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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 12, 2012  
10:08 AM

VOLUME I of III

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

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Continued Hearing Re: Motions to Transfer Venue

Doc# 127 Amended Motion to Transfer Venue Motion of The United Mine Workers of America to Transfer the Case to the Southern District of West Virginia (related document(s)116)

Doc# 287 Motion to Transfer Venue (related document(s) 116) filed by Chrisandrea L. Turner on behalf of ARGONAUT INSURANCE COMPANY, Westchester Fire Insurance Company.

Doc# 406 Motion to Transfer Venue United States Trustees Motion, Pursuant to 28 U.S.C. Section 1412 and Fed. R. Bankr. P. 1014(a), to Transfer Venue of these Cases in the Interest of Justice

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**PATRIOT COAL CORPORATION, et al.**  
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THE COURT: Good morning. Please have a seat. All right. Good morning, everyone.

MS. SCHWARTZ: Good morning.

THE COURT: Before we get started, I have a couple exhibits I want to put into the record. Exhibit A, Cliff Bar Mojo Dipped Chocolate Peanut, Benzini Salted Cashews, also Benzini Milk Chocolate Raisins. There's no food in the courtroom. If you're hungry, you're welcome to take a break and go outside and have something to eat. I'm not your mother. You should at least clean up after yourselves and that includes your water bottles.

In long hearings of this kind, I usually relax the no coffee rule. This gives me pause as to whether I should relax it in this case, but because I believe in second chances, I will. You can bring in coffee, but you better clean it up. And if you spill it, you have to pay to clean my carpet. Okay? Okay.

Ms. Schwartz, when we concluded yesterday, we left off with agreeing that you would have an opportunity to look at your notes and determine if there was anything else you wanted to add to what you had said yesterday. Shall we start there?

MS. SCHWARTZ: Yes, Your Honor, thank you.

THE COURT: Are there additional matters that --

MS. SCHWARTZ: Very small.

**PATRIOT COAL CORPORATION, et al.**

11

1 THE COURT: Okay. Come on up. And as you're coming  
2 up, I'll ask the group generally, are there any other  
3 housekeeping matters that we need to address before we get  
4 started today? Mr. Huebner?

5 MR. HUEBNER: Your Honor, for the debtors, we know of  
6 none.

7 THE COURT: Okay. All right. Thank you.

8 MS. SCHWARTZ: Good morning, Your Honor.

9 THE COURT: Good morning.

10 MS. SCHWARTZ: Andrea Schwartz for Tracy Hope Davis,  
11 the United States Trustee. With me in the courtroom today is  
12 Susan Golden, also counsel to the United States Trustee.

13 Your Honor, thank you so much -- I'm sorry, is it  
14 better? Okay. Your Honor, thank you so much for giving me an  
15 opportunity to just review my notes from yesterday. I've  
16 identified a few points, Your Honor, that I'd just like to  
17 bring to the Court's attention, and then I will sit down and  
18 the proceedings can go further.

19 THE COURT: Okay.

20 MS. SCHWARTZ: One of the issues that Your Honor was  
21 focused on yesterday had to do with -- and I think the  
22 questions were asked of the union's counsel, maybe not to me,  
23 but whether or not there were -- there was a finding of bad  
24 faith. I think the Court was asking some questions with  
25 respect to that.

**PATRIOT COAL CORPORATION, et al.**

12

1 THE COURT: Well, not a finding but an assertion.

2 MS. SCHWARTZ: An assertion.

3 THE COURT: Right.

4 MS. SCHWARTZ: Yes. I misspoke. I apologize, Your  
5 Honor. The United States Trustee does not assert that there  
6 was bad faith; that wasn't part of our motion, but we also  
7 believe that Your Honor does not need to make a finding of bad  
8 faith in order to, in the interest of justice, transfer these  
9 cases to a district where venue is proper. I know Your Honor  
10 knows that in Winn-Dixie --

11 THE COURT: That's what Judge Drain said in Winn-  
12 Dixie, right?

13 MS. SCHWARTZ: Right. And he went out of his way to  
14 make it clear for the record that he did not find bad faith.  
15 So that was one point I wanted to make for the Court. The  
16 other was that we talked about -- one of the reasons why the  
17 United States Trustee believes that this is a misuse of the  
18 statute is that because these entities were created for no  
19 purpose other than to achieve venue in the district. And I  
20 didn't have an opportunity to say, Your Honor, it's also  
21 notable that there appears to be no reorganization purpose for  
22 these entities as well.

