movants' motions. I have a joinder of American Electric  
4 Power. Is anyone here on behalf of AEP?

5 MR. SLOME: Yes, Your Honor. Thomas Slome, Meyer,  
6 Suozzi, English & Klein, for American Electric Power, and  
7 Monongahela Power as well.

8 THE COURT: All right, and do you wish to be heard?

9 MR. SLOME: Your Honor, it only depends if statements  
10 are made that are contrary to our view of the facts. And there  
11 was something in a committee objection that we think is  
12 incorrect. If it comes up --

13 THE COURT: All right.

14 MR. SLOME: -- we would want to address that.

15 THE COURT: Okay. All right, and is there someone  
16 here on behalf of the West Virginia Attorney General's Office?

17 Okay, and the Kentucky Department of Natural  
18 Resources?

19 MR. WOOD: Your Honor, Michael Wood on behalf of the  
20 Commonwealth of Kentucky, Natural Resources. We do not expect  
21 to need to say anything, unless there's a question or a  
22 clarification is needed.

23 THE COURT: All right, thank you, Mr. Wood.

24 MS. SCHWARTZ: Your Honor, just --

25 MR. WOOD: Thank you, Your Honor.

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1 MS. SCHWARTZ: -- just one clarification.

2 THE COURT: Ms. Schwartz, yes?

3 MS. SCHWARTZ: Just so that the record is clear. I'm  
4 speaking today on behalf of the United States Trustee and no  
5 other departments within the Department of Justice.

6 THE COURT: Absolutely. Yes, I would assume as much.  
7 Thank you.

8 All right, next there's a joinder of the benefit plans  
9 and the pension trust. Is someone here on behalf of those  
10 entities today?

11 MR. GOODCHILD: I am, Your Honor. John Goodchild here  
12 on behalf of the UMWA Health and Retirement Funds.

13 THE COURT: All right, what is your firm,  
14 Mr. Goodchild?

15 MR. GOODCHILD: Morgan, Lewis & Bockius.

16 THE COURT: Thank you. And do you intend to speak?

17 MR. GOODCHILD: Yes, Your Honor.

18 THE COURT: All right, thank you, Mr. Goodchild.

19 MR. HUEBNER: Your Honor, just one thing for the  
20 record.

21 THE COURT: Yes.

22 MR. HUEBNER: I normally would not have stood up at  
23 this point to say we'll have some things to say about some of  
24 their joinders as well. I think that's just part of argument.

25 THE COURT: I think you all are going to have a lot to

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1 say about --

2 MR. HUEBNER: Exactly.

3 THE COURT: -- everything that everybody else says.

4 So we're going to make that an additional stipulation, all  
5 right?

6 MR. HUEBNER: Thank you, Your Honor.

7 THE COURT: All right.

8 MR. HUEBNER: I didn't want to leave Ms. Schwartz  
9 feeling asymmetrical.

10 THE COURT: All right, I also see that there's a  
11 joinder of those interested shareholders who have asked for the  
12 appointment of an equity committee. Mr. Carney, do you intend  
13 to speak with respect to the venue motion?

14 MR. CARNEY: Not unless something is addressed that  
15 directly affects us.

16 THE COURT: All right. Very good. Thank you,  
17 Mr. Carney.

18 All right, now, we have the debtors, of course; we  
19 have the unsecured creditors' committee.

20 And sorry to be making you stand for this.

21 MS. JENNIK: That's okay.

22 THE COURT: We have the unsecured creditors'  
23 committee, and then we have what I would call unique objections  
24 that have been filed by the first out DIP agent, which was  
25 joined by the second out DIP agent. We have a joinder to the

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1 debtors' position that was filed by Wilmington Trust.

2 MR. SILVERSTEIN: Wilmington Trust --

3 THE COURT: Yes, I see -- Mr. Silverstein, you intend  
4 to speak?

5 MR. SILVERSTEIN: Briefly, yes, Your Honor. Thank  
6 you.

7 THE COURT: Thank you. And then we also have an  
8 objection that was filed by the Brown Rudnick firm on behalf of  
9 the ad hoc consortium of senior noteholders.

10 MR. STARK: Good afternoon, Your Honor. Robert --

11 THE COURT: Good afternoon.

12 MR. STARK: Robert Stark from Brown Rudnick. We do  
13 ask to speak, please.

14 THE COURT: All right, Mr. Stark, has your firm filed  
15 a 2019 statement?

16 MR. STARK: We did yesterday, Your Honor. It's docket  
17 number 544.

18 THE COURT: All right, do you have a copy of that?

19 MR. STARK: I do. I'd be happy --

20 THE COURT: Would you hand it up, please?

21 All right, and then we have what I'll call the thirty-  
22 two identical joinders that were filed to the debtors'  
23 position. Are any of the parties who filed one of those -- one  
24 or more of those joinders here in the courtroom? Yes,  
25 Ms. Grubin?



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1 MS. GRUBIN: Yes, Your Honor. We represent -- Janis  
2 Grubin from Todtman, Nachamie, Spizz & Johns, and we represent  
3 J.H. Fletcher & Company, a company about fifty miles from  
4 Charleston, West Virginia.

5 THE COURT: All right. All right, we'll get to the  
6 various joinders in due course. Thank you.

7 MS. GRUBIN: Thank you, Judge.

8 THE COURT: Thank you.

9 MS. GRUBIN: May I approach?

10 THE COURT: Can I take a look at your 2019 statement,  
11 please?

12 All right, did I leave anyone out? Anyone who's  
13 keeping score? Yes, ma'am.

14 MS. DAVIDSON: Yes. Kristi Davidson, Buchanan  
15 Ingersoll & Rooney, here for Caterpillar Financial, and  
16 Caterpillar --

17 THE COURT: You filed a joinder to the debtors'  
18 position --

19 MS. DAVIDSON: Correct.

20 THE COURT: -- correct?

21 MS. DAVIDSON: Yes.

22 THE COURT: All right, thank you.

23 All right. Go ahead, Ms. Jennik.

24 MS. JENNIK: Good afternoon, Your Honor. Susan Jennik  
25 of Kennedy, Jennik & Murray, representing United Mine Workers

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1 of America. I am here with my associate, Serge Ambroise. And  
2 also in the courtroom is the general counsel for the UMWA,  
3 Grant Crandall.

4 I would like to thank Your Honor for your remarks  
5 about September 11th and particularly how that has affected  
6 each of us in a very personal way.

7 I also extend the gratitude of the mine workers and  
8 retirees to Your Honor for providing the broadcast of this  
9 hearing to the courthouse in the Southern District of West  
10 Virginia. I understand that there are hundreds of mine workers  
11 and retirees --

12 THE COURT: Let me stop you. Let me stop you. It is  
13 my request and desire that you not tell me how many individuals  
14 there are at the courthouses watching this, unless you can give  
15 me some secondary assurance that it's an accurate headcount.  
16 And the reason I'm doing that is for the integrity of the  
17 record, because it's -- it would be put forth as a fact that  
18 someone might argue should have a bearing on the decision that  
19 comes as a result of this motion. So it may sound like I'm  
20 being nitpicky, but as a trial lawyer I'm sure you can  
21 appreciate where I'm coming from.

22 So if the parties at some point want to give me a  
23 headcount, and you all agree on the methodology of counting who  
24 is there, I'm happy to take that, but I really don't want to  
25 have any representations about how many folks are there. I'm

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1 very happy if all the courtrooms are full; then that means  
2 we've achieved the goal of providing access.

3 So I'm sorry to interrupt you.

4 MS. JENNIK: Certainly, Your Honor. So without  
5 mentioning numbers, the mine workers and retirees who are in  
6 Charleston, West Virginia, are very appreciative that they can  
7 observe this hearing as it is being conducted. However,  
8 observing a remote broadcast of the hearing is not the same as  
9 a case being heard in the Southern District of West Virginia, a  
10 venue which has a great interest in the coal mining industry.  
11 And with all due respect to Your Honor, it's not the same as a  
12 case being decided by judges who have extensive experience with  
13 that industry.

14 THE COURT: Well, let me stop you, and I do intend to  
15 give you an opportunity to make all your remarks, but I may  
16 stop you to ask you questions. Is that a dispositive fact, in  
17 your view on a venue motion, that a particular court has had a  
18 particular level of experience with a particular industry?

19 MS. JENNIK: I think it is one of many factors that  
20 the courts look at and consider. I don't know that any one  
21 particular fact is dispositive, except perhaps in this case the  
22 issue having to do with the creation of the New York  
23 corporations. But other than that, I think all of the facts  
24 and the factors that are considered by the courts on a motion  
25 to transfer venue are considered on a case-by-case basis and

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1 looked at with care in the discretion of the Court.

2 THE COURT: Because this district, of course, has  
3 conducted coal cases.

4 MS. JENNIK: There have been some, that is true. When  
5 you compare the numbers of coal cases in New York and West  
6 Virginia, it's pretty overwhelmingly in the favor of West  
7 Virginia. And I think the level of experience of those judges  
8 with those coal cases, and the very specialized industry  
9 terminology, environmental concerns that arise in the coal  
10 industry, would be a factor to be considered. And that, of  
11 course, is under the interest of justice standard and whether  
12 the Court would have a learning curve in dealing with the facts  
13 that will arise in this case.

14 THE COURT: But there's no particular learning curve,  
15 for example, different from a case involving large-scale  
16 chemical manufacturing, or the supply and generation and sale  
17 and distribution of electric power, or the aviation industry,  
18 or any number of industries, if you will, that require -- that  
19 have and require specialized knowledge, wouldn't you agree?

20 MS. JENNIK: Largely I would agree. I think one of  
21 the major exceptions to that is the environmental issues and,  
22 particularly also related to that, the safety issues for the  
23 coal miners. I think those issues are unique to the coal  
24 mining industry, and I will defer questions on that, I  
25 think --

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1 THE COURT: Okay.

2 MS. JENNIK: -- to the sureties who are much more  
3 familiar with that area than I am.

4 THE COURT: All right. Thank you.

5 MS. JENNIK: Just ten days after the petitions in this  
6 case were filed, the mine workers filed this motion to transfer  
7 venue to the Southern District of West Virginia where most of  
8 the mines and the employees are located.

9 THE COURT: Well, let me stop you on "most of the  
10 employees", and this is one of those facts that I think is very  
11 important. Could you walk me through the breakdown of the  
12 employees? Because many people have said many things about the  
13 numbers of the employees. So there's the issue of union versus  
14 nonunion employees, and there's the issue of geographically  
15 where those sets of employees work, and I'd like very much to  
16 know if you could fill out that map for me in a way that points  
17 me to the record.

18 MS. JENNIK: There are forty-two percent of the  
19 employees overall of the debtors who are represented by the  
20 union, the United Mine Workers' union, which is the only union  
21 that represents any employees --

22 THE COURT: Okay.

23 MS. JENNIK: -- in these cases. And I would say, as  
24 we said in our papers, the interests of the nonunion workers  
25 who will be affected by what the debtors may do in this case

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1 are not issues that will, for the most part, come before the  
2 Court, unless there may be an individual --

3 THE COURT: Well, and this is where I'm going to --

4 MS. JENNIK: -- discrimination case.

5 THE COURT: -- this is where I'm going to take you up  
6 on your observation about the learning curve in coal cases.  
7 And you're going to have to help me out on the differences  
8 between the mine workers' union and perhaps some other unions.  
9 But unfortunately, bankruptcy sometimes is a zero-sum game. I  
10 often say to parties if I had a printing press, and I could  
11 print money back there, it would be really great; but I don't.

12 So you're going to have to help me out and explain the  
13 relationship and the dynamic between the union and the nonunion  
14 employees, because it strikes me that those groups may have  
15 different needs and concerns. And to the extent that there are  
16 modifications, if you will, or adjustments that need to be made  
17 to the compensation arrangements with respect to each of those  
18 groups about what happens with respect to one may have an  
19 impact on what happens with respect to another, which is a  
20 constellation of facts that to me is further complicated, and  
21 it's something I'm going to get to, with respect to the issue  
22 of the many, many thousands of folks who have pensions.

23 So stay with me on the employees and explain to me why  
24 it is or what's the basis for your statement that it's all the  
25 same as far as the employees go.

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1 MS. JENNIK: I didn't mean to say it was all the same.  
2 What I mean to say is only the union employees have a  
3 collective bargaining agreement which governs their wages,  
4 hours, and --

5 THE COURT: Right.

6 MS. JENNIK: -- working conditions. The nonunion  
7 employees have no contracts.

8 THE COURT: Right.

9 MS. JENNIK: The union contracts can only be modified  
10 in a bankruptcy case by using the procedures of Section 1113.  
11 There is no requirement, under general common law or bankruptcy  
12 law, that there be any motion made before Your Honor if changes  
13 are made in the terms and conditions --

14 THE COURT: I agree with --

15 MS. JENNIK: -- of nonunion employees.

16 THE COURT: I agree with all of that, but why do the  
17 needs and concerns of the forty-two percent prevail over the  
18 interests of the fifty-eight percent?

19 MS. JENNIK: Because Congress has decided that when  
20 there is a collective bargaining agreement in place --

21 THE COURT: No, no, no, that's not my question. My  
22 question is -- we all agree that 1113 pertains only to the  
23 unions. Totally with you. I'm talking about the economics,  
24 and the dynamic, and the interests of the nonunion mine  
25 workers.

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1 MS. JENNIK: They certainly have an economic interest  
2 in what happens in this case.

3 THE COURT: Okay. What's the difference in --

4 MS. JENNIK: But my point --

5 THE COURT: What's the difference in the wages and  
6 benefits package that the union workers have versus the  
7 nonunion? Can you give me some idea?

8 MS. JENNIK: I do not know that, Your Honor.

9 THE COURT: See, this is the kind of fact that to me  
10 is important, because you're asking me to grant a motion that  
11 speaks for forty-two percent of the workers. There are fifty-  
12 eight percent as to whom I just have to guess what they want,  
13 and that's of great concern to me.

14 And the next question that I have is -- fill out the  
15 map geographically for me of the forty-two percent of the  
16 employees. Now, is that forty-two percent figure -- those are  
17 of the mine workers, employees?

18 MS. JENNIK: I understand that's the total employment  
19 of the employer.

20 THE COURT: I'm sorry, say that again? That --

21 MS. JENNIK: That the forty-two --

22 THE COURT: Two percent --

23 MS. JENNIK: -- is not only those who are working --

24 THE COURT: I see.

25 MS. JENNIK: -- in the mines, but that is the total



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1 employment. So it would include, and they can correct me if  
2 I'm wrong about this, but my reading of the --

3 THE COURT: Office workers --

4 MS. JENNIK: -- Schroeder declaration -- yes --

5 THE COURT: Okay.

6 MS. JENNIK: -- it would include those who work at the  
7 headquarters in St. Louis.

8 THE COURT: All right, now, fill out the map  
9 geographically, if you would, please.

10 MS. JENNIK: The union-represented employees work at  
11 mines in West Virginia, with the exception of one mine in  
12 Kentucky which is union. And I confess, I do not know at this  
13 moment the number of mines. There are people here who can tell  
14 me -- who can give me the answer to that.

15 THE COURT: Well, this is exactly what my concern was  
16 about the stipulation. And we'll just keep going, and I'll  
17 leave it to you to decide what you need to do about the fact  
18 that I don't have an accurate answer to these questions. Can  
19 you tell me -- can you describe for me some details of the  
20 wages and benefits that the union workers enjoy versus the  
21 nonunion workers; the hourly wage, the value of the benefits  
22 and the like?

23 MS. JENNIK: My understanding is that that varies from  
24 mine to mine --

25 THE COURT: Okay.

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1 MS. JENNIK: -- that there's not -- it is not uniform.

2 And as I told you before, I do not have the detail about the  
3 differences between union and nonunion.

4 THE COURT: Can you tell me -- and, again, helping me  
5 come up the learning curve -- in general terms, what's the  
6 relationship between the unionized workers on the one hand, and  
7 the nonunionized workers on the other hand? In qualitative  
8 terms, can you describe for me the relationship or lack  
9 thereof?