23 Now, as I've said, Your Honor, we are not -- we didn't  
24 make the argument that there was bad --

25 THE COURT: Well, the debtor --

**PATRIOT COAL CORPORATION, et al.**

13

1 MS. SCHWARTZ: -- faith.

2 THE COURT: The debtors say that they're obligors on  
3 the debt. I think.

4 MS. SCHWARTZ: Yes, that became --

5 THE COURT: I think that's what they say.

6 MS. SCHWARTZ: Yes. Well, that became -- that  
7 became -- that happened after they created these two entities  
8 and, Your Honor, there's no evidence before the Court that they  
9 needed to make these two nonoperating affiliates obligors on  
10 the DIP. So we want to make it clear that another factor we  
11 would ask the Court to consider, in the interest of justice, is  
12 that there's no -- there's no evidence of any reorganization  
13 purpose for entities that were created four weeks before the  
14 bankruptcy.

15 And if Your Honor were call -- let's say we only had  
16 those two entities, Your Honor, and we were in a different  
17 factual scenario -- we were in a different factual scenario  
18 where Your Honor was just focusing on those two entities, you  
19 know, we may be in a different place where we would be looking  
20 at possibly a bad faith filing. So I wanted to just put that  
21 out there for the Court and note that we think that that should  
22 also be considered.

23 In addition, Your Honor was making the distinction  
24 yesterday between forum selection versus forum shopping. And I  
25 wanted it to be clear for the record that the United States

**PATRIOT COAL CORPORATION, et al.**

14

1 Trustee sees nothing wrong with forum selection. And we would  
2 think -- and Your Honor talked a lot about fiduciary duties,  
3 duties of management, et cetera, that a company should, in  
4 fact, make an evaluation as to what forum would be for  
5 whatever -- for whatever the factors are important to that  
6 company. And I said it yesterday, and I'll say it again today  
7 to be clear. We're not advocating a per say rule. We're  
8 saying it again, this is a case by case analysis. And in fact  
9 it is, Your Honor, because it's a discretionary mechanism for  
10 the Court. You're not going to have a per se rule when the  
11 statute provide it's discretionary for the Court.

12 And I think it's also important to note, Your Honor,  
13 that forum selection is fine and, in this case, if the debtors  
14 had said, okay -- which we know, Your Honor, that there's at  
15 least ten districts that are available to these debtors -- and  
16 they said, well, let's evaluate those ten districts and we say,  
17 oh, well, we could go here, it's better if we go here, et  
18 cetera. They do an evaluation, and they say, no, we want to go  
19 somewhere else. We don't have it so let's create it. That's  
20 the problem we have, Your Honor. Because if companies were  
21 allowed to just create facts to fit the statute, then why do we  
22 need a venue statute?

23 Let's say, for example, Your Honor, that the debtors  
24 decided Alaska was the best place to go. Well -- and they have  
25 absolutely no connection, at all, with Alaska. Again, I make

**PATRIOT COAL CORPORATION, et al.**

15

1 the argument that I said yesterday. Would it be okay to --  
2 would it be proper to use the statute to put five dollars in a  
3 bank account and file whatever the fee is with the Secretary of  
4 State, get venue a few days before the case is filed and go  
5 there with absolutely no nexus.

6 THE COURT: I assume you're picking Alaska because,  
7 along with Hawaii, it's the farthest away and that it's nothing  
8 particular that offends you about the State of Alaska, right?

9 MS. SCHWARTZ: Your Honor, I promise you, there's  
10 nothing behind my thought on Alaska.

11 THE COURT: Okay. Alaska or Hawaii --

12 MS. SCHWARTZ: Right.

13 THE COURT: -- shall we say?

14 MS. SCHWARTZ: Could be either or.

15 THE COURT: Okay.

16 MS. SCHWARTZ: And I think that those really are the  
17 points that I wanted to just make clear for the record here  
18 today, Your Honor. And I appreciate, again, that Your Honor  
19 has given me this opportunity to take a couple of minutes with  
20 the Court. Of course, as Your Honor had said yesterday, Your  
21 Honor would like to be the first to inquire about the joinder  
22 issue. When we filed our papers, there was no evidence of bad  
23 faith. The joinder issue presents certain other factors that  
24 the Court will inquire into, and then if there's other facts  
25 that we think might be helpful to the Court on that issue, we

**PATRIOT COAL CORPORATION, et al.**

16

1 would like to reserve the right to be heard on that.

2 THE COURT: Certainly. Thank you.

3 MS. SCHWARTZ: Thank you, Your Honor.

4 THE COURT: I should note -- I should've at the  
5 outset, we, again, are joined today by a video in St. Louis and  
6 in Charleston, and also we have a roster of folks on the phone,  
7 some the same, some different from yesterday. I'm not going to  
8 take the time to go through them. If anybody is on the phone  
9 who wishes to have their appearance noted, please let me know.  
10 Mr. Wood, I note that you're on the phone, again, live, sir.  
11 Are you there?

12 MR. WOOD: Yes, that is correct, Your Honor.

13 THE COURT: All right. Thank you.

14 MR. WOOD: Thank you.

15 THE COURT: Okay. I think that brings us to the  
16 sureties.

17 MR. MELDRUM: Good morning, Your Honor.

18 THE COURT: Good morning.

19 MR. MELDRUM: I'm Brian Meldrum. I'm from the law  
20 firm of Stites & Harbison. With me in the court today are my  
21 colleagues Blaine Early and Bill Gorton.

22 THE COURT: Okay.

23 MR. MELDRUM: We represent four surety movants on the  
24 venue motions. They are Argonaut Insurance Company, Indemnity  
25 National Insurance Company, U.S. Specialty Insurance Company,



1 **PATRIOT COAL CORPORATION, et al.** 17  
and Westchester Fire Insurance Company.

2 THE COURT: Mr. Meldrum, did you file a 2019 statement  
3 with the Court?

4 MR. MELDRUM: I believe we have, yes.

5 THE COURT: All right. If I could have a copy of that  
6 at your convenience, that would be great.

7 MR. MELDRUM: Thank you, Judge.

8 THE COURT: All right? Can you give me the  
9 particulars of each of your clients? Where they're located,  
10 what their exposure is, and the like?

11 MR. MELDRUM: I can give you, as I sit here today,  
12 Your Honor, the aggregate exposure, but I don't have that  
13 breakdown --

14 THE COURT: Okay.

15 MR. MELDRUM: -- client by client.

16 THE COURT: Can you tell me where each of your clients  
17 is located in terms of where they do business, headquarters and  
18 the like?

19 MR. MELDRUM: Your Honor, I don't have that at the  
20 ready.

21 THE COURT: Okay.

22 MR. MELDRUM: To answer at least what I can answer,  
23 Your Honor, the total exposure for these four sureties is  
24 approximately sixty-seven million dollars. That's the penal  
25 amount of reclamation bonds that they issued to bond the

**PATRIOT COAL CORPORATION, et al.**

18

1 debtors obligations to do environmental reclamation relating to  
2 its culmination.

3 THE COURT: That's the bonded amount, though?

4 MR. MELDRUM: That's right.

5 THE COURT: That's not funded debt, right? So it's  
6 contingent?

7 MR. MELDRUM: It's contingent. That's right.

8 THE COURT: Okay.

9 MR. MELDRUM: Your Honor, what I was anticipating  
10 doing today, so there's not a whole lot of overlap with Ms.  
11 Jennik and the U.S. Trustee, is focusing on, I think, our  
12 unique perspective on this and that's the connections of this  
13 debtor to the State of West Virginia, vis-a-vis its  
14 environmental obligations and liabilities, as well as its  
15 operations, what the nature of their operations are, how it  
16 affects the land and the water of the State of West Virginia.