10 MS. JENNIK: Well, for the most part there would not  
11 be interaction in a workplace. The mines -- the mining complex  
12 is actually -- I mean --

13 THE COURT: I understand that. I'm talking about in  
14 an attitudinal sense. How do the groups view each other? Are  
15 they --

16 MS. JENNIK: I don't think I'm capable of giving you  
17 information about that. I can turn to my colleague  
18 Mr. Crandall, who's the general counsel for the mine workers,  
19 and I think he will --

20 THE COURT: Well, again, I don't want to sound like a  
21 broken record, although probably some of you don't even know  
22 what a record is anymore, but this highlights one of the issues  
23 that I have with the stipulation and the lack of a witness.  
24 Are each of the -- at each mine, are all of the workers either  
25 union or nonunion?

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1 MS. JENNIK: The workers who would be part of the  
2 bargaining unit -- in other words, anyone doing a function that  
3 is covered by the bargaining unit -- yes, they would either be  
4 a union or -- in each mine?

5 THE COURT: In each mine.

6 MS. JENNIK: In each mine, all of those people would  
7 either be union -- in another mine, they would all be nonunion.

8 THE COURT: All right.

9 MS. JENNIK: And so in that sense they do not interact  
10 at the workplace. And by the way, when we're saying "mine",  
11 we're really talking about mining complexes.

12 THE COURT: Sure. Okay. And is there anything in the  
13 papers that have been submitted that ties the amount of revenue  
14 generated by each of the mine complexes on a geographic basis?

15 MS. JENNIK: Not that I am aware of.

16 THE COURT: All right, and I understand from all the  
17 reading that I've done that there are some differences between  
18 the coalfields in West Virginia and the coalfields in the  
19 Illinois Basin. Are those factors that have a bearing on  
20 Patriot's business and/or future?

21 MS. JENNIK: First of all, there are only three mines  
22 that are in what's called the Illinois Basin, and those are all  
23 in Kentucky; they're not in any other state.

24 THE COURT: Okay.

25 MS. JENNIK: So in this situation there are mining

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1 complexes: three in Kentucky and nine in West Virginia.

2 THE COURT: Okay.

3 MS. JENNIK: And I don't know -- I have not seen that  
4 there is any economic difference between either the Kentucky or  
5 the West Virginia mines.

6 THE COURT: All right, I've interrupted you quite a  
7 lot. Why don't I let you get back to your remarks.

8 MS. JENNIK: I wanted to point out that of the  
9 objectors -- of those who have joined in this motion or  
10 supported the United States Trustee's motion, they include  
11 American Electric Power, which is a member of the creditors'  
12 committee, and also the UMWA 1974 Pension Trust, which is also  
13 a member of the creditors' committee.

14 THE COURT: But -- and I'm going to interrupt you  
15 again. But that's -- I have to comment on that, because the  
16 pension trust -- by way of shorthand -- did not join your  
17 motion; they joined the motion of the United States Trustee.

18 MS. JENNIK: That's right.

19 THE COURT: And I'm going to ask them later to explain  
20 that distinction, but, as you know, the United States Trustee  
21 moved on the basis of the interest of justice and did not  
22 specify an alternative venue.

23 MS. JENNIK: That's right, Your Honor. That is true.  
24 And the -- but the point that I am making is, three of the  
25 seven members of the creditors' committee have presented papers

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1 in this court supporting a transfer of venue. It is true the  
2 pension trust did not name West Virginia as their venue of  
3 choice.

4 THE COURT: But if I'm going to count heads, if you  
5 will, which I don't think the venue statute or the case law  
6 says I should do, but if I'm going to count heads, don't I also  
7 have to count all the other heads and all the dollars?

8 MS. JENNIK: Well, I was referring to the creditors'  
9 committee.

10 THE COURT: Okay.

11 MS. JENNIK: And the point that I would like you --  
12 that I'm making at this time is that there are seven members of  
13 the creditors' committee, yes: Four of them, who are now the  
14 official position of the creditors' committee, have objected;  
15 three of them are supporting a transfer of this case.

16 THE COURT: All right.

17 MS. JENNIK: In terms of the dollars that are to be --  
18 are one of the factors that the courts look at in the number of  
19 creditors or the kind of the creditors who are supporting a  
20 change or supporting the case staying here, the UMWA actually  
21 is the largest creditor by far. According to Mr. Schroeder's  
22 initial declaration, the liabilities that the debtors project  
23 exceed 1.3 billion dollars for the labor-related legacy  
24 liabilities. And although certainly we don't expect that that  
25 amount would end up being a claim here, as the case stands

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1 today, that is by far the largest liability for any party that  
2 the debtors have projected and far exceeds the other top fifty  
3 creditors in this case. Now, of course the UMWA was not listed  
4 as one of the top fifty creditors, but that amount, the 1.3  
5 billion dollars, is what the debtors project as the  
6 liabilities.

7 In the creditors' committee objection, they stated,  
8 "When considering the proximity of the creditors, courts also  
9 consider the amount of the claims held by creditors, with  
10 emphasis on the interests of the largest creditors." That's at  
11 page 7 of the creditors' committee objection. And they cited  
12 CORCO and quoted In re Suzanne de Lyon, stating, "As the  
13 creditors with the most to lose from this bankruptcy, they are  
14 the true interested parties in this case and their opinion as  
15 to what would be most convenient for them carries great  
16 weight." Here, it is the workers and the retirees who stand  
17 the most to lose in this case, and their opinion as to what is  
18 convenient for them should carry great weight.

19 Several objectors, including the debtors and the  
20 creditors' committee, argued that New York is more convenient  
21 to the mine workers' headquarters, which is near Washington,  
22 DC. But the UMWA is not a corporation with the goal of  
23 maximizing profits; rather, it is an organization composed of  
24 its members. In this case, the majority of the affected  
25 members are in West Virginia, and it is the opinion of the mine

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1 workers, the largest creditor in this case, that the Southern  
2 District of West Virginia is more convenient for them.

3 Here, of course, these debtors are engaged in the  
4 business of mining and producing coal. There are nine mining  
5 complexes in West Virginia, and three in Kentucky. After the  
6 debtors hired their bankruptcy attorneys, and less than six  
7 weeks before the petitions were filed, which was on July 9th,  
8 Patriot created two New York corporations: PCX Enterprises,  
9 Inc. was created on June 1st; Patriot Beaver Dam Holdings, LLC  
10 was created on June 14th. The debtors have no New York  
11 presence other than those two corporations. There are no  
12 employees, there are no offices, there are no business  
13 operations in New York.

14 The debtors stipulate that the New York corporations  
15 were created to ensure that the provisions of 1408(1) of the  
16 Bankruptcy Code were satisfied and for no other purpose, and  
17 that's at paragraph 3(d) of the stipulation. I would note,  
18 although probably dozens of lawyers reviewed this stipulation,  
19 it is not, of course, 1408 of the Bankruptcy Code; rather, it  
20 is 28 U.S.C. 1408(1).

21 THE COURT: No comment.

22 MS. JENNIK: I was one of those attorneys. I noticed  
23 it today.

24 In addition to 1408, under 28 U.S.C. 1412, the Court  
25 may transfer to another district in the interest of justice or

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1 for the convenience of the parties. The decision is within the  
2 Court's discretion, on a case-by-case consideration of  
3 convenience and fairness.

4 THE COURT: Can I ask you a hypothetical question?

5 MS. JENNIK: Sure.

6 THE COURT: If the case had been filed in St. Louis,  
7 would the union have made a motion to transfer venue?

8 If you can't answer or decline to answer, that's fine.

9 MS. JENNIK: I cannot answer --

10 THE COURT: And I'm not --

11 MS. JENNIK: -- that question.

12 THE COURT: And I'm not asking -- I'm never asking  
13 anyone to violate attorney-client privilege.

14 MS. JENNIK: I cannot answer that question.

15 THE COURT: All right.

16 MS. JENNIK: The burden is, of course, on the movants  
17 to show by a preponderance of the evidence that the case should  
18 be transferred to another district. The union submits that a  
19 preponderance of the evidence here establishes that this case  
20 should be transferred to the Southern District of West Virginia  
21 in the interest of justice and for the convenience of the  
22 parties.

23 Now, first addressing the interest of justice factors.  
24 The relevant factors set out in many cases, including Dunmore  
25 Homes, are to promote economic and efficient administration of



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1 the estate. That, I think, morphs into the convenience of the  
2 parties, and so I will defer discussion of that factor to the  
3 convenience of the parties.

4 THE COURT: All right, give me some guidance here. I  
5 want to be very clear on when you're telling me something that  
6 you think goes to the convenience of the parties, and when you  
7 are telling me something that goes to the interest of justice  
8 analysis, because the statute is in the disjunctive, so it's  
9 one or the other. If you think there's an interconnection, you  
10 should tell me that as well.

11 MS. JENNIK: I do think there's an interconnection  
12 between the convenience of the parties' proximity and some of  
13 those other factors, and the economic and efficient  
14 administration of the estate. I think the other interest of  
15 justice factors are standalone.

16 THE COURT: Okay. Go ahead. Keep going.

17 MS. JENNIK: All right, the others of course are  
18 judicial economy, whether either forum has an interest in  
19 having the controversy decided in its borders, and whether the  
20 plaintiff's choice should be disturbed. There are some other  
21 factors that I don't think are relevant here, and so I will not  
22 address them.

23 The judicial economy includes the concept of a  
24 judicial learning curve, and we talked about that some. Here,  
25 of course --

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1 THE COURT: Well, but your view of the learning curve  
2 is this Court's -- the concern with this Court's lack of  
3 familiarity with the coal industry.

4 MS. JENNIK: Well, there are two ways in which courts  
5 use the term "learning curve"; one is whether the Court, in  
6 this case, has learned so much about the facts of this case  
7 that it has reached that learning curve and another Court --

8 THE COURT: Right.

9 MS. JENNIK: -- would have a learning curve --

10 THE COURT: All right.

11 MS. JENNIK: -- in taking the case.

12 THE COURT: Okay.

13 MS. JENNIK: That is one example of the judicial  
14 economy learning curve. Here, the motion was filed very early;  
15 it was filed ten days after --

16 THE COURT: So it's not -- this is not a factor in  
17 this case?

18 MS. JENNIK: That's right.

19 THE COURT: All right.

20 MS. JENNIK: The other kind of learning curve that the  
21 courts refer to is whether there is some kind of special  
22 interest in the case that one court, as opposed to another  
23 court, would be more familiar with. Now, one example of that  
24 is in Enron I, where the Court's familiarity with cross-border  
25 insolvency cases supported retaining venue in New York.

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1 THE COURT: Well, let's stick with that one for a  
2 while, because yes, of course, this is a coal case. There is  
3 no company here without coal and, frankly, there's no company  
4 here without the workers. The company is the workers. And are  
5 you a bankruptcy attorney, Ms. Jennik?

6 MS. JENNIK: I'm primarily a labor attorney.

7 THE COURT: All right, well, I'm sure you've learned  
8 more about bankruptcy in the last couple of weeks and months  
9 than you possibly ever wanted to know. But --

10 MS. JENNIK: I'm sorry to say the last few years,  
11 but --

12 THE COURT: All right, well, we're happy to have you.  
13 The debtor is very much a -- supposed to be an honest  
14 broker, supposed to be discharging its fiduciary duty to all of  
15 its constituencies, right?

16 MS. JENNIK: Yes.

17 THE COURT: All right. And they're competing  
18 interests, those constituencies, just as we have here.

19 MS. JENNIK: Of course.

20 THE COURT: Correct?

21 MS. JENNIK: Yes.

22 THE COURT: Okay. And you've already cited me to  
23 1113, and then we have to talk about 1114. We have serious  
24 environmental obligations that are also at the table, so to  
25 speak, right?

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1 MS. JENNIK: Yes.

2 THE COURT: Okay.

3 MS. JENNIK: Yes.

4 THE COURT: It certainly is the case that courts in  
5 this district have substantial experience with that set of  
6 issues, wouldn't you agree?

7 MS. JENNIK: Certainly with 1113 and with 1114  
8 environmental issues, yes --

9 THE COURT: And --

10 MS. JENNIK: -- that's true.

11 THE COURT: And there have been rulings on all  
12 imaginable sides of those issues, haven't there?

13 MS. JENNIK: Yes, there have.

14 THE COURT: So that's a factor too in the so-called --  
15 with respect to the learning curve analysis, right?

16 MS. JENNIK: I would say those issues, where the Court  
17 in West Virginia and the Court in New York are equal, don't  
18 establish that there's a learning curve issue here.

19 THE COURT: So the learning curve issue is a jump ball  
20 in this case?

21 MS. JENNIK: Well, no, what I'm saying is, the issues  
22 that you're addressing -- the 1113, the 1114 environmental  
23 issues -- that, yes, the New York Court --

24 THE COURT: And the way in which they all work with  
25 one another and against one another and --

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1 MS. JENNIK: Yes. A New York Court is very familiar  
2 with those issues and, you know, entirely -- does not need a  
3 learning curve in order to understand those --

4 THE COURT: Okay.

5 MS. JENNIK: -- issues. What I am saying is, though,  
6 the learning curve that we're talking about is the coal  
7 industry itself, and it is not just the fact that there will  
8 be, or may be an 1113 motion in this case, but it is the fact  
9 that this industry is very specialized; particularly in the  
10 environmental damage that can be done in coal mining. And  
11 again, I would like to defer that to the sureties when they  
12 make their presentation.

13 THE COURT: All right. Go ahead.

14 MS. JENNIK: I did want to just add one thing, though.  
15 Because the case -- because this motion was filed so early, and  
16 we are very early in this case, it would not be disruptive, at  
17 this early point, to transfer the case, because it would not  
18 take the West Virginia Court much time to get up to speed on  
19 what has happened here.

20 THE COURT: Okay.

21 MS. JENNIK: Another factor under the interest of  
22 justice is that West Virginia has an interest in the case being  
23 decided in its borders. And this is a factor that was found to  
24 be significant in CORCO, BL of Miami, and Landmark Capital.

25 We've submitted information showing that coal mining

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1 is an important industry in West Virginia, accounting for more  
2 than twelve percent of West Virginia's gross state product. It  
3 is so important that West Virginia imposes a five percent  
4 severance tax on coal, which generated more than 400 million  
5 dollars for West Virginia in 2010.

6 Many of the communities depend on the coal industry,  
7 and particularly, the communities in West Virginia where these  
8 mining complexes are located. It is often the primary employer  
9 in that area.

10 THE COURT: But doesn't this get into, once again, the  
11 issue of the very sensitive and complex, conflicting views, and  
12 needs, and concerns that folks have? In other words, you have  
13 -- let's count all the parties who are at the table. You have  
14 the state and local regulators who are guardians of the  
15 environment; they have one set of concerns. You have federal  
16 regulators who have an overlapping, but maybe not a one hundred  
17 percent overlapping, set of concerns with the state regulators.  
18 You have the pension holders. You have the workers. You have  
19 the unsecured creditors; the so-called financial and/or trade  
20 creditors.

21 And to go back to my zero-sum analogy, to the extent  
22 that the company successfully convinces, within the law, the  
23 environmental regulators to be satisfied with less costly  
24 remediation, that value will inure to the benefit of the  
25 workers, because it reduces the company's debt load. And yet,

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1 I'd imagine that you have local conflicting views as to what  
2 the best thing is for a particular locale near a mining  
3 complex.

4 I was very taken with the statements that I read in  
5 your papers that the members of the negotiating committee are a  
6 fifth generation coal miner, and a fourth generation, and a  
7 third generation. Obviously, this is of tremendous importance.

8 But what I'm trying to understand is the notion that,  
9 because of the intense local interest, why it inexorably  
10 follows that a local court would be the best place to resolve  
11 this when I've identified so many different conflicting  
12 interests. Certainly, this Court doesn't have, as you point  
13 out, New York -- and I have some issues with the geographical  
14 aspect of this. We're a federal bankruptcy court. But be that  
15 as it may, but I have no -- this Court has no particular  
16 predisposition, if you will, towards those issues. So I'm just  
17 trying to understand what the inexorable connection is on this  
18 point, not the access to the courthouse point, but on this  
19 point; the traditional bankruptcy court function of sorting out  
20 difficult and competing economic interests to a limited pool,  
21 if you will, of money.

22 MS. JENNIK: These complex issues and the tensions  
23 that are created between the environmental groups, the state  
24 and federal regulators, the workers who want to be working as  
25 much as possible, the union, the nonunion workers, all of those

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1 issues coalesce in West Virginia. The citizens of West  
2 Virginia address and deal with those issues every day. There  
3 are political campaigns about those issues. There are --

4 THE COURT: That's not necessarily a good fact,  
5 though, is it? I mean, in terms of deciding what the  
6 appropriate venue is for this case. It's a fact, I have no  
7 doubt. And I have no doubt that there are citizens groups, and  
8 environmental groups, and very, very serious disagreements  
9 probably among -- between and among neighbors about some of  
10 these issues, but I hear you.

11 MS. JENNIK: Perhaps even in families.

12 THE COURT: And perhaps even in families. But all  
13 good families argue with each other, so that's a good thing.  
14 But again, I'm pushing you on this point. Why is it that it  
15 inexorably follows that the best place to resolve that issue is  
16 in a West Virginia Court, right in the middle of all that  
17 action?

18 MS. JENNIK: Because they deal with those issues every  
19 day. Because West Virginia -- the government, the citizens,  
20 the workers, the company, the employers, the regulators -- all  
21 of them deal with these issues every day, and somehow they  
22 manage to keep on going. They manage to deal with the  
23 litigation.

24 THE COURT: I'm not suggesting any -- I'm not  
25 suggesting any lack of ability or competence in any manner.



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1 I'm just talking about this concept of the interest of justice  
2 as it relates to or is driven by this notion that the best  
3 tribunal to decide those conflicting concerns necessarily would  
4 be a tribunal in the midst of all those conflicting concerns.

5 MS. JENNIK: Because of the intensity of the interest  
6 in this industry, because of the importance of coal mining in  
7 West Virginia, because of the passionate debates that take  
8 place in West Virginia, a court in another district, which  
9 doesn't understand the complexities, which doesn't understand,  
10 if you take this position on this issue, it has that effect on  
11 that issue. The judges in West Virginia are in that community.  
12 They know the coal mining industry; they grew up with it just  
13 as the mine workers' representatives did. And they understand  
14 the debate. They understand when one group is saying, "We need  
15 more regulation."

16 THE COURT: But isn't it true -- isn't it true that --  
17 and I learned this in judge school which I now teach, by the  
18 way, but that's another story -- we judges aren't supposed to  
19 read the newspaper about the controversies that are before us.  
20 We're not supposed to create and seek extra-record facts.

21 So why is it that any judge who would preside over  
22 this case -- as I said to you at the outset, I need you folks,  
23 I rely on you folks to create a record for me. And, therefore,  
24 with the greatest respect to my colleague in West Virginia whom  
25 I don't know, and I'm pretty new at this job, so I don't know

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1 many of my colleagues across the country, you would create a  
2 record and this Court would listen, or another court would  
3 listen, and we're all -- as someone said, we all went through  
4 the same vetting process and, presumably, we would all work  
5 very hard to understand what you all were telling us. So why  
6 is that -- why is that different? Why is that different here  
7 versus anywhere else?

8 MS. JENNIK: Well, one of the factors that other cases  
9 have said a court should consider, in a motion to transfer  
10 venue, is whether there is "a local interest in having  
11 localized controversies decided at home." And that is what  
12 we're talking about here. We're talking about the  
13 controversies --

14 THE COURT: The Supreme Court said that, didn't they?

15 MS. JENNIK: It was --

16 THE COURT: That was from the Supreme Court?

17 MS. JENNIK: -- Landmark -- that was from Landmark  
18 Capital. They may have gotten it from the Supreme Court, yes.

19 THE COURT: Okay.

20 MS. JENNIK: But that quote was from Landmark Capital.  
21 And I think that is particularly true in this case where there  
22 are complex, heated issues that are addressed regarding the  
23 coal mining industry. And while I am sure Your Honor can be  
24 fair and knowledgeable, there is -- other courts have said that  
25 is a consideration. That local interest should be decided in

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1 the home where those local interests arise.

2 The most significant factor to be considered in this  
3 case, in the interest of justice, is whether the debtors'  
4 choice should be disturbed because it is not in the interest of  
5 justice to allow debtors to manipulate the statute by creating  
6 New York corporations for the sole purpose of establishing  
7 venue.

8 Now, this is arising out of the Winn-Dixie case that  
9 was decided by Judge Drain. And I will defer to the U.S.  
10 Trustee for the bulk of that argument. She's made that  
11 argument in great detail.

12 I will only say the debtors argue that this Court may  
13 not exercise discretion to transfer the case using the same  
14 analysis as Judge Drain in Winn-Dixie, because such a result is  
15 barred by Capital Motors Courts v. LeBlanc Corp., the Second  
16 Circuit corporation (sic) decided in 1953. That nearly sixty-  
17 year-old case has not stopped judges from exercising their  
18 discretion to transfer cases in the interest of justice under  
19 1412.

20 And one distinguishing fact in Capital Motor Courts  
21 was that, quoting from the case, "The troubles of the business  
22 were not manufacturing, but financial." And that heart, and  
23 also body of that, was in New York. Now, here, we argue the  
24 troubles of this debtor are not financial, but are operating  
25 costs. When --

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1 THE COURT: Well, let's pause on that one, because  
2 someone observed, and you'll forgive me if I can't always  
3 remember who, someone observed that Mr. Schroeder, in his first  
4 day declaration, admitted that the purpose of this bankruptcy  
5 was to reduce the cost of taking the coal out of the ground,  
6 right?

7 MS. JENNIK: That was actually in the 341 meeting.

8 THE COURT: In the 341 meeting.

9 MS. JENNIK: Yes.

10 THE COURT: Thank you very much.

11 MS. JENNIK: Yes.

12 THE COURT: I'm just having a hard time understanding  
13 how you can say that this case is not financial. There are  
14 various methods of mining coal. There are, as I understand it,  
15 there are issues in the coal mining industry related to the  
16 controversial process known as mountaintop removal. But this  
17 is not about a company where they're going to come up with a  
18 business plan that involves a new business line. This is not  
19 the Internet where it's a bit of unchartered waters as to how  
20 much money you can make related to the growing use of social  
21 media. As you keep telling me, this is coal mining. And the  
22 problems that this debtor has relate to its liabilities.  
23 That's financial, is it not?

24 MS. JENNIK: That is financial, but what I meant by  
25 that and what I read the Second Circuit to mean by that is it's

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1 not -- the problem here is not that the debtors are not able to  
2 obtain credit. It's not that they need better financing. That  
3 is not the problem with these companies. The problem, as  
4 described by Mr. Schroeder, is that their costs are high. And  
5 the costs that they have identified are the environmental costs  
6 and the labor costs.

7 THE COURT: And they have embarked on this Chapter 11  
8 proceeding and, presumably, they need to comply with what the  
9 Code says. I mean, there are many things about the Bankruptcy  
10 Code, right? Among them is the absolute priority rule.  
11 There's 1113, there's 1114. And there's a very highly-  
12 developed area of the case law that deals with the overlap  
13 between the Bankruptcy Code and the environmental laws. I  
14 think that one or more parties have suggested that the debtor  
15 intends to try to escape, I think was the word, their  
16 environmental liabilities. But that actually can't happen.  
17 That actually can't happen. It has to happen in accordance  
18 with law.

19 Are you familiar with the Midlantic case by the United  
20 States Supreme Court?

21 MS. JENNIK: No, I am not.

22 THE COURT: Well, your partner undoubtedly is. The  
23 United States Supreme Court a long time ago said that a debtor  
24 cannot abandon assets, when it's in a bankruptcy, in  
25 contravention of state environmental statutes designed to

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1 protect the public health and safety. So it's not going to  
2 happen.

3 So, again, I'm just trying to understand in what sense  
4 this is more a coal case than it is a financial case, and in  
5 what sense this is more about the industry than the auto cases  
6 were about the industry. Automobiles aren't manufactured in  
7 New York as far as I know. We drive way too many of them.

8 MS. JENNIK: Actually, I think there were some auto  
9 plants in New York. But at any rate --

10 THE COURT: I don't think in the Southern District of  
11 New York, but be that as it may, I think there is still a fair  
12 amount of debate against -- about the success of the auto  
13 bailout, and I'm not going to touch that with a ten-foot pole.  
14 But go ahead.

15 MS. JENNIK: The point here is that the debtors and  
16 the objectors have argued that these cases need to be in New  
17 York, because this is where the bankers are. This is the  
18 financial center of the world.

19 THE COURT: Oh, okay, so now let's -- now we're going  
20 to -- now we're going to really talk. Is it part of your  
21 allegation that the debtors made their choice of venue in bad  
22 faith? Did the company act in bad faith in filing here?

23 MS. JENNIK: I am not aware of evidence that it was  
24 made in bad faith.

25 THE COURT: All right.

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1 MS. JENNIK: It was made -- the choice was made for  
2 the purpose of establishing venue in New York, which --

3 THE COURT: Okay.

4 MS. JENNIK: -- it did not have without the creation  
5 of those two corporations.

6 THE COURT: Okay. And then why is it that you believe  
7 that the debtors elected to do that? In other words, why did  
8 they select this venue? Is it because of the proximity to the  
9 bankers? Your word; not mine.

10 MS. JENNIK: I cannot speak for the debtors. I don't  
11 know the reasons that they decided to -- that venue was better  
12 for them in New York.

13 THE COURT: Well, what -- hold on.

14 MS. JENNIK: What I am addressing --

15 THE COURT: Hold on. I'm going to -- I'm sorry; I  
16 just have to interrupt you. You said the word "them." You  
17 said the word "them." Who is the "them"?

18 MS. JENNIK: The debtors.

19 THE COURT: Okay. When you say the debtors, who is  
20 that? Who do you mean? Who is the economic stakeholder behind  
21 that word?

22 MS. JENNIK: When I say the debtors, I'm referring to  
23 the ninety-nine entities that have filed petitions.

24 THE COURT: Okay. But, and this is a very important  
25 point, the debtors owe a fiduciary duty to all of their

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1 stakeholders to maximize the value of the estate. That's  
2 Bankruptcy 101. If you don't know anything else, you know  
3 that. You sound like you know --

4 MS. JENNIK: I do know that.

5 THE COURT: You do know that, right? So the debtors  
6 had a fiduciary duty to decide what was in the best interest of  
7 all of its stakeholders. And one thing that I'm going to talk  
8 about extensively later, when they stand up, is what their  
9 analysis was in making this decision. If the debtors concluded  
10 that this was the best venue to enable them, and I'll use the  
11 very extreme words "to save the company," meaning save the  
12 jobs, can they be faulted for making that choice?

13 I'm struggling with who the debtors are for this  
14 purpose, because the debtors, in my view, and I'm not giving an  
15 opinion about the equity committee's motion, Mr. Carney. I'm  
16 not making a finding about how much value there is. But the  
17 debtors, for this purpose, are the sum of their stakeholders;  
18 all of the creditors. So when you say they thought it was best  
19 for them, there's implied in that, that it was better for them  
20 versus your clients, and that's the connection I'm just not  
21 getting.

22 MS. JENNIK: I was actually using the term more  
23 generically. And what I was addressing was the arguments that  
24 were made by the debtors and the creditors' committee, and some  
25 of the other objectors, that it is important for these cases to



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1 stay in New York because of the location of the financiers, the  
2 bankers; because New York is the financial capital of the  
3 world. And many of the cases actually also address that issue  
4 and make that assumption, that it is important for bankruptcy  
5 cases to be here because this is where the financiers are.

6 THE COURT: What cases say that? Who says that?

7 MS. JENNIK: Enron, for one.

8 THE COURT: But the financial institutions can have  
9 meetings anywhere they want, right? It doesn't matter, does  
10 it? If the case --

11 MS. JENNIK: It does not matter.

12 THE COURT: It does not matter.

13 MS. JENNIK: In fact, negotiation of the finances in  
14 this case, of the DIP loan in this case, I am not sure where  
15 they occurred, but, undoubtedly, there were e-mails.  
16 Undoubtedly, there were telephone calls. The debtors' officers  
17 are primarily located in Missouri. The top management  
18 representatives of the debtors are in Missouri. And I don't  
19 know exactly where they held meetings, but I don't think it is  
20 essential to the case that it be heard in New York because the  
21 financiers and the bankers are in New York. And that's the  
22 point that I was addressing. And particularly --

23 THE COURT: I hear you, but go back to try to answer  
24 the question that I asked, which -- what was the motivation for  
25 the debtors to make the venue choice? Just to please the

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1 financial creditors? Did they actively decide that some  
2 constituency versus another, they thought, would do better in  
3 the Southern District of New York than any one of the other, I  
4 think, nine venues that someone told me in a footnote existed?

5 MS. JENNIK: I don't know their motivation, Your  
6 Honor. That's a question that they will have to answer. I  
7 don't know why they chose New York.

8 THE COURT: But implicit in your argument, Ms. Jennik,  
9 is that there was some unacceptable or untoward motivation,  
10 isn't there?

11 MS. JENNIK: I don't know that it has to be untoward.  
12 The fact is, this case could not have been brought in the  
13 Southern District of New York without, shortly before the  
14 filing, creating the two corporations that were created.

15 THE COURT: All right. I think everybody agrees on  
16 that. Okay.

17 MS. JENNIK: So what motivated them to do that?

18 THE COURT: Yes.

19 MS. JENNIK: I don't know the answer to that. I don't  
20 know why they were motivated to do that.

21 THE COURT: So you don't know, for example, if there  
22 was an analysis done, that -- and I'm making this up -- that  
23 the case would, I'll say, turn out the same way in terms of the  
24 substantive decisions that would be made, or the negotiated  
25 outcome, because I don't know if you were here for some of the

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1 first day hearings, but the debtors stated, at the beginning of  
2 these cases, that it was their goal to have everything be  
3 consensual, which, of course, is a laudable goal. In other  
4 words, you don't know whether the debtors made a decision or  
5 analysis that the case would come out the same in New York  
6 versus West Virginia, versus Delaware, versus St. Louis, versus  
7 Kentucky, but that it would cost X-million dollars less to have  
8 it in New York and, therefore, it was better for the creditors  
9 and the other constituencies to have it in New York, because if  
10 you spend less you get to distribute more to your creditors.

11 MS. JENNIK: I don't know that they did that analysis.  
12 They have not said that they did that analysis. They have not  
13 presented any such analysis.

14 THE COURT: And there is no -- I haven't seen that  
15 analysis, and I haven't seen any evidence. But if you knew, as  
16 you stood here today, that my hypothetical were true, would you  
17 still want the case to be in West Virginia?

18 MS. JENNIK: If it would cost --

19 THE COURT: Same result, less cost by keeping it in  
20 New York.

21 MS. JENNIK: I'm not accepting the premise.

22 THE COURT: I understand. There is no evidence on  
23 that. There is no evidence. A lot of statements have been  
24 made, including, I believe, in your papers, and I'll find the  
25 specific reference. A lot of statements have been made about

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1 the costs. A lot of hypotheses have been offered. But there's  
2 no evidence as to the cost of the case in one venue versus  
3 another. There is speculation about the use of local counsel.  
4 There's speculation about travel time, hotel rooms, costs of  
5 flights, but no one's presented me with kind of a coherent or  
6 cohesive model of what would actually happen, because we don't  
7 know, right? We don't know if the case here would be much  
8 shorter than the case somewhere else. We just don't know,  
9 right?

10 MS. JENNIK: We don't know what would happen.

11 In answer to your question, the mine workers -- and  
12 I'm speculating here -- but on that hypothetical, I believe the  
13 mine workers would want that case to be heard in West  
14 Virginia -- I believe. That's where they are. That's where  
15 they work. And they think the judges in that community should  
16 be deciding this bankruptcy case.