17 And if it pleases the Court, I'm a bankruptcy lawyer;  
18 I'm not an environmental lawyer. My colleague Mr. Early is an  
19 environmental lawyer and what I'd like to do is try to address  
20 a couple of the points that I thought Your Honor raised  
21 yesterday regarding the, sort of, intersection of the two  
22 subject matters --

23 THE COURT: Okay.

24 MR. MELDRUM: -- and then turn it over to Mr. Early to  
25 talk the vocabulary of an environmental lawyer, if that's okay.

**PATRIOT COAL CORPORATION, et al.**

19

1 THE COURT: All right. Now, I notice that you're not  
2 on the briefs that were submitted, but you're familiar with the  
3 submissions that were made?

4 MR. MELDRUM: I am.

5 THE COURT: Okay.

6 MR. MELDRUM: Your Honor, the particular element that  
7 I guess I'd like to focus on today is the factor four in the  
8 interest of justice standard and that's whether either forum  
9 has a particularized interest in the outcome of the case. And  
10 it's my contention, Judge, that the nature of the debtors'  
11 operations on the ground in West Virginia, give West Virginia a  
12 unique -- a unique and profound interest in these proceedings.

13 And a couple of highlights -- factual highlights that  
14 I'd like to note for the record is that in 2011, the debtor  
15 mined 31.1 million tons of coal. 23.8 of that came from its  
16 Appalachian operations, which are based in the mines in West  
17 Virginia, and 7.2 million tons came from its operations in the  
18 Illinois basin, and its mines are presently in Western  
19 Kentucky, which is a neighbor of West Virginia. That comes,  
20 Your Honor, from the 2011 10-K, page 11, specifically. That's  
21 the volume of production.

22 In terms of dollar, the ratio of revenue by  
23 location -- you had asked the question yesterday -- I don't  
24 know the numbers for 2011, but we know that in 2010 the  
25 debtor -- the debtor reported 1.7 billion dollars in revenue

**PATRIOT COAL CORPORATION, et al.**

20

1 from its Appalachian mining operation and 276 million in  
2 revenue from its Illinois basin operations. Again, this comes  
3 from the 2011 10-K(a) at page 72.

4 In terms of where the assets are, we know from the  
5 monthly operating report that the debtor reports about 3.7  
6 billion dollars in assets. A large majority of that is in the  
7 land and coal reserves that the debtor owns, and we know this  
8 from the 10-Q filed in 2011 in August where, on its balance  
9 sheet, it reports that 2.9 billion dollars in assets are its  
10 land and coal reserves. And those are, of course, located in  
11 these two locations.

12 So in addition to the revenue generation, the asset  
13 location, these activities inherently create a lot of  
14 liability. That's why my clients are here.

15 THE COURT: Create a lot of potential liability.

16 MR. MELDRUM: Potential liability, that's right. In  
17 the 10-Q, the debtors estimate 737 million dollars in estimated  
18 reclamation and water treatment obligations. That figure of  
19 737 million, while contingent, is very large and it, in fact,  
20 is more than all of the top fifty unsecured creditors put  
21 together and then some. So it's a big number.

22 Judge, you had asked yesterday, and I was happy to  
23 hear you raise, sua sponte, the Midlantic decision, and I think  
24 you had challenged one of the speakers to explain to you why  
25 this matters if the debtors are constrained by Midlantic, and I

**PATRIOT COAL CORPORATION, et al.**

21

1 wanted to try to come in and answer that from our perspective.  
2 Why it matters is we don't expect the debtors to take a  
3 broadside attack on the premise of Midlantic that the debtor  
4 can't -- that the debtor should be able to abandon bad property  
5 or reclamation-heavy sites under Section 554 directly.

6 THE COURT: Well --

7 MR. MELDRUM: We don't expect them --

8 THE COURT: But hold on. Because somewhere in your  
9 papers, I'm trying to find the exact words, give me a moment.  
10 Maybe you could help me. Somewhere in your papers, you make  
11 the statement that the debtor may use the bankruptcy proceeding  
12 to escape.

13 MR. MELDRUM: Yes, we did.

14 THE COURT: Escape liability. That was the word that  
15 was used. Can you point me to where you -- where that is,  
16 please?

17 MR. MELDRUM: I don't know if I can find it. I don't  
18 dispute that we said it, and I can explain what we meant by it.