17 THE COURT: Well, let me focus on that, because of all  
18 the many things that I've been thinking about in preparation  
19 for today, I hear you loud and clear on that point, but it  
20 gives me some cause for concern. And one thing that I think  
21 that no one has done is to really give me some good material on  
22 what justice means. You and your opponents all are telling me  
23 that it's in the interest of justice to do what I say; to move  
24 it, to leave it, but nobody's really fleshed out what that  
25 really means. And in my mind, this issue that you're raising,

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1 the familiarity -- the judges grew up with coal miners, they  
2 live among coal miners -- it gives me some pause, I have to  
3 say, because, in my mind, the most ancient traditions of  
4 justice require that the tribunal be completely impartial, and  
5 that the best justice is delivered when the court doesn't know  
6 the parties. Moreover, ancient traditions of justice require  
7 that a court treat the stranger among them the same way that  
8 they treat their own fellows.

9 So the fact that you're urging me to transfer the case  
10 to a place that you believe, it sounds like you believe is more  
11 sympathetic to your constituents, gives me some pause. And it  
12 also, I think, implies that this Court, for some reason which I  
13 find hard to discern, would not be sympathetic to your  
14 constituents. So that, I have a -- I'm struggling with that  
15 concept and that aspect, that very strong aspect of your  
16 argument that's urging me to send it to West Virginia because  
17 they know us, they know us -- they know coal, they know us. So  
18 help me out with that.

19 MS. JENNIK: It is not whether one court or the other  
20 would be sympathetic. I mean, I think judges in general are  
21 sympathetic to the plight of those who are not wealthy, and  
22 that is certainly the mine workers and the retirees here. And  
23 I think that would be true in the Southern District of New York  
24 and the Southern District of West Virginia.

25 So it's not a question of sympathy, it's a question of

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1 understanding, I mean, as you raise the issue of the union and  
2 the nonunion workers, and what's the relationship of those  
3 groups.

4 Now, I'm not from West Virginia, and I don't know the  
5 answer to that question, but I think anybody who is in West  
6 Virginia does know the answer to that question.

7 THE COURT: But that's precisely the problem that I  
8 have, is that that's not how you conduct a proceeding. You  
9 conduct a proceeding based on evidence and on a record that  
10 gets produced and adduced by the parties, not on what you think  
11 you know. That's not the way judicial decision-making is  
12 conducted. It's not based on what I think I know about the  
13 financial institutions, which one or more parties, I think,  
14 either explicitly or implicitly suggested that that's the  
15 reason why the lenders want the case filed here. It's not  
16 about what I might know about them. It's about what you and  
17 all of you tell me and that's in the record, and I make a  
18 finding of fact based on the record. That's what we're  
19 supposed to do.

20 MS. JENNIK: And the point that I was making is that  
21 in the coal industry, a judge in West Virginia is going to be  
22 able to understand and get to those issues faster than a judge  
23 who has not heard cases like that before. And there are  
24 probably parallels in New York where New York courts have heard  
25 certain kinds of cases frequently in the past and would get to

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1 a decision more efficiently and faster than a judge in another  
2 district.

3           Regarding your point about whether outsiders, whether  
4 an outsider is a better judge -- is better able to make a  
5 determination, that is not the basis of the venue --

6           THE COURT: Well, those were your words, not mine.

7           MS. JENNIK: I'm sorry. I'm paraphrasing --

8           THE COURT: Okay. That's okay.

9           MS. JENNIK: -- and maybe characterizing inaccurately.

10          THE COURT: Okay.

11          MS. JENNIK: That's not what the venue statutes,  
12 though, intend. The venue statutes intend that the case will  
13 be brought where there is a connection with the debtors. There  
14 has to be some nexus. And the reason for that -- one of the  
15 reasons for that, which is at least referred to in some of the  
16 cases, is that a local community has an interest in deciding  
17 those local issues. And so our venue statutes require us to  
18 have that connection between the place where the court is  
19 sitting and the parties before it.

20          (Pause)

21          THE COURT: You can keep going; I'm sorry.

22          MS. JENNIK: Okay. I was going to move on to the  
23 convenience of the parties, unless you have any other questions  
24 about the interest of justice.

25          THE COURT: I might, but you can keep going.

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1 MS. JENNIK: Okay. On the convenience of the parties,  
2 not only the workers and the retirees have more ties to West  
3 Virginia than to New York, but many other parties in this case  
4 also. More of the top fifty creditors are in West Virginia  
5 than any other state. None of them are in New York.

6 The majority of the debtor entities listed West  
7 Virginia as their residence in the petitions that they filed;  
8 fifty-four of ninety-nine. Only two listed New York.

9 Of the top twenty vendors of the company, five are in  
10 West Virginia; only two are in New York.

11 And of course, most of the debtors' assets and  
12 operations are also in West Virginia.

13 There are a host of other factors that we listed in  
14 our reply at pages 7 and 8, and I know you've read the papers,  
15 and so I won't repeat those.

16 One of the -- go ahead.

17 THE COURT: Sorry. No, just my paper hit the  
18 microphone. Go ahead.

19 MS. JENNIK: Okay. One of the arguments that the  
20 debtors make is that the contractual choice of law clauses that  
21 they have in many of their sales contracts, which name New York  
22 as the choice of law, show that there is a connection to New  
23 York. However, those choice of law clauses do not determine  
24 venue. In fact, when the debtors brought two actions on those  
25 contracts, they were brought in West Virginia.



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1 THE COURT: Doesn't that -- might that not also have  
2 something to do with personal jurisdiction over the defendants?

3 MS. JENNIK: In fact, it did not. Both of those  
4 defendants were not based in West Virginia. Those were the  
5 Keystone and Bridgehouse cases. And they were filed in West  
6 Virginia on the basis that that is where the breach occurred.  
7 And so the debtors, when they were choosing venue for those  
8 contract cases, which named New York as the choice of law,  
9 chose to file those cases in West Virginia.

10 THE COURT: Well, but in -- I don't know which way  
11 that cuts because, in those cases, presumably, someone made a  
12 thoughtful determination as to, again, what's -- as your  
13 words -- what's best for them and, and for whatever reason,  
14 they decided to file those cases in West Virginia, and I can't  
15 speculate as to what that reason was. But this also raises an  
16 interesting issue, because you've been -- we've been talking a  
17 lot about learning curve, and you've been urging that this  
18 court would have a learning curve on coal. Yet, the debtors  
19 have shown that a great number of the contracts are governed by  
20 New York law. So presumably, if those contracts became the  
21 subject of controversy, then another court, be it West Virginia  
22 or somewhere else, would have a learning curve on New York law,  
23 right?

24 MS. JENNIK: Yes.

25 THE COURT: On those discrete issues.

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1 MS. JENNIK: On those issues, that is true. And yet,  
2 in the cases that were just brought, the debtors chose to go to  
3 West Virginia.

4 THE COURT: Okay.

5 MS. JENNIK: Where, presumably, there would be  
6 something of a learning curve on what is the New York law on  
7 breach of contract.

8 THE COURT: Okay.

9 MS. JENNIK: The objectors also make much of the  
10 presence of the professionals in this case; virtually all of  
11 the attorneys who are from New York. Professionals, of course,  
12 are not parties. Parties do pay their fees. But the  
13 convenience of the professionals should not decide venue in  
14 this case. Many of the attorneys are in this case and are from  
15 New York because it was filed here, and so for a debtor -- for  
16 a creditor who is located outside of New York, they may very  
17 well decide, well, I'll get New York counsel to handle this  
18 matter, rather than having counsel from another state and local  
19 counsel also appear in this case. So --

20 THE COURT: But are you telling me that the location  
21 of the counsel shouldn't drive the venue choice? Or are you  
22 telling me the opposite, which you believe that, if a case gets  
23 filed somewhere other than New York, there won't be New York  
24 counsel involved?

25 MS. JENNIK: I'm actually saying both, I think. I'm

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1 saying I don't think the location of professionals should  
2 determine venue.

3 THE COURT: Okay. That's one point.

4 MS. JENNIK: And I am also saying, if the case had  
5 been brought, for example, in West Virginia, I think there  
6 would be West Virginia counsel -- many more West Virginia  
7 counsel appearing in the case.

8 THE COURT: In lieu of or in addition to New York  
9 counsel? I mean, everybody is entitled to choose their  
10 attorneys, right?

11 MS. JENNIK: Yes. Everybody is.

12 THE COURT: If the case moves to West Virginia, you're  
13 going to move with it, aren't you?

14 MS. JENNIK: I hope to.

15 THE COURT: And you practice here in New York, right?

16 MS. JENNIK: Yes, I do.

17 THE COURT: So if a case moves, it doesn't necessarily  
18 mean that the parties are going to relinquish their chosen  
19 counsel, right?

20 MS. JENNIK: Well, they may not. But, for example,  
21 the debtors in this case have already retained seven firms in  
22 West Virginia.

23 THE COURT: Of course, because they need local -- they  
24 need local counsel to address the very issues -- some of the  
25 very issues that you've identified. So why doesn't that count

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1 as a checkmark in their column?

2 MS. JENNIK: Because what I was going to say is that  
3 the debtors may be able to use those local West Virginia  
4 attorneys more efficiently if the case is located in West  
5 Virginia. They may be able to have those West Virginia  
6 attorneys doing more work than the New York attorneys who, of  
7 course, are very competent and also more expensive.

8 THE COURT: Well, you know, in a lot of cases that we  
9 have in this district, the United States Trustee takes a very  
10 active role and takes very seriously her obligation to be a  
11 watchdog on fees. And I would expect that in this case, if it  
12 were to stay here, and the U.S. Trustee identified tasks that  
13 could be more efficiently and more cost effectively done by  
14 local counsel, I would hear from her in that regard. Or the  
15 debtors might hear from me without anyone saying anything,  
16 which has been known to happen, if you follow what goes on down  
17 here, but be that as it may.

18 MS. JENNIK: Another point that the objectors made is  
19 that there are technological advances, such as video and  
20 teleconferencing, both of which we're using here today. And of  
21 course, that's a great advance from what happened in the past.  
22 However, it's not the same as having the hearing being held in  
23 the location where the parties are actually located. And --

24 THE COURT: But really drill down on that for me,  
25 because I have no idea how large the courthouse -- the

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1 courtrooms are elsewhere; I only know what I know. But we're  
2 standing room only here. We have an overflow room here. Only  
3 so many people can fit in the courthouse, and then everyone  
4 else in this courthouse are sitting in an overflow room  
5 watching a video screen, the same way the folks are in West  
6 Virginia and St. Louis today. So you got to let the lawyers  
7 in, right? And for better or worse, in a case like this,  
8 lawyers travel in packs. There's never just one; they travel  
9 in packs. Even you have someone with you today.

10 MS. JENNIK: Even I do.

11 THE COURT: So there's only, and I mean this  
12 seriously, there's only so many seats physically in a  
13 courtroom. And as Judge Drain observed in the Winn-Dixie case,  
14 it's really not the usual thing for, in every hearing, in a  
15 large case, for there to be large numbers of employees and  
16 workers who attend. I mean, they've got -- in all of these big  
17 cases, there are statutory representatives. There are other  
18 folks who are on the front lines and then give a report. So I  
19 hear you. I love being in the courtroom. It's my favorite  
20 thing. But as a practical matter, how different would it be  
21 from what we are experiencing here today?

22 MS. JENNIK: Well, I have been told that the courtroom  
23 in West Virginia holds 150 people. As far as the attendance of  
24 employees and workers at hearings, yes, they are not going to  
25 attend many hearings, but they will attend, and be witnesses

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1 at, and want to observe some of the hearings that are very  
2 critical to them.

3 THE COURT: Sure.

4 MS. JENNIK: And in those hearing, there would be  
5 union representatives. And, as we've described, most of them  
6 are in West Virginia. There would also be employees and  
7 retirees who would be testifying about the impact of any  
8 proposed changes that those -- the impact those changes would  
9 have on their lives.

10 THE COURT: All right, but that presupposes that there  
11 isn't a consensual resolution of those issues, right --

12 MS. JENNIK: In the event --

13 THE COURT: -- which is the debtors' first choice.

14 MS. JENNIK: In the event that there -- that we get to  
15 an 1113 motion, yes.

16 THE COURT: Okay.

17 MS. JENNIK: Then there would be those hearings and  
18 there would be worker, union, and retiree witnesses.

19 THE COURT: And presumably, there's going to be a --  
20 no one's raised it so maybe I'm getting ahead of myself,  
21 presumably, there's going to be a retiree committee here in  
22 this case, maybe not. Have you explored with the debtors  
23 whether or not -- in the eventuality that there's contested  
24 1113 hearings whether or not the estate would bear the expense  
25 of bringing the witnesses to the hearing? I mean, it's not a

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1 foregone conclusion that that's not an expense that the  
2 state -- the estate in general would bear.

3 MS. JENNIK: The union has determined that it will  
4 represent any retirees. And so in terms of whether there would  
5 be a separate retiree committee, I am not aware that there are  
6 a significant number of nonunion retirees who are getting  
7 health benefits. So the union would not be involved in that,  
8 in any event, because the union will be representing the  
9 retirees separately.

10 THE COURT: Right, I understand. But what I'm  
11 focusing on here is the -- you make the point in your brief  
12 about the employees and the retirees, those who are least able  
13 to bear the expense and inconvenience of travel, which I  
14 certainly understand, but what you're really focusing on is  
15 that circumstance in which there'd be a contested 1113 hearing  
16 and there would be a need to have those witnesses, and it may  
17 well be that the estate would bear the expense of bringing  
18 those individuals to a hearing, wherever it is.

19 MS. JENNIK: The union has requested that the debtors  
20 pay expenses of the 1113 negotiations, the union's expenses,  
21 and the response has been "not at this time."

22 THE COURT: Okay. What's the -- in keeping  
23 through -- going through your convenience argument, you make  
24 the statement that -- on page 11, that the debtors' estate can  
25 be most economically administered in West Virginia.

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1 MS. JENNIK: Are you referring to the reply or my --

2 THE COURT: I'm sorry. The corrected motion that was  
3 filed on the docket, page 11 of the motion; it's Roman I(e).

4 Do you need a break? I'm sorry. We're just -- I  
5 think I'm getting towards the end of my questions, but if you'd  
6 like a break, I'm happy to do it. We've been at it for two  
7 hours now.

8 MS. JENNIK: I don't need a break.

9 THE COURT: Okay. Neither do I.

10 MS. JENNIK: But I'm not seeing the sentence that you  
11 referenced. Okay, on the top of page 12?

12 THE COURT: Well, the heading is on the -- it's  
13 heading E at the bottom of page 11, and then there's a  
14 statement on the top of page 12 that says, "On balance, it  
15 would be most economical for the case to be transferred to  
16 SDWV." Are we looking at the same pleading?

17 MS. JENNIK: Yes. I see it now.

18 THE COURT: Okay.

19 MS. JENNIK: Yes.

20 THE COURT: All right. So what is the evidence of  
21 that statement? What is the evidence that you've given me in  
22 support of that statement?

23 MS. JENNIK: The evidence that we gave is in our reply  
24 papers.

25 THE COURT: Okay. I have those, too.



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1 MS. JENNIK: And that would be at point 3 starting on  
2 page 18. And as you addressed earlier, there's not -- no one  
3 has done an analysis to say, well, there will be so many hours  
4 spent on this case, and if it's in New York, it will cost X  
5 amount of dollars, and if it's in West Virginia, it will cost Y  
6 dollars. However, the debtors and the creditors' committee  
7 presented evidence showing that it's going to cost 2,000  
8 dollars to get from New York to West Virginia and only  
9 thirty-seven people can get on any flight.

10 THE COURT: All right. We're not going to talk about  
11 the size of airplanes in this hearing. This case is not going  
12 to turn on the size of airplanes, and this case is not going to  
13 turn on the difference in cost of hotel rooms, and it's not  
14 going to turn on the number of flights that go in and out of  
15 Charleston; it's just not.