19 THE COURT: All right. Well, could somebody on your  
20 team tell me where it is?

21 MR. MELDRUM: Yes.

22 THE COURT: Mr. Huebner, do --

23 MR. HUEBNER: Your Honor, may I be heard for one  
24 second? We actually checked the docket while he began. We do  
25 not believe they filed a 2019 and had he actually answered the

**PATRIOT COAL CORPORATION, et al.**

22

1 Court the other way, which is I don't think we did, I think we  
2 probably would have sat up at the outset to say we're not sure  
3 that he should be heard today. Just because he represented he  
4 believed they did and my team advises they've searched the  
5 docket and they believe they did not --

6 THE COURT: Okay. Well, the reason --

7 MR. HUEBNER: I wanted to advise the Court.

8 THE COURT: -- I asked is because I looked for 2019s,  
9 and it's not there. So I --

10 MR. MELDRUM: Okay.

11 THE COURT: -- assume that by the time the day is out,  
12 you'll file a 2019.

13 MR. MELDRUM: We certainly will, Judge.

14 THE COURT: All right. So somebody tell me where the  
15 word -- where this heading is, please. Where this section of  
16 brief is, because I'm -- as I'm flipping pages, I'm not able to  
17 find it, and I know it's in there. This is in the category of  
18 how many lawyers does it take to screw in a lightbulb.

19 MR. MELDRUM: We believe it --

20 MR. EARLY: Your Honor?

21 THE COURT: Do we have a winner? Page number?

22 MR. EARLY: Blaine Early for the sureties.

23 THE COURT: Yes, Mr. Early.

24 MR. EARLY: It's page number 7 in the --

25 THE COURT: In your --

**PATRIOT COAL CORPORATION, et al.**

23

1 MR. EARLY: -- sureties' reply.

2 THE COURT: In your main brief?

3 MR. MELDRUM: In the reply.

4 MR. EARLY: In the reply memorandum.

5 THE COURT: Reply. Thank you, sir. Yes. Page number

6 7. "The debtors may attempt to escape their environmental

7 liabilities."

8 MR. MELDRUM: That's right.

9 THE COURT: So -- okay, let's go back to where you  
10 were before I interrupted you.

11 MR. MELDRUM: What we meant by that, Judge, is not the  
12 debtors are going file an abandonment motion. They clearly  
13 can't do that under Midlantic. But there are --

14 THE COURT: Well, they can do it.

15 MR. MELDRUM: They would lose it.

16 THE COURT: But they have to satisfy the Midlantic  
17 test.

18 MR. MELDRUM: Right.

19 THE COURT: Right?

20 MR. MELDRUM: Midlantic, as I read it, is based on  
21 abandonment. That has not stopped other coal companies from  
22 attempting to do -- achieve a similar outcome through a  
23 different mechanism such as a sale of part of the assets, but  
24 not the reclamation-heavy assets and trying to firewall off  
25 those two dimensions.

**PATRIOT COAL CORPORATION, et al.**

24

1 THE COURT: Okay. When I say okay --

2 MR. MELDRUM: I understand.

3 THE COURT: -- everyone, it's in the sense of I hear  
4 you, not that I'm agreeing with you.

5 MR. MELDRUM: Right.

6 THE COURT: Just to clarify.

7 MR. MELDRUM: I understand. And why I think location  
8 matters here, Your Honor, whether the debtor attempts to do  
9 that or not, let's say that they do, that's going to raise  
10 disputes not about whether they're permitted to do it, but, as  
11 you indicate, whether they leave sufficient resources with the  
12 bad bucket to permit somebody --

13 THE COURT: Okay.

14 MR. MELDRUM: -- to satisfy their --

15 THE COURT: Right.

16 MR. MELDRUM: -- environmental obligations which they  
17 have to under 959.

18 THE COURT: Right.

19 MR. MELDRUM: That's going to raise a lot of fact  
20 disputes, we think, about what are these liabilities? What are  
21 the reasonable projections and cost estimates needed? What's  
22 the value of what's left? And we think that's going to be very  
23 fact intensive --