16 MS. JENNIK: Well, I think actually that is very  
17 sensible, because I think people can get to West Virginia or to  
18 New York and --

19 THE COURT: But what's --

20 MS. JENNIK: -- of course, there are certain --

21 THE COURT: What's the evidence for the very sweeping  
22 statement that it would be less costly to move the case to West  
23 Virginia? In particular, you tell me that professional fees  
24 are another increased cost of continuing the case in New York  
25 City. Transfer of the case to West Virginia will result in

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1 cost savings in professional fees. What is the proof that you  
2 have that that is true?

3 MS. JENNIK: The proof is that the debtors have  
4 submitted retention applications for the West Virginia counsel  
5 and for the New York counsel, and the difference between the  
6 fees is significant. So as I was stating earlier, to the  
7 extent that the West Virginia counsel can be handling matters  
8 in West Virginia, it will save the estate money.

9 THE COURT: All right. But there's no -- just to put  
10 a fine point on it, there's been no statement that, if the case  
11 is transferred, that the debtors are going to switch counsel.  
12 I mean, there's every reason to believe that everyone's going  
13 to keep their current counsel and head out to wherever the case  
14 might be transferred to, right?

15 MS. JENNIK: Yes.

16 THE COURT: Yes.

17 MS. JENNIK: I am not suggesting that Davis Polk would  
18 be replaced.

19 THE COURT: Okay.

20 MS. JENNIK: I'm not suggesting that. What I am  
21 suggesting --

22 THE COURT: Or that the DIP agents are going to get  
23 different counsel, or the ad hoc noteholders, or anybody else  
24 who's appears here.

25 MS. JENNIK: Well, I don't know what other parties do.

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1 I mean, other parties may decide to do that.

2 THE COURT: But that's my point, Ms. Jennik, is that  
3 you don't know, so you make a -- you've made a claim that it  
4 would cost less in terms of professional fees, but there is no  
5 actual evidence.

6 MS. JENNIK: We do know that the attorneys that have  
7 been retained by the debtors in West Virginia are less  
8 expensive than the attorneys in New York.

9 THE COURT: Okay. But we don't know --

10 MS. JENNIK: We know that.

11 THE COURT: -- how much they're going to be used in  
12 lieu of, I'll call it New York counsel generically, right?

13 MS. JENNIK: We do not know how much they would be  
14 used, but I think we can infer that if the case is in West  
15 Virginia, the local counsel, the West Virginia counsel will be  
16 used to a greater extent --

17 THE COURT: Of course.

18 MS. JENNIK: -- than if the case remains in New York.

19 THE COURT: But that might be incremental to the cost  
20 of New York counsel, and then, of course, there's the cost of  
21 New York counsel traveling, right? I mean, it's just a fact.

22 MS. JENNIK: You're talking about the time it takes to  
23 travel?

24 THE COURT: Yes.

25 MS. JENNIK: Because you don't -- you didn't want us

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1 to address the cost of travel.

2 THE COURT: No. I just -- everybody sent me reams of  
3 submissions from Expedia and other travel Web sites about the  
4 costs of various flights, and I noted on some of them that  
5 those were for flights that were for yesterday, and I don't  
6 know when hearings would take place, so I don't know if the  
7 cost would vary.

8 What I'm trying to say to you in the nicest possible  
9 way is that there is no coherent cost model that's been  
10 presented on which I can conclude that the statement that you  
11 made is supported by the facts or what actually occur. You'd  
12 want it to be; I'd want it to be. Who wouldn't want the case  
13 to be cheaper?

14 MS. JENNIK: There is no coherent cost model on either  
15 side. The point that we were addressing is that the debtors  
16 and the creditors' committee, we think, exaggerated the cost of  
17 traveling to West Virginia and the difficulties of traveling to  
18 West Virginia. And I did not want to counter flight by flight.

19 THE COURT: Correct.

20 MS. JENNIK: But I did want to give Your Honor the  
21 facts that, in fact, you can get to West Virginia, and it can  
22 be done economically.

23 THE COURT: I'm sure you can. There is one aspect of  
24 it that I'll put out there to you, and that is that -- and I'm  
25 not sure that this is a factor that should cut one way or the

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1 other, but because a lot of the folks here in the courtroom  
2 today are a subway ride away, and I'm not going to talk about  
3 New York's traffic, we have bad traffic, but I don't view the  
4 fact that we have bad traffic as a factor; we all take the  
5 subway. The fact that they're a subway ride away, and my  
6 experience has been -- this Court's experience in many cases is  
7 that if there's something that Court wants to talk about,  
8 chambers calls out to the parties, they put out a notice, and  
9 everybody gets on the subway and comes down here, and we have  
10 hearings, and we have status conferences and the like. So my  
11 perspective on that is that that provides greater access to the  
12 parties because this Court's a phone call and a subway ride  
13 away.

14 And although it may be the case that West Virginia  
15 counsel is used more than out-of-state counsel, if you will, it  
16 may also be that the effect, one of the collateral aspects of  
17 transferring the case, would be that there are fewer hearings,  
18 because folks have a concern about the economics; they're not  
19 going to go to court at the drop of a hat.

20 So I have a concern also that this is very much a  
21 double-edged sword when there could be very frequent hearings,  
22 and indeed there are very frequent hearings in this court in  
23 large cases such as this because there are a lot of issues, and  
24 we can have parties in every week, twice a week. If there's a  
25 discovery dispute, they can call, and they can come down here.

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1 So I just put that out as a concern and one that I  
2 don't think was addressed anywhere in your papers.

3 MS. JENNIK: Well, of course, telephone calls can be  
4 made anywhere. I mean, that can happen --

5 THE COURT: Of course.

6 MS. JENNIK: -- with the court in West Virginia as  
7 well as a court here. There may be a need to make sure that  
8 hearings are conducted efficiently and that hearings perhaps  
9 are conducted back-to-back on back-to-back days to minimize the  
10 travel of New York lawyers.

11 THE COURT: All right. If you would just give me a  
12 moment to look through my notes and perhaps you can look  
13 through yours, we might be getting to the point where it's a  
14 good time for a break.

15 MS. JENNIK: Thank you.

16 THE COURT: All right.

17 (Pause)

18 THE COURT: Ms. Jennik, did you want me to address any  
19 questions I have about the applicability of Winn-Dixie to Ms.  
20 Schwartz rather than yourself?

21 MS. JENNIK: Yes, Your Honor.

22 THE COURT: Okay. Let me ask you one question. You  
23 raised this in your reply on page 2. You say that it would not  
24 be in the interest of justice to uphold the debtors' blatant  
25 forum shopping, and by that I assume you mean the incorporation

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1 of the two entities in order to come within the venue statute.

2 MS. JENNIK: Yes.

3 THE COURT: But isn't -- doesn't forum shopping --  
4 isn't it traditionally used to suggest that you're seeking to  
5 get some -- you're running away from something bad? In some of  
6 the cases that were cited, for example, the debtor was a serial  
7 filer in another jurisdiction and knew that if there were  
8 another case filed they would get the same judge, and they  
9 certainly didn't want that, or there was an attempt to  
10 establish venue here when literally every creditor and every  
11 asset was somewhere else in a very small case. So it implies  
12 result orientation. It implies a conclusion that I'm going to  
13 do better here versus there.

14 What was the -- what's the debtors' result orientation  
15 here? Why did they forum shop? Why? I'm just -- no one's  
16 told me that in any of the movants' papers, why they came here.  
17 What were they -- were they running away from something? In  
18 Winn-Dixie, for example, there was -- I think there was  
19 evidence in the record that initially the debtors were  
20 concerned about the negative press. What is it that the  
21 debtors were seeking to do here by this forum shopping?

22 MS. JENNIK: Well, the venue statutes and the  
23 standards that are listed do not include a better outcome, that  
24 the law in one court is better than the law in another court.  
25 So I don't --

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1 THE COURT: But doesn't -- let me stop you on that,  
2 because this is a big point, and this goes back to my  
3 discussion with you about fiduciary duty. The debtors'  
4 management has a very, very serious obligation; they have a  
5 fiduciary duty to maximize the value for the sake of all of the  
6 stakeholders. So if the debtors' management -- and no one's  
7 told me this, but if the debtors' management did an analysis of  
8 the various venues and the applicable law in each of those  
9 venues and made a determination that it's in the best interest  
10 of the stakeholders to choose one venue versus another, isn't  
11 that exactly what they're supposed to be doing? Isn't that --  
12 why is that forum shopping as opposed to forum selection?  
13 They're choosing the place, hypothetically, where they believe,  
14 on behalf of their stakeholders, they're going to get the best  
15 result.

16 MS. JENNIK: That's not what the statute says. The  
17 statute says a case --

18 THE COURT: No, I'm not asking what the statute -- I'm  
19 asking you about the debtors' fiduciary duty and your statement  
20 that they forum shopped. So if all you mean by "forum shop" is  
21 that they created the New York entities, I'm with you; they  
22 created the New York entities. They're going to hear from me  
23 about that, trust me. But I'm just trying to understand what  
24 were they running from, what were they running towards in terms  
25 of their result, because venue -- forum shopping, to me, is



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1 about result orientation; I'm going to get a better result  
2 here, I'm going to get a fairer shake there, I'm going to get  
3 away from this over here, and I'd rather be experiencing this  
4 over there.

5 MS. JENNIK: And I think that is similar to what  
6 you're calling forum selection as well. I think that's similar  
7 to doing an analysis and deciding we're going to be treated  
8 better in New York and so we're going to create some  
9 corporations here that we --

10 THE COURT: Right, but who's the "they"?

11 MS. JENNIK: "They" meaning the debtors, the debtors,  
12 the ninety-nine entities.

13 THE COURT: Their management? Do you think that it's  
14 about that they think that management thinks that they're going  
15 to get bonuses if they come here? I'm still -- I don't mean to  
16 be giving you a hard time. I hope it doesn't feel that way.  
17 I'm really struggling with the "they" and "the debtors",  
18 because the debtors, in my mind, is the sum total of their  
19 constituents and no more. Constituents may include the equity  
20 or it may not include the equity; we don't know that yet.

21 MS. JENNIK: Well, I used the term "they" because  
22 there's more than one debtor here.

23 THE COURT: Okay.

24 MS. JENNIK: I don't mean it in that generic sense of  
25 "they did something bad." But the point that I think is

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1 relevant is before these cases were filed, there were many,  
2 many cases that the debtors have been involved in in West  
3 Virginia. I don't know the outcome of all those cases, and I  
4 don't know that they were running away from something in West  
5 Virginia that they didn't like. I don't know that.

6 THE COURT: Okay.

7 MS. JENNIK: But I do know that without those  
8 corporations they were not properly before this Court.

9 THE COURT: Let me ask you one more question, and then  
10 we're going to take a break. When the statute talks about  
11 convenience, convenience of the parties, you've argued that  
12 that doesn't include counsel. That's not my question. Doesn't  
13 the law require that the Court take into account the  
14 convenience of all the parties?

15 MS. JENNIK: Yes, it does.

16 THE COURT: It does. Okay. And so I've got the  
17 creditors' committee here siding with the debtors, if you will,  
18 and I've got a very, very large dollar number of noteholders  
19 saying stay here, I've got the DIP agents saying stay here.  
20 I've got a lot of both, by head count and by dollars, saying  
21 stay here, and I've got some creditors, I think, from West  
22 Virginia and Kentucky and some other places saying stay here.  
23 What weight should I afford that -- those arguments?

24 MS. JENNIK: Well, one of the considerations is of the  
25 top fifty creditors, a majority did not join the debtors'

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1 objections.

2 MR. HUEBNER: That's not --

3 MS. JENNIK: Twenty --

4 MR. HUEBNER: That's not correct.

5 THE COURT: Mr. Huebner, I'm going to get to --

6 MS. JENNIK: By my count --

7 THE COURT: I'm going to get to all this.

8 MS. JENNIK: By my count, twenty-one of the top fifty  
9 creditors joined the objection.

10 THE COURT: All right. Well, Ms. Jennik, I'll leave  
11 you with this thought as we head into a break, as I started  
12 with. There's a burden of proof here, and my job, when we're  
13 done, is going to be to comb through the record and determine  
14 whether the burden of proof was carried. So I think we're  
15 going to hear more about which way the various creditors voted,  
16 and perhaps you'll have more to say about that in rebuttal.

17 All right. Can I take a moment to look at the clock  
18 and talk about what the parties would like to do in terms of  
19 how late you'd like to go today, and we've cleared the decks  
20 for you tomorrow as well. And my understanding is that we have  
21 the technology in place to continue tomorrow in West Virginia  
22 and in St. Louis.

23 Thoughts?

24 MR. HUEBNER: Your Honor, I'll speak for the estates,  
25 if that sounds sensible.

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1 THE COURT: Mr. Huebner.

2 MR. HUEBNER: Depending on how much Ms. Jennik has  
3 left, I think it might make sense to finish with the union, I'm  
4 guessing, since I think we said we could go until at least  
5 5:30, given the other jurisdictions. We can probably get the  
6 primary movants done today, and then tomorrow we can deal with  
7 the replies, and then any rebuttal.

8 THE COURT: All right. Well, we do have a hard stop  
9 at 5:30 in order to accommodate the technology, in particular  
10 in West Virginia, and St. Louis is behind us by, I'm going to  
11 show my ignorance here, an hour or two hours -- one hour. So  
12 why don't we take a break, come back at 4 o'clock. We'll go  
13 from 4 o'clock to 5:30. We'll get as far as we get, and then  
14 we'll reconvene tomorrow at 10 o'clock. All right?

15 IN UNISON: Thank you, Your Honor.

16 (Recess from 3:49 p.m. until 4:06 p.m.)

17 THE COURT: All right. Ms. Schwartz, hold on one  
18 second before you start. We're adjusting the schedule, and  
19 we're going to conclude today at 5 o'clock instead of 5:30 in  
20 order to accommodate the requirements of the broadcast in the  
21 various locations, so we just have fifty-five minutes to go for  
22 today. But Ms. Schwartz, if you don't mind, I just want to ask  
23 Ms. Jennik one more question.

24 MS. SCHWARTZ: Sure.

25 THE COURT: Could you switch places? Thank you.

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1 Ms. Jennik, one thing that we didn't talk about when  
2 we talked about all the different competing interests and  
3 tensions and issues in this case, I believe it was in your  
4 papers there was some discussion of how it was that Patriot  
5 came to be in terms of the relationship with Peabody. Was that  
6 in your papers?

7 MS. JENNIK: Yes, Your Honor.

8 THE COURT: I believe it was. So is it your view that  
9 Peabody is a party-in-interest in these cases and that Peabody  
10 somehow figures into the analysis and/or the result that might  
11 obtain in these cases?

12 MS. JENNIK: I understand -- I believe Peabody is a  
13 creditor here, and so in that sense --

14 THE COURT: Well, they're certainly --

15 MS. JENNIK: -- it is a party-in-interest.

16 THE COURT: -- a contract counterparty. Is that the  
17 only sense in which, in your view, Peabody is, I'll say,  
18 involved in this case or may become involved in this case?

19 MS. JENNIK: Many people, including many in the union,  
20 believe that the spin-off was inappropriate and that the  
21 transfer of retiree liabilities from Peabody to Patriot was  
22 inappropriate. Those issues may certainly arise in this case,  
23 and I expect that they will at some point.

24 THE COURT: Does that have any bearing or does the  
25 possibility that that may occur, how does that factor into your

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1 analysis of where it would be best to have those issues play  
2 out in terms of this court versus West Virginia versus any of  
3 the other possible venue choices?

4 MS. JENNIK: Well, since the assets that were  
5 transferred in that spin-off are primarily West Virginia  
6 assets, it is the position of the union that that matter as  
7 well should be heard in West Virginia.

8 THE COURT: But where -- you have to help me out with  
9 this. Where is Peabody headquartered?

10 MS. JENNIK: In St. Louis.

11 THE COURT: And where are the majority of Peabody's  
12 assets?

13 MS. JENNIK: I don't know --

14 THE COURT: Peabody's assets, not Patriot's assets.

15 MS. JENNIK: I don't know where Peabody's assets are.

16 THE COURT: Okay.

17 MS. JENNIK: What I'm saying is that the assets that  
18 were spun off from Peabody to Patriot are primarily located in  
19 West Virginia.

20 THE COURT: And are all of Patriot's employees former  
21 Peabody employees?

22 MS. JENNIK: No.

23 THE COURT: No.

24 MS. JENNIK: I don't believe so.

25 THE COURT: All right. And are some of Patriot's

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1 employees formerly employees of other coal companies that were  
2 involved in various transactions that occurred before this  
3 case?

4 MS. JENNIK: My understanding is that there was  
5 another transaction involving the spin-off of Arch, which was  
6 also a Peabody subsidiary. So I don't know of any other  
7 companies that were involved than those.

8 THE COURT: Okay. All right.

9 MS. JENNIK: And of course, employees who were hired  
10 since --

11 THE COURT: Of course.

12 MS. JENNIK: -- the spin-offs --

13 THE COURT: Okay. All right.

14 MS. JENNIK: -- have not -- were not employed by the  
15 other companies.

16 THE COURT: All right. Okay. Thank you

17 Ms. Schwartz.

18 MS. SCHWARTZ: Thank you.

19 THE COURT: Give me one minute to shift my papers  
20 around here.

21 MS. SCHWARTZ: I can relate to that.

22 THE COURT: I'm sorry?

23 MS. SCHWARTZ: I can relate to that.

24 THE COURT: Yep. Okay.

25 MS. SCHWARTZ: Your Honor, before I begin my

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1 presentation, two things. One, I'm sure Your Honor has had a  
2 ton of papers to read here, but if Your Honor has time, or her  
3 law clerks, you might want to take a look through the 341(a)  
4 transcript --

5 THE COURT: I read it.

6 MS. SCHWARTZ: -- as Mr. Schroeder talked about --

7 THE COURT: I read it.

8 MS. SCHWARTZ: -- that Peabody -- okay.

9 THE COURT: Are you submitting that transcript in its  
10 entirety as evidence? I assume that you have.

11 MS. SCHWARTZ: It's in.

12 THE COURT: It's in, right?

13 MS. SCHWARTZ: Yes.

14 THE COURT: All right.

15 MS. SCHWARTZ: As part of the stipulation, all of the  
16 exhibits annexed to the declarations are in.

17 THE COURT: Okay.

18 MS. SCHWARTZ: Okay. And also, Your Honor, since  
19 we're cutting it short, I'd just like to be able to --

20 THE COURT: Nothing's being cut. We're just stopping  
21 at 5 o'clock today so --

22 MS. SCHWARTZ: I meant cutting shorter than 5:30.

23 THE COURT: Okay.

24 MS. SCHWARTZ: Thank you.

25 Good afternoon, Your Honor. Andrea Schwartz on behalf



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1 of Tracy Hope Davis, the United States Trustee.

2 Your Honor, as I stated earlier for the record, with  
3 me here today is Susan Golden.

4 It was very -- I was very pleased to hear Your Honor's  
5 focus at the outset of this hearing when Your Honor mentioned  
6 two words that basically would be themes of the United States  
7 Trustee's argument, those being justice and integrity. By the  
8 United States Trustee's motion, we're asking the Court to  
9 exercise the discretion that's been afforded to it by Congress  
10 under Section 1412 of Title 28 of the United States Code and,  
11 in the interest of justice, transfer the bankruptcy cases of  
12 Patriot Coal Corporation to another district where venue is  
13 proper.

14 Your Honor, the United States Trustee's motion is not  
15 complicated, and it is narrowly circumscribed. In essence,  
16 Your Honor, we're asking the Court to right a wrong, to correct  
17 an injustice. The cases before this Court should not be here.  
18 The only reason that they are here is that the debtors, with  
19 the assistance of their long time counsel, Davis Polk, who is  
20 their retained bankruptcy counsel in these cases, created two  
21 nonoperating affiliates, namely PCX and Patriot Beaver Dam, on  
22 the eve of bankruptcy solely to satisfy the requirements of  
23 Section 1408 of Title 28.

24 The Court should not permit the statute to be  
25 exploited in this manner and should rectify this injustice.

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1 That the debtors manufactured venue in this district on the eve  
2 of bankruptcy is a fact on the ground.

3 THE COURT: I'm going to stop you, because the use of  
4 the word "manufactured" is not something that I want to  
5 perpetuate here. I don't think it's a fact that they  
6 "manufactured". The facts, as stipulated by the parties, are  
7 that they formed the two New York entities when they did.  
8 Those are the facts, right?

9 MS. SCHWARTZ: Well, also the fact is, Your Honor, at  
10 number 3(d) --

11 THE COURT: Yes, to --

12 MS. SCHWARTZ: -- that the debtors formed the two  
13 companies for the sole purpose of achieving venue in this  
14 district and for no other purpose.

15 THE COURT: Well, that's not what it says. The  
16 stipulation says the debtors formed both PCX and Patriot Beaver  
17 Dam to ensure that the provisions of Section 1408.1 of the  
18 Bankruptcy Code, which we now all agree is not the Bankruptcy  
19 Code, were satisfied, and for no other purpose. That's --  
20 those are the facts.

21 MS. SCHWARTZ: Well, Your Honor, let me tell you what  
22 that has been interpreted by the parties who stipulated to that  
23 being included in as a fact. It's very important that the  
24 Court --

25 THE COURT: Okay. Well, this is -- hold on, hold on.

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1 You can make arguments, but -- and this is one of my concerns  
2 at the top of the hour with this procedure of stipulating,  
3 because the stipulation deprives me of the ability to ask  
4 questions on this fact. So I don't think that I can hear you  
5 give me your views on what the parties meant.

6 MS. SCHWARTZ: Okay.

7 THE COURT: Those are the words, okay, and I was  
8 merely stopping you on the use of the word "manufactured".

9 MS. SCHWARTZ: Got you, Your Honor. I got it.

10 THE COURT: All right?

11 MS. SCHWARTZ: Yes. And I think, Your Honor, though  
12 that the facts will show, and are already stipulated to, a host  
13 of things that support that the only way these debtors got  
14 venue in this district was by forming these two companies.  
15 That's it.

16 THE COURT: I think that that -- that everyone  
17 agrees --

18 MS. SCHWARTZ: Okay.

19 THE COURT: -- that no one disputes that fact.

20 MS. SCHWARTZ: Okay.

21 THE COURT: But for the creation and existence of  
22 those two entities, PCX and Patriot Beaver Dam, there would be  
23 no venue in this district.

24 MS. SCHWARTZ: Right. And, Your Honor, these  
25 companies were created for no other purpose. That's a fact.

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1 THE COURT: Okay.

2 MS. SCHWARTZ: Okay. Thus, Your Honor, we now have,  
3 which we would otherwise have taken testimony here in court,  
4 but we tried to work together with the debtors so that we could  
5 streamline what we thought were really noncontested facts.  
6 There was a lot said at the beginning of this hour or two hours  
7 ago about the burden of proof. I'd just like to address that  
8 for a moment.

9 Your Honor, the burden of proof is preponderance of  
10 the evidence. It's not clear and convincing evidence; it's  
11 preponderance of the evidence. Your Honor knows that's a less  
12 exacting standard than the clear and convincing evidence.  
13 That's on the first number. With respect to our argument, Your  
14 Honor, we believe that we have put forth the facts that support  
15 what we're asking the Court to do. We didn't need a lot of  
16 facts in order to make the argument that we had. We suspected  
17 when we put in our opening papers that these entities were  
18 created for no purpose other than to get venue in the district,  
19 but there were other facts that we have.

20 We have -- Your Honor, we have a host of facts that  
21 are important to this consideration. There -- it is a fact --

22 THE COURT: Let me -- let's stop and talk about this  
23 threshold fact, and that is that these entities were formed to  
24 ensure that there was venue here. If the entities had been  
25 formed six months ago, what would the position of the United

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1 States Trustee be?

2 MS. SCHWARTZ: Well, as Your Honor knows, every venue  
3 analysis is a case-by-case basis. If that was the only shift  
4 in facts --

5 THE COURT: Yes.

6 MS. SCHWARTZ: -- from what you have here, Your Honor,  
7 I think our position would be the same, because our position is  
8 that a company that gets venue in a district has a valid  
9 business purpose. There's no business purpose here.

10 THE COURT: Where does it say that in the statute?

11 MS. SCHWARTZ: The statute says -- well, the statute  
12 says --

13 THE COURT: The statute says that it needs to be --  
14 there needs to be a domicile, and then there's not the best  
15 drafted language about 180 days.

16 MS. SCHWARTZ: Right. Your Honor, you're absolutely  
17 correct. We're not contesting that venue is proper. This is a  
18 different argument than we made previously in other cases.

19 THE COURT: Right.

20 MS. SCHWARTZ: We're not contesting that they didn't  
21 satisfy 1408.

22 THE COURT: I understand that.

23 MS. SCHWARTZ: What we are saying though, Your Honor,  
24 is it's an abuse of the statute and that --

25 THE COURT: Hold on. Ms. Schwartz, you know me well

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1 enough to know that when I like to talk, you need to stop,  
2 right? So how far back do we go? How do I figure out when  
3 there's been compliance with the statute versus creation of  
4 facts to fit the statute? How do I know? It says "domicile";  
5 that's what it says. And there's lots and lots of argument,  
6 and learning, and positions that are taken out there that  
7 judges are supposed to read the words on the page and interpret  
8 the words on the page. So I have certificates of  
9 incorporation.

10 If you see the microphone being adjusted from time to  
11 time, it's because we're receiving intelligence that folks  
12 can't hear me somewhere. So I apologize.

13 How can I tell? I've got a -- you're saying in this  
14 case, Judge, you can tell because it was done on the eve of  
15 filing, right? But how far back in time would the same  
16 conclusion pertain?

17 MS. SCHWARTZ: Well, first of all, you can tell  
18 because the debtors have admitted it.

19 THE COURT: Right.

20 MS. SCHWARTZ: That's how you can tell in this case.

21 THE COURT: Right. But I'm asking you, in terms of  
22 how far back in time might it be the case that you could  
23 domicile a corporation in a district and have that be okay in  
24 terms of being a venue hook, to use the parlance that people  
25 use.

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1 MS. SCHWARTZ: It's okay for them to have gotten it as  
2 a venue hook here. We're not contesting that they didn't  
3 satisfy 1408. The distinction --

4 THE COURT: No, but you're -- then let me ask the  
5 question a different way. What I'm saying is that you -- this  
6 is not Houghton Mifflin.

7 MS. SCHWARTZ: Right.

8 THE COURT: You're not saying that this is a motion  
9 that there's no proper venue, although I think the word  
10 "proper" is a loaded term, too. Venue exists by virtue of the  
11 existence of the New York corporations.

12 MS. SCHWARTZ: That's right. We do not contest that.

13 THE COURT: At what point would the creation of the  
14 New York corporations not be asserted by the Office of the  
15 United States Trustee as something that's contrary to the  
16 interests of justice? At what point would that not be a  
17 factor?

18 MS. SCHWARTZ: I think it's a very good question, Your  
19 Honor. I'm not sure that I can answer that specifically for  
20 you today. I will tell you that a factor that's important to  
21 the United States Trustee is that a company that seeks to get  
22 venue in a district should not be creating the facts to fit the  
23 statute as opposed to where they have already established the  
24 facts and Your Honor was called upon to apply the law to the  
25 facts. Here's a different scenario. They created the facts on

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1 the eve of bankruptcy so that they could get into the New York  
2 court.

3 THE COURT: And why do you think they did that?

4 MS. SCHWARTZ: Well, Your Honor, you asked -- I have a  
5 lot of views about why I think they did that, and I think that  
6 they're probably going to tell you. But I know Your Honor  
7 knows that I was in private practice for a long period of time.  
8 I know that there are analyses that are done. I don't know  
9 whether they were done here; they haven't said, but generally  
10 companies will seek to file for venue in a district where they  
11 think there will be some advantage. I know Your Honor --

12 THE COURT: Now, you heard me ask Ms. Jennik  
13 repeatedly, repeatedly about this question. Advantage to whom?

14 MS. SCHWARTZ: Advantage to the company.

15 THE COURT: And you heard me tell Ms. Jennik that that  
16 was an unsatisfactory answer, right?

17 MS. SCHWARTZ: Well, Your Honor, I mean, look, let me  
18 just -- if you can just give me a little space to just try to  
19 explain it to you.

20 THE COURT: I always do.

21 MS. SCHWARTZ: Look, companies file cases in different  
22 districts, because they have a perception that the law will be  
23 more favorable to them or the law is more developed --

24 THE COURT: Same comment, the "them". I'm -- we need  
25 to keep focusing on who the "them" is.



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1 MS. SCHWARTZ: Okay. Well, who's the "them"? The  
2 "them" is the counsel and the management of the company that  
3 decide where to put the case; that's the "them".

4 THE COURT: Okay. So just to be clear, just to be  
5 clear, the hypothesis is that the company's management, on the  
6 advice of counsel, who are fiduciaries and who have ethical  
7 obligations, made this choice to benefit themselves and not for  
8 the benefit of the creditors and other stakeholders in this  
9 case.

10 MS. SCHWARTZ: That's not what I said. What I said  
11 was they've made it for the benefit of the company. And you  
12 asked for clarification on what I meant by "the company", and I  
13 believe -- I don't -- first of all, we're in a hypothetical  
14 analysis here. We don't know why Mr. Engelhardt, together with  
15 his counsel, decided where to place the case, et cetera. What  
16 we do know, Your Honor --

17 THE COURT: You think I'm going to ask him?

18 MR. SCHWARTZ: Yeah, I do. I think -- because I think  
19 they're going to be the best people to tell you.

20 But what I want to say to you about this, Your Honor,  
21 is -- and I've been asked this question before in the context  
22 of a venue motion, whether or not it's appropriate for an  
23 analysis to be done as to the various choices of venue where a  
24 company believes that it will be most beneficial to its  
25 fiduciary obligees; let's put it that way.

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1 No one is saying that the -- no one has said --  
2 there's no facts in evidence saying that there was some self-  
3 interest on the part of management. We don't know. We don't  
4 know of any. We didn't make any allegations of that. What we  
5 said, Your Honor, was more so that they cannot create the  
6 facts. That's what happened here.

7 THE COURT: Hold on. All right. So let's stop, let's  
8 stop. Two questions, two questions. And you know I'll give  
9 you all the time you want even if it's not today.

10 MR. SCHWARTZ: Thank you.

11 THE COURT: The first question is that if, in my  
12 hypothetical, there was an analysis done that this district was  
13 the "best district" in terms of a substantive law provision,  
14 which no one has brought to my attention -- a substantive law  
15 provision that would drive a result that would return the most  
16 value to the creditors or most support the survival -- the  
17 long-term survival of the company, which would enable the  
18 company to continue to employ the most workers, wouldn't it be  
19 a breach of management's fiduciary duty to not seek to  
20 establish venue or to file a case in that location?

21 MR. SCHWARTZ: You asked me -- I have two answers for  
22 that --

23 THE COURT: Go ahead.

24 MR. SCHWARTZ: -- because I think you raised two  
25 issues. First, on the issue of the substantive law, we have

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1 guidance from the Supreme Court in Piper Aircraft at 102 S. Ct.  
2 252, 1981, where Justice Marshall said, in considering a forum  
3 non conveniens motion, that -- and I'll -- if I might just read  
4 it to the Court because I think it's directly on point.

5 "Plaintiffs may not defeat a motion to dismiss on the  
6 ground of forum non conveniens merely by showing that the  
7 substantive law that would be applied in the alternate forum is  
8 less favorable to the plaintiffs than that of the chosen forum.  
9 The possibility of a change in substantive law should  
10 ordinarily not be given conclusive or even substantial weight  
11 in a forum non conveniens."