24 THE COURT: Yes.

25 MR. MELDRUM: -- and is going to require engineers who



**PATRIOT COAL CORPORATION, et al.**

25

1 work in West Virginia and evidence about --

2 THE COURT: I had an A+ average when I was an  
3 engineering student at Cornell University.

4 MR. MELDRUM: I have to tell you, Judge, I don't doubt  
5 that you're capable of doing it, and we don't doubt that.

6 THE COURT: Then tell me exactly where you're going  
7 with this.

8 MR. MELDRUM: Where we're going is we think the  
9 connections between the debtors' operations, the impact of  
10 their operations on the ground in West Virginia is a factor to  
11 be considered and should be a factor to be considered in  
12 whether --

13 THE COURT: Of course it --

14 MR. MELDRUM: -- West Virginia has interest.

15 THE COURT: Of course it is. I agree with that. The  
16 coal is in the ground in the various mining complexes. And the  
17 coal miners take it out of the ground. Absolutely. But I'm  
18 going to keep pushing back, questioning the same thing I did  
19 yesterday, which is why it follows inexorably from that  
20 premise, which I agree with you, that, therefore, there's any  
21 compelling reason for the case to be heard by a West Virginia  
22 judge, as distinct from the justice arguments that have to do  
23 with the propriety of the creation of the two New York --

24 MR. MELDRUM: Right.

25 THE COURT: -- affiliates. And just to be clear, I

**PATRIOT COAL CORPORATION, et al.**

26

1 haven't heard from a whole host of parties yet, and I'm going  
2 to question everybody the same way I've questioned --  
3 questioning you and questioned everybody who spoke yesterday.  
4 So that's the question that I keep coming back to because this  
5 Court has presided over dozens, if not hundreds, of complex  
6 cases involving difficult, very, very serious environmental  
7 issues.

8 MR. MELDRUM: Right.

9 THE COURT: Ms. Schwartz yesterday talked about the  
10 Getty Petroleum case. That case just got a confirmed plan of  
11 reorganization here, right here. And in that case, there was  
12 an enormous battle over underground storage tanks, bad stuff.  
13 They leak; they're bad. And we had the EPA, the DOJ, U.S.  
14 Attorney's Office, the State Attorneys General from  
15 Connecticut, New Jersey, New York, and we had the City of New  
16 York, and they all argued for days about what to do with the  
17 underground storage tanks. And we talked about Midlantic, and  
18 lo and behold, there was an agreed order that dealt with it.

19 So the notion that this Court is not capable of  
20 listening to the facts and making a decision based on the facts  
21 and the record, I just -- I can't agree with you.

22 MR. MELDRUM: And Your Honor, to be clear --

23 THE COURT: And I know this is not personal.

24 MR. MELDRUM: I understand.

25 THE COURT: This is not personal, and I'm trying very

**PATRIOT COAL CORPORATION, et al.**

27

1 hard to not make it personal.

2 MR. MELDRUM: I understand. And to be clear, we're  
3 not asserting that you're -- that this Court or any judge in  
4 this district is incapable of it; to the contrary. However,  
5 for whatever reason, the -- at least as a theoretical matter,  
6 these cases tie off location to the venue issue. 1408 is a  
7 location-based venue statute. Judge, I heard you talk  
8 yesterday --

9 THE COURT: Domicile goes back to -- the notion of  
10 domicile as a predicate for venue in bankruptcy cases goes back  
11 to the nineteenth century, right?

12 MR. MELDRUM: Right. But if what we were trying to  
13 accomplish instead was to have the most remote jurist, the  
14 least connected to the community so you don't wade into that  
15 sympathy area you were discussing yesterday, we would have a  
16 very different system, and we don't have that. I can't tell  
17 you -- I don't know what the framers of the venue statute were  
18 thinking. But there is a locus-based approach. It's loose.  
19 There's a lot of flexibility for debtors, and we don't doubt  
20 they took it seriously here. We just think that this needs --  
21 these numbers are so big, this environmental impact on this  
22 state is so large, we need to make sure we look at it, and  
23 we're entitled to second-guess the debtors' judgment on this, I  
24 believe. It's not a shot at all about the Court. And had the  
25 debtors not incorporated those -- the two LLCs at the last

**PATRIOT COAL CORPORATION, et al.**

28

1 minute, I can't tell you we'd be here. This just makes it a  
2 much easier --

3 THE COURT: So if they had selected one of the other  
4 venues that Ms. Schwartz mentioned, you wouldn't have made this  
5 motion?

6 MR. MELDRUM: I don't know. What I do know is --

7 THE COURT: Because your argument has to do with West  
8 Virginia.

9 MR. MELDRUM: It does.

10 THE COURT: So it sounds to me like you would have  
11 made the motion anyway.

12 MR. MELDRUM: We may have. Recognizing it would be an  
13 even longer shot. What made us unquestionably file the motion  
14 here is, I think the U.S. Trustee's right, and I think this  
15 case has to go somewhere. And if it has to go somewhere, I  
16 want it to go to West Virginia because that's where the  
17 operations are, that's where the evidence is, that's where the  
18 value is, that's where these enormous environmental liabilities  
19 are, that's where the regulators are, that's where the  
20 engineers are.

21 If I were to try to recreate what would happen if  
22 there had been -- if they had filed in St. Louis, for instance,  
23 I don't know. We probably would have moved, recognizing it was  
24 a thousand-to-one shot because this is an uphill battle no  
25 matter what. I think it happens to be a little bit easier in

**PATRIOT COAL CORPORATION, et al.**

29

1 this case.

2 THE COURT: Well, I can't agree with that  
3 characterization. I mean, I'm not --

4 MR. MELDRUM: Oh, and I'm not asking for you to admit  
5 that the probability -- I'm giving you my thinking, and our  
6 thinking has not only to do with where you want to go, but you  
7 have to balance that against is it worth the fight. In this  
8 case, it is.

9 Your Honor, unless you have any more questions for me,  
10 what I would like to do is invite my colleague, Mr. Early, up  
11 to walk through some of the particularized environmental  
12 issues.

13 THE COURT: Are your -- I'm happy to do that, but let  
14 me ask you one additional question. Are your clients'  
15 interests wholly aligned economically with the interests of the  
16 UMWA?

17 MR. MELDRUM: No, I would say no.

18 THE COURT: Could you explain that?

19 MR. MELDRUM: Well, the UMWA, as we heard yesterday,  
20 may have a CBA-related fight that we have no part of.

21 THE COURT: Right.

22 MR. MELDRUM: We may -- I don't know what position  
23 we'll take on that. It could be -- we could be on the debtors'  
24 side and against them on that if we think that it's going to  
25 mean a reorganizing; that's one example.

**PATRIOT COAL CORPORATION, et al.**

30

1 THE COURT: And do you know -- and you can't speak for  
2 them, and Ms. Jennik can speak to this later perhaps -- do you  
3 know what the union's view generally is on environmental  
4 matters related to the mining of coal? Do they have a view  
5 about, for example, MTR, do they have a view about selenium, do  
6 they have a view about whether or not it's appropriate for the  
7 company to buy land to ensure access -- whoever's on the phone,  
8 could you please put your phone on mute? Thank you.

9 Go ahead.

10 MR. MELDRUM: I don't know what views they have. I  
11 can imagine that there's probably some overlap in that regard.  
12 If you're a citizen of West Virginia and you're a union member  
13 who lives and works there, you might have concerns about the  
14 environment that happen to coincide with those who sort of have  
15 the economic skin in the game, but I don't know that from  
16 conversations or independently. I can see it working both  
17 ways.

18 THE COURT: I'm going to ask one more time. Whoever's  
19 on the phone, put your phone on mute or I'm going to disconnect  
20 the line for everyone. Thank you.

21 I'm sorry.

22 MR. MELDRUM: So the short answer is, Judge, I don't  
23 know. I suspect there's commonality in some regards, but that  
24 may turn out to be different.