12 Now, I raise that --

13 THE COURT: But that's a completely different context.  
14 I asked you a question about the management's discharge of its  
15 fiduciary --

16 MR. SCHWARTZ: Well, you --

17 THE COURT: -- duty.

18 MR. SCHWARTZ: I thought I understood the Court to  
19 say, would it be a breach of that duty if they didn't try to  
20 file a case where the substantive law was better.

21 THE COURT: Well, in good faith, in good faith,  
22 which --

23 MR. SCHWARTZ: No one's saying other than that.

24 THE COURT: In good faith, they believe that there  
25 would be a better outcome for the company, as you've put it, or

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1 "them", as they've been called --

2 MR. SCHWARTZ: Right.

3 THE COURT: -- here --

4 MS. SCHWARTZ: Yeah.

5 THE COURT: -- and they said to their counsel, what do  
6 we have to do to do that. And without getting into attorney-  
7 client privilege, although we might at some point --

8 MR. SCHWARTZ: Right.

9 THE COURT: -- that's what they did. What you're  
10 telling me is that it's the position of the United States  
11 Trustee that that dog won't hunt, that that's --

12 MR. SCHWARTZ: That they created the facts in order --

13 THE COURT: -- that it's in the --

14 MR. SCHWARTZ: -- to get venue.

15 THE COURT: Yes, that it is per se not in the interest  
16 of justice to allow that to stand.

17 MR. SCHWARTZ: Well, I'm sorry, Your Honor. I'm not  
18 saying "per se". I'm saying it's a fact-by-fact basis; it's a  
19 case-by-case analysis.

20 In this case, what you have before you, admitted facts  
21 that that's what they did for no business purpose other than to  
22 get venue, yes, we say that the interests of justice dictate  
23 that the Court transfer the cases as Congress has given you the  
24 discretion to do. And many cases have said, it's a broad and  
25 flexible concept and that in this case, you know, we didn't

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1 make the argument on the convenience of the parties. We  
2 believe that the convenience of the parties does not trump the  
3 interest of justice. We think that when parties use a statute  
4 and, in our view, misuse a statute that the court should not  
5 let it stand, that the court should do what is just. The court  
6 should transfer the cases.

7 Now, also at the outset of today's hearing, Your  
8 Honor, you talked about justice. And as much as you've been  
9 thinking about this case, so I believe I might be doing half as  
10 much because I know you, of course, are a harder worker than  
11 me, but I've thought a lot about justice, and how to talk about  
12 justice, and how to persuade the Court, and help the Court on  
13 the issue of justice. And the best way I've been able to come  
14 up with, Your Honor, is we all talk about justice. Every trial  
15 lawyer that comes into court talks about justice, but it's  
16 sometimes hard -- it's more -- when we talk in terms of  
17 justice, it's more of a kind of a theoretical concept what  
18 would be just.

19 However, if you look at the reverse and think about  
20 injustice, that's something that affects us. When something is  
21 not right, when something is unjust, we know it. In our view,  
22 Your Honor, this -- with excellent lawyers here today and no  
23 criticism in that regard, we're saying to Your Honor you've got  
24 a one hundred affiliated global enterprise that prior to the  
25 eve of bankruptcy had no contacts with this district, and they

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1 had about ten other ones they could have gone to. They admit  
2 it; it's in their papers. We did not say to Your Honor, Your  
3 Honor transfer this case to this district, transfer it to that  
4 district.

5 THE COURT: No, I know that, but we still don't have  
6 any meat on the bones on the issue of why here other than that  
7 it was better for the company, and I'm troubled by the notion  
8 that, as I'm trying to figure out what justice might be, if I  
9 had a crystal ball, and I could see in the crystal ball what  
10 the result is in each of the different venues, that it's  
11 necessarily the case that it would be just to transfer it if  
12 the outcome is going to be worse for the company.

13 MR. SCHWARTZ: May I address that for a minute, Your  
14 Honor?

15 THE COURT: All right. And it's -- I mean, to me, and  
16 it was throughout my conversation with Ms. Jennik, it's not at  
17 all clear to me how this sorts out.

18 MR. SCHWARTZ: Well --

19 THE COURT: Courts in this district have declined to  
20 agree with the company's views on collective bargaining  
21 agreements. I'm sure everybody's familiar with what's  
22 happening in the American Airlines case and the Hostess case.  
23 It's not clear to me that it follows inexorably that it would  
24 be unjust for the case to stay here, because they created those  
25 entities.

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1 MR. SCHWARTZ: But that's our --

2 THE COURT: Try to convince me.

3 MR. SCHWARTZ: Your Honor, look, I don't -- I think  
4 that if I were the judge, and I had the public trust placed in  
5 me as you do, I would also think about what the -- it would  
6 be -- I think it would be --

7 THE COURT: Make your head hurt, right?

8 MR. SCHWARTZ: -- thinking about where it should go.  
9 However, if this helps Your Honor at all, I don't think that  
10 that trumps what happened here. You know, when I --

11 THE COURT: Well, you know what, let me stop you  
12 because this is the distinction between Houghton Mifflin, this  
13 isn't Houghton Mifflin, okay. But in that case your office  
14 pointed out that there was no venue, and Judge Gerber agreed  
15 with you, even though everybody in the case was happy to just  
16 agree to have it here.

17 MR. SCHWARTZ: Yes.

18 THE COURT: So this is a very different case, right?

19 MR. SCHWARTZ: Yes.

20 THE COURT: This is a very different case.

21 MR. SCHWARTZ: This is a completely different case.

22 THE COURT: Right. But it may be that management here  
23 engaged in an analysis that led them to conclude that it would  
24 be better for the company, not that it would be more likely  
25 that a court in this district would approve a management bonus

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1 program; I haven't heard that. I'm just struggling with the --

2 MR. SCHWARTZ: Your Honor, in the other case --

3 THE COURT: -- motivation component.

4 MR. SCHWARTZ: In the other case, I know that the  
5 debtors' counsel did an analysis and had multiple options where  
6 to file. They chose to file in New York. They --

7 THE COURT: In this case?

8 MR. SCHWARTZ: In the Houghton -- you just referred to  
9 the Houghton Mifflin case.

10 THE COURT: No, I'm --

11 MR. SCHWARTZ: I know that there was an analysis that  
12 was done there, and they chose to file in New York, and that  
13 was erroneous. They made a mistake.

14 THE COURT: All right. It's a different -- this is a  
15 different case, and I think everybody agrees that it's a  
16 different case.

17 MR. SCHWARTZ: Right, I agree. But Your Honor, I  
18 think what I'm trying to say, and I understand that Your Honor  
19 is trying to really wrap her head around it to see -- to  
20 determine what is just, and I'm trying my best to help you  
21 because --

22 THE COURT: Okay. All right. Well, keep going.

23 MR. SCHWARTZ: Your Honor, look, take a look at some  
24 of the facts that we know, that there's no dispute, right? We  
25 know these companies were formed on the eve of bankruptcy. We



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1 know they were formed after the bankruptcy counsel had come in  
2 and started to consult with regard to restructuring. That's in  
3 the 341(a) transcript. Mr. Schroeder testified to that, right?  
4 We know that neither company has any employees. We know that  
5 neither any company has any operations. We know that neither  
6 any company has offices.

7 If you take a look at how much money you're talking  
8 about, well, I actually had to call someone how to say this in  
9 English, but the PCX case has 98,000 dollars in it. The  
10 monthly operating report that was recently filed by the debtors  
11 for the period ending July 31 states that the total cash assets  
12 on an aggregate basis is a little over 539 million, that's the  
13 cash assets, and that all assets exceed 3.7 billion.

14 If Your Honor was to do an analysis as the how much  
15 money the debtors have, their principal assets in this district  
16 versus what they have as an enterprise, I will tell you it is  
17 less than two one-hundredths of one percent. If Your Honor --  
18 that's if you only consider the cash assets. If you consider  
19 the aggregate assets, it's three one-hundred-thousandths of a  
20 percent. So that's what we're talking about.

21 I mean, I don't -- I hear what you're saying, Your  
22 Honor, but you got to look at the facts on the ground, and  
23 they're not disputed. They're admitted. They're in evidence.  
24 We have them. So with respect to that, I think that those  
25 factors should play in.

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1 Your Honor, the top fifty creditors in the case,  
2 they're not in New York. Take a look at the list of the top  
3 fifty. They're not here. Unsecured creditors, right?

4 THE COURT: Well, Ms. Schwartz, let's focus on the  
5 creditors.

6 MR. SCHWARTZ: Okay.

7 THE COURT: Your office appointed a statutory  
8 committee of creditors, right?

9 MR. SCHWARTZ: Um-hum.

10 THE COURT: And they voted, and as I understand it,  
11 four to three voted.

12 MR. SCHWARTZ: Okay.

13 THE COURT: And so now I've got the creditors'  
14 committee, and if we're talking about numbers, I'm sure  
15 somebody's going to give me the numbers, they added them up in  
16 Winn-Dixie, there's an enormous, enormous amount of debt,  
17 although I heard Ms. Jennik tell me that the union has the  
18 single largest amount, but there's an enormous amount of debt  
19 that's telling me to keep it here. So the committee of  
20 creditors that your office appointed --

21 MR. SCHWARTZ: Right.

22 THE COURT: -- says keep it here. And I think that  
23 there are any number of cases that say that their view should  
24 be taken into account. How do I deal with that? How do I deal  
25 with the fact that the creditors' committee wants to keep it

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1 here?

2 MR. SCHWARTZ: One way is to say that they don't  
3 dispute what happened here. They don't address the interest of  
4 justice argument at all. They talk only about the convenience  
5 of the creditors. And as Your Honor knows, 1412 was amended,  
6 and it now provides for those two prongs under 1412 to be  
7 applied in the disjunctive. So the interest of justice is its  
8 own separate discretionary vehicle for this Court to use as is  
9 convenience of the parties.

10 THE COURT: I totally agree.

11 MR. SCHWARTZ: Okay. I asked myself the same  
12 question. I said, how do we address that, how do we deal with  
13 the fact that the creditors' committee opposes the motion and  
14 that there are a host of joinders that were filed by creditors,  
15 which I'm going to tell you there's some issues with, but I'll  
16 get to that.

17 THE COURT: I'm going to ask you to keep your powder  
18 dry on that --

19 MR. SCHWARTZ: Yeah, okay.

20 THE COURT: -- because I want to go first on that  
21 issue.

22 MR. SCHWARTZ: Okay.

23 THE COURT: All right?

24 MR. SCHWARTZ: Yeah.

25 Your Honor, I think that at the end of the day if we

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1 think about what the job for the creditors' committee is to do  
2 is to maximize the value for their constituency. Here in New  
3 York, you have New York counsel that is well regarded  
4 representing the committee. I'm not behind the scenes, Judge.  
5 I'm not at the committee meetings, and I'm not in the debtors'  
6 offices discussing why they pick a case and where it should be,  
7 but I suspect, Your Honor, that the committee is in line with  
8 the debtors, that the thinking as to why the cases should stay  
9 in New York would benefit the distribution to unsecureds.  
10 That's what they must believe. I mean, otherwise they would  
11 say, we don't have a dog in this fight because -- or they would  
12 pick a different venue where it would have to go.

13 THE COURT: Okay. And what's wrong with that?

14 MR. SCHWARTZ: What's wrong with it is you -- we keep  
15 shifting away from how they did it. What's wrong with it is  
16 that they abused the statute. It was never intended, Your  
17 Honor, that companies like this one, as huge as this one, a  
18 hundred entities, could simply say, ah, you know what, New York  
19 is the best, New York has the best judges, the best  
20 courthouses, the most convenience, the most consistency. These  
21 are all issues I'm sure that debtors are going to tell Your  
22 Honor may, in fact, be reasons. I only have to form an LLC.  
23 Why does it have to be 98,000 dollars? Let's put five dollars  
24 in a bank account and pay 175 dollars to the Secretary of  
25 State; I have venue. I don't think that's what Congress

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1 intended. And I think, Your Honor, that by enacting 1412 and  
2 giving you the discretion to put a stop to that, to curb that  
3 wrong, that's why you have the interest of justice.

4 THE COURT: But what you're saying is that -- and we  
5 can talk about the loophole that was talked about in  
6 Winn-Dixie, okay. So what you're saying is that everyone  
7 agrees judges shouldn't be activists, they shouldn't close  
8 loopholes. That's Congress's job, not the court's job, right?

9 MR. SCHWARTZ: Right.

10 THE COURT: So you're saying notwithstanding the fact  
11 that I look at the statute, and it says "domicile", and I look  
12 at the certificate issued by the New York Secretary of State,  
13 and I've got a match, right?

14 MR. SCHWARTZ: Right.

15 THE COURT: That I should take the fact that they  
16 incorporated those entities when they did into account in my  
17 interest of justice analysis. That's what you're saying,  
18 right?

19 MR. SCHWARTZ: And for the purpose that they did.

20 THE COURT: But the purpose -- your formulation of the  
21 purpose is that -- the purpose was to get the case here.

22 MS. SCHWARTZ: They admit that's the purpose.

23 THE COURT: And they admit that that's the purpose and  
24 what I --

25 MS. SCHWARTZ: It's not my formulation.

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1 THE COURT: What I keep talking to all of you about is  
2 why; why, why, why, why do they want the case here?

3 MS. SCHWARTZ: Well, Your Honor, I submit -- I hate  
4 that word -- I suggest to you that it doesn't matter why they  
5 did that. It's wrong. It's wrong.

6 THE COURT: But how can you tell me that it's wrong  
7 without knowing --

8 MS. SCHWARTZ: Because I know --

9 THE COURT: -- without knowing -- excuse me -- without  
10 knowing actually what the analysis was? It's not that they  
11 didn't have the desire to provide access to their creditors. I  
12 mean, in Winn-Dixie there was a lot of talk about what they  
13 were running away from --

14 MS. SCHWARTZ: Uh-hum.

15 THE COURT: -- in Florida. There hasn't been that  
16 kind of talk here. There has been a lot of focus on access,  
17 and I think access is a very important part of justice. But in  
18 Winn-Dixie, you know, Winn-Dixie is very unique on its facts  
19 and the position of your office in that case appears to have  
20 been that they were urging Judge Drain to look at the 600  
21 million dollars of debt that wanted to stay there,  
22 notwithstanding the fact that the debtor changed its mind,  
23 wanted to go back to Florida, and then the committee objected,  
24 very -- I mean, it's like a law school hypothetical.

25 MS. SCHWARTZ: Right.

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1 THE COURT: Okay?

2 MS. SCHWARTZ: Well, a couple of things on that, Your  
3 Honor.

4 THE COURT: Yes.

5 MS. SCHWARTZ: First of all, in Winn-Dixie, Judge  
6 Drain transferred the cases for the sole reason on the interest  
7 of justice.

8 THE COURT: Yes, he did.

9 MS. SCHWARTZ: And the sole reason was --

10 THE COURT: Yup.

11 MS. SCHWARTZ: -- because they created the facts to  
12 fit the statute; exactly what happened here. He says it in the  
13 transcript. I know Your Honor's read it.

14 With respect to the United States Trustee's position  
15 in that case we addressed it in our reply brief, but I will  
16 just cite for the Court, U.S. v. Boccanfuso at 882 F.2d 666.  
17 It's a Second Circuit case, 1989. And basically what that says  
18 is we're not estopped from taking the position --

19 THE COURT: I'm not saying you're -- that you're  
20 estopped. I'm just trying to parse the difference between that  
21 was then, this is now.

22 MS. SCHWARTZ: Right.

23 THE COURT: What led you to take that -- you, meaning  
24 your office, to take that position then --

25 MS. SCHWARTZ: Yeah.

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1 THE COURT: -- and how I can make a reasoned  
2 conclusion from what you did there, because there -- and you  
3 know that I afford your office a great deal of deference and  
4 respect --

5 MS. SCHWARTZ: Yes, you do.

6 THE COURT: -- that you took that position there and  
7 for a variety of factors, you're taking a different position  
8 here. You are urging on me what I view as kind of a per se  
9 rule that --

10 MS. SCHWARTZ: Well, first of all, with respect to the  
11 position, I'm not so sure the U.S. Trustee took a position, if  
12 you will. Debtors take the position and read into it that the  
13 United States Trustee opposed the transfer. It's a little  
14 unclear if you read the statute, Your Honor, but in all  
15 fairness, I wasn't there.

16 THE COURT: If you read the transcript.

17 MS. SCHWARTZ: Yeah.

18 THE COURT: You mean if you read the transcript.

19 MS. SCHWARTZ: I read the transcript; right.

20 THE COURT: You said if you read that statute.

21 MS. SCHWARTZ: I meant the transcript.

22 THE COURT: You meant if you read the transcript.

23 MS. SCHWARTZ: Thank you for correcting me. I wasn't  
24 there, Your Honor. I wasn't even with the U.S. Trustee's  
25 Office at that time, but we tried to address that in our papers



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1 to say, Judge, that it's a little unclear what was said at that  
2 time, but there should be no doubt today that the position of  
3 the office is --

4 THE COURT: Well, let me quote you.

5 MS. SCHWARTZ: Yeah.

6 THE COURT: Let me quote to you from the transcript.

7 MS. SCHWARTZ: I read it.

8 THE COURT: Page 107, do you know what I'm going to  
9 read to you?

10 MS. SCHWARTZ: I know what you're going to read. I  
11 read it.

12 THE COURT: All right. So let me read it.

13 MS. SCHWARTZ: Sure.

14 THE COURT: Okay. "Movants have the burden of proof  
15 on this issue." I'm at page 107. I'm starting on line 13.  
16 "The debtors' support of the transfer may not be dispositive  
17 since the committee and what I have calculated to be almost 600  
18 million of debt have objected to the transfer. So the U.S.  
19 Trustee encourages the Court to apply the standard under 1412  
20 to allow the true stakeholders in this case to be heard."  
21 It's --

22 MS. SCHWARTZ: That's not our position today, Your  
23 Honor.

24 THE COURT: Okay.

25 MS. SCHWARTZ: Okay. You had mentioned a little bit

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1 before about the loophole. I just want to address that issue  
2 about Congress.

3 THE COURT: Okay.

4 MS. SCHWARTZ: Debtors have made much of that and said  
5 that, you know, really, Judge, it's not for you. Let the  
6 statute go to Congress. Let Congress deal with it. Congress  
7 doesn't need to deal with it. Congress already dealt with it.  
8 They gave you the discretionary authority under 1412. You've  
9 got it. It's not about -- there's a distinction here and the  
10 distinction is that 1408 talks about establishing or achieving  
11 venue. What we're saying is they cannot sustain venue in this  
12 district because of how they got it.

13 THE COURT: All right. So let me stop you there. So  
14 let me give you another hypothetical.

15 MS. SCHWARTZ: Okay.

16 THE COURT: All right? So the -- where's the line in  
17 terms of formation of the entity test? You've said you don't  
18 know, but you know that this case doesn't work for you, right?  
19 This was the eve of.

20 MS. SCHWARTZ: And --

21 THE COURT: In your view, this qualifies as on the eve  
22 of, right?

23 MS. SCHWARTZ: And also because there's no purpose  
24 other than --

25 THE COURT: Because there's no purpose.

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1 MS. SCHWARTZ: -- to achieve the venue.

2 THE COURT: All right. So let's focus on the purpose.

3 If companies are really smart, right, suppose a year ago the  
4 debtors had decided, you know, natural gas has an affect on  
5 coal prices, right? There's a lot of natural gas in Upstate  
6 New York. Let's get ourselves a company, a subsidiary in  
7 Upstate New York to explore hydraulic fracturing, right?  
8 Fracking. And they do that and they have people on the ground  
9 and they did it a year ago. It's not generating much revenue  
10 but they're out there trying to get their fracking operation  
11 off the ground and the rest of the ninety-nine debtors are  
12 exactly the way they are today; then what do I do?

13 MS. SCHWARTZ: Well, I don't think you'd hear an  
14 argument from us, Your Honor, that there was an abuse of the  
15 statute in order to achieve venue. I think --

16 THE COURT: But what if it was a calculated decision  
17 to hedge their bets so that they had a business up and running?

18 MS. SCHWARTZ: Well in other words, if there was a  
19 deposition and they gave in testimony, they said that's what  
20 they --

21 THE COURT: Well, evidence; I'm really big on  
22 evidence.

23 MS. SCHWARTZ: You had evidence that said they  
24 calculated solely -- are you saying that in this hypothetical  
25 that a year before filing bankruptcy they said, We might need

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1 to file bankruptcy in a year, so let's form a company, an  
2 operating company, let's fund it, let's give it employees and  
3 then we'll have venue if we need it in a year. Is that kind of  
4 a little more fuller --

5 THE COURT: I wouldn't exactly put it that way but if  
6 there were an operating company that constituted a small  
7 portion of the overall revenue, maybe not quite as extreme as  
8 the numbers you quoted me but --

9 MS. SCHWARTZ: Your Honor, I think, you know --

10 THE COURT: It gets to be hard to tell, right?

11 MS. SCHWARTZ: Oh, there's no question about that  
12 but -- I know I keep going back to this but that's not what's  
13 before you, Your Honor.

14 THE COURT: Okay.

15 MS. SCHWARTZ: But let me just say this though with  
16 respect to it, and that is that as I said -- and I think every  
17 judge that has been confronted with a situation like this has  
18 said it's a case-by-case, fact-by-fact analysis. I don't know  
19 what we would do. Maybe we would then make an interest of  
20 justice argument if we had those facts that it was done to -- I  
21 would use the word manipulate the statute, misuse the statute.  
22 Maybe we would. But again, Your Honor, it's so extreme from  
23 what you have here. I mean, you've got two nonoperating  
24 companies formed not more than six weeks before the case was  
25 filed. They do nothing. They basically have nothing and it's

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1 admitted the only reason they formed them was to come to New  
2 York. That's what you got, and that's admitted.

3 Your Honor, I had mentioned to you that in Winn-Dixie,  
4 and I know that Your Honor took it in, that Judge Drain, the  
5 sole reason why he transferred the cases was on the interest of  
6 justice. I'm also trying not to duplicate things that Ms.  
7 Jennik has already addressed with the Court. Just give me one  
8 quick sec, so I can --

9 THE COURT: Sure.

10 MS. SCHWARTZ: -- run down here. You know, Your  
11 Honor, I do want to make a mention about Enron. It seems like  
12 every case where venue is an issue, everybody says Enron,  
13 Enron, Enron. Well, let me say this. The decisions that are  
14 cited for Enron are factually distinguished from here. In  
15 Enron-I, the debtor was Enron Metals and Commodities. They had  
16 an office on Madison Avenue. They were an operating company.  
17 They had fifty-five employees; four of the eleven executives  
18 were in New York. One of the three board members --

19 THE COURT: I got it.

20 MS. SCHWARTZ: Okay. With respect to Enron-II, that  
21 kind of feeds into what Your Honor was asking earlier and that  
22 is that question which Judge Drain also picked up on and, you  
23 know, while on the surface there might be appeal to people to  
24 say well, we need access to the Court, right? And I know Your  
25 Honor cares about access to the Court. That's why Your Honor

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1 went to great lengths to make sure that today's hearing would  
2 be video streamed or however they did it technologically --

3 THE COURT: I don't agree with that characterization.

4 MS. SCHWARTZ: Oh.

5 THE COURT: The hearings are being video broadcast. I  
6 don't think there's anything in the record on how that came  
7 about or what was done.

8 MS. SCHWARTZ: Oh, okay, but it --

9 THE COURT: It exists.

10 MS. SCHWARTZ: Okay.

11 THE COURT: And it's for the benefit of everybody.

12 MS. SCHWARTZ: Right. But the point is that the idea  
13 behind that clearly was so that a larger audience could at  
14 least see these proceedings. That would be fair, right?

15 THE COURT: Right.

16 MS. SCHWARTZ: And I think that that's a laudable  
17 purpose, but being able to watch proceedings on TV and being in  
18 the courtroom are two completely different animals. And I know  
19 that there are -- you're right, Your Honor, if there was a  
20 committee that was set up for retirees and perhaps counsel was  
21 in New York and that things that were happening with respect to  
22 that would be before the Court and we wouldn't have the 10,000  
23 retirees wanting to come into the courtroom and be in front of  
24 you, but there certainly are going to be hearings in this case  
25 to the extent that one of the three major issues as to why

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1 these cases were filed, admitted by the debtor and set forth in  
2 the 1007 affidavit, is their legacy and labor costs.

3 And, Your Honor, I know from being in cases in our  
4 courthouse here before Your Honor and other judges that when  
5 issues are really important to people -- for example, in Getty  
6 Real Estate, we saw all the property owners and operators come  
7 into the court. People want the justice that the Constitution  
8 provides. That's what they want. They want to -- even if they  
9 don't stand up and talk, they want you to see them. They want  
10 to be counted. They want you to know that it's important to  
11 them.

12 So whereas you could have a video broadcast and people  
13 could see this hearing, it's no comparison at all for parties,  
14 interested parties, to be able to participate or even be  
15 present. And the other thing, too, is interesting, there's  
16 a lot that's been made about the convenience of the  
17 professionals --

18 THE COURT: But you're not suggesting that the fact  
19 that I had or that we had in the Getty case so many of the  
20 operators here that that influenced the decision, are you?

21 MS. SCHWARTZ: No, I'm talking about people feeling  
22 it's important and wanting to be present. That's what I am  
23 talking about, Your Honor, and I want to be clear about that.

24 THE COURT: Okay.

25 MS. SCHWARTZ: But I think that, you know -- I mean, I

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1 think that there's been a lot said about the professionals and  
2 the convenience to the professionals and we've all read Enron-  
3 I, Enron-II, et cetera. We know that there's a lot to be said  
4 for the convenience of the professionals. That is a factor but  
5 as we know, Enron was a completely different case and this is  
6 different. Here, Judge -- what Judge Gonzalez said in one of  
7 the decisions was, well I don't even know whether or not any of  
8 the employees are going to want to participate in the  
9 bankruptcy proceedings. You know it now, Your Honor. The  
10 debtors acknowledge that one of the three main reasons they  
11 filed for bankruptcy has to do with the employees and the  
12 retirees. That's why these cases are here. So that's not in  
13 doubt.

14 THE COURT: Well, I agree with you. A lot of the  
15 hoopla surrounding the Enron venue decisions related to an  
16 observation that I think has never been backed with any  
17 empirical evidence and that is that somehow the result was  
18 worse in this court than it would have been had it been in  
19 another court.

20 MS. SCHWARTZ: Right.

21 THE COURT: And there is no empirical evidence that  
22 that's the case. Many folks have stated it as a fact that  
23 that's what would be the result. But the fact is, there's no  
24 empirical evidence that the outcome for any particular group is  
25 better or worse as a result of a case being in this district



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1 versus any other district. That's a fact, right?

2 MS. SCHWARTZ: I'm unaware --

3 THE COURT: Do you agree with that?

4 MS. SCHWARTZ: -- of any, Your Honor.

5 THE COURT: Okay.

6 MS. SCHWARTZ: You know, another thing, too, I just  
7 want to make a comment with respect to efficiency. I think  
8 that efficiency is another goal. It's certainly a goal of the  
9 United States Trustee Program and a goal of courts. I think  
10 Judge Drain talks about this in the Winn-Dixie case and you've  
11 explored it somewhat with Ms. Jennik about local counsel, et  
12 cetera. I think Your Honor raised some good points that not --  
13 just because a case gets transferred somewhere doesn't mean New  
14 York counsel's not going to go there or, et cetera.

15 But I think one of the goals or hopes at least in  
16 Winn-Dixie was that if the case went to a different  
17 jurisdiction that perhaps -- perhaps local counsel may in fact  
18 be used more, not that they replaced the main counsel but maybe  
19 that would be a result. And I think from an efficiency  
20 perspective, Your Honor, that may in fact be helpful. I think  
21 it's a little difficult to judge the efficiency in -- sitting  
22 here. It would be a much easier evaluation in hindsight. But  
23 like I said, Your Honor, I mean there are a host of districts  
24 where venue is proper and they're easily -- you can get to them  
25 easily; St. Louis, Chicago. You know --

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1 THE COURT: So if the debtor had chosen any of those  
2 districts, is it -- am I safe in concluding that your office  
3 wouldn't have made the motion?

4 MS. SCHWARTZ: Unless we -- unless there were facts  
5 similar to the ones here, we wouldn't have made this same  
6 motion. This is the only place they did it. And, you know,  
7 earlier you talked about the employees and you were trying to  
8 rightfully so, get a handle on how many employees are there.  
9 Where are they, et cetera, right? They're not here. That's  
10 important. They're not here. They're not in New York.

11 So, Your Honor, I think the last thing I would like to  
12 just address and then -- have any questions, any further  
13 questions from the Court, is just to say that convenience, even  
14 though that wasn't our argument, but we didn't make that  
15 argument but I just want to make a comment about it and that is  
16 that convenience no matter how stated or by whom defined should  
17 defeat the interest of justice.

18 THE COURT: So if it costs a little extra, it doesn't  
19 matter as long as you can conclude that that would serve the  
20 interest of justice?

21 MS. SCHWARTZ: I think the integrity of our laws and  
22 the integrity of the bankruptcy system are paramount to that.

23 THE COURT: All right. Well, I think that that's a  
24 good note to end for today. It's minutes before 5 o'clock. I  
25 might, on further reflection, have some more questions for you

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1 in the morning.

2 MS. SCHWARTZ: And, Your Honor -- yes, may I also just  
3 reserve a couple of minutes in the morning to the extent I look  
4 at my notes and there's anything further?

5 THE COURT: Sure. Okay. All right. So in the  
6 morning --

7 MR. GOODCHILD: Excuse me, Your Honor?

8 THE COURT: Yes.

9 MR. GOODCHILD: I'm sorry to interrupt. My name is  
10 John Goodchild. I represent the 1974 Pension Trust.

11 THE COURT: Yes.

12 MR. GOODCHILD: With the few minutes that we have  
13 remaining, Your Honor is obviously troubled on a factual basis  
14 for why it is, if the debtors have a witness here --

15 THE COURT: Excuse me. It's not your time to make an  
16 argument. If you want to stand up tomorrow when it's your  
17 turn, I'm happy to hear you but you seem to be trying to answer  
18 some of my questions that I've been asking other parties and I  
19 don't need to hear from you on that right now.

20 MR. GOODCHILD: Your Honor, I'm not arguing. I'm  
21 suggesting that the debtors have a witness here that if Your  
22 Honor has a question about the reason, then perhaps the debtors  
23 could answer.

24 THE COURT: Thank you.

25 MS. SCHWARTZ: And, Your Honor, also perhaps when

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1 you're ready on the issue of joinders, may I have an  
2 opportunity to address that.

3 THE COURT: Tomorrow.

4 MS. SCHWARTZ: Okay.

5 THE COURT: All right. I thank you all for your  
6 attendance here today. We'll see you at 10 o'clock tomorrow  
7 morning. We've got nothing that's going to occur in between.  
8 So if you want to leave your papers here, we'll lock the  
9 courtroom after you leave today. All right? Thank you.

10 MS. SCHWARTZ: Thank you, Your Honor. Have a good  
11 evening.

12 (Whereupon these proceedings were concluded at 4:58 PM)

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I N D E X

RULINGS

	Page	Line
Debtors' Motion for Approval of Patriot's Assumption and Execution of Certain Agreements with Peabody, approved.	20	1
Notice of Application of the Official Committee of Unsecured Creditors of Patriot Coal Corporation, et al., for an Order Authorizing and Approving the Employment and Retention of Kramer Levin Naftalis & Frankel LLP as Counsel, Nunc Pro Tunc to July 18, 2012, approved.	23	11
All parties' exhibits are made a part of the record.	35	17

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C E R T I F I C A T I O N

I, Clara Rubin, certify that the foregoing transcript is a true and accurate record of the proceedings.



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CLARA RUBIN

AAERT Certified Electronic Transcriber CET\*\*D-491

eScribers

700 West 192nd Street, Suite #607

New York, NY 10040

Date: September 12, 2012