25 THE COURT: But you don't have any reason to believe

**PATRIOT COAL CORPORATION, et al.**

31

1 that a court not sitting in West Virginia has any vested  
2 interest, one way or the other in that arena, has a particular  
3 orientation toward --

4 MR. MELDRUM: I don't think that --

5 THE COURT: -- the environment and mining, that very  
6 large question.

7 MR. MELDRUM: Well, I can -- if we unpack that a  
8 little bit, I see two parts.

9 THE COURT: Go ahead.

10 MR. MELDRUM: There's the do you think a jurist is  
11 going to run into somebody that we care about or that the union  
12 cares about in a grocery store and is going to be sympathetic  
13 and we're going to get a better result.

14 THE COURT: No, that's not my question.

15 MR. MELDRUM: Okay. Are you talking about sort of  
16 specialized knowledge or the --

17 THE COURT: No. I'm talking about the issue of the  
18 importance of preserving the environment and the beauty of the  
19 land in West Virginia.

20 MR. MELDRUM: I would hope, and I expect, that you or  
21 anyone here would care as much as anyone there.

22 THE COURT: Or any other bankruptcy judge anywhere in  
23 the country.

24 MR. MELDRUM: Yes.

25 THE COURT: Right?

**PATRIOT COAL CORPORATION, et al.**

32

1 MR. MELDRUM: I agree with that. So if I may, Judge.

2 THE COURT: All right. Now, do you -- I have a number  
3 of questions about your papers. Do you want me to direct them  
4 to Mr. Early?

5 MR. MELDRUM: You can start with me.

6 THE COURT: Okay. And then you can tag team me.

7 MR. MELDRUM: The more technically environmental these  
8 are, the quicker I'm going to run out of answers so --

9 THE COURT: Okay. All right. On page -- you didn't  
10 number your pages in your main memorandum.

11 MR. MELDRUM: It appears that we did not.

12 THE COURT: Okay.

13 MR. MELDRUM: We can go by the pages' numbers at the  
14 top on the PDF, if that helps.

15 THE COURT: Yeah, I don't have that.

16 MR. MELDRUM: Okay.

17 THE COURT: But on page 3, you say at the end of the  
18 first carryover paragraph, "Chapter 11 debtors should not be  
19 able to leave their home districts and shop for a forum whose  
20 judicial precedent on bankruptcy law they happen to prefer."

21 MR. MELDRUM: This is in the main brief, right?

22 THE COURT: Yes, it is in the main brief.

23 MR. MELDRUM: Well, I agree with the concept. I  
24 imagine your question is do we have any evidence of that.

25 THE COURT: I have two questions. Do you have any



**PATRIOT COAL CORPORATION, et al.**

33

1 evidence of that?

2 MR. MELDRUM: I have no evidence that the debtors did  
3 that here, no.

4 THE COURT: Okay. And are you familiar with the  
5 entire statement that you cite for that proposition? That's  
6 the --

7 MR. MELDRUM: To be honest, Judge, I still have not  
8 found it thanks to our page numbering.

9 THE COURT: It's page 3; 1, 2, 3. The footnote 2 is  
10 to the statement of the Judiciary Committee Chairman Lamar  
11 Smith.

12 MR. MELDRUM: Yes, I am familiar with that.

13 THE COURT: You're familiar with that?

14 MR. MELDRUM: Yep.

15 THE COURT: Are you suggesting that the statements  
16 made in that statement are true and accurate and support your  
17 position?

18 MR. MELDRUM: No. I think what we were trying to  
19 indicate is that there's lots of obviously different opinions  
20 about --

21 THE COURT: Opinions.

22 MR. MELDRUM: Yes.

23 THE COURT: Not facts.

24 MR. MELDRUM: Right.

25 THE COURT: Right.

**PATRIOT COAL CORPORATION, et al.**

34

1 MR. MELDRUM: Yes.

2 THE COURT: And are you familiar with what Judge Drain  
3 said about some of those opinions in Winn-Dixie?

4 MR. MELDRUM: Yes, I am.

5 THE COURT: Okay. You go on to say that -- how this  
6 Court has been inundated with large company filers, again  
7 citing Chairman Smith. And you go on to say that criticism of  
8 these filings is warranted. What I'm interested in is that you  
9 again go on to cite a recent article by the American Bankruptcy  
10 Institute that "describe the resulting limitations on many  
11 creditors' meaningful participation and the increased expense  
12 of case administration." Do you have any evidence of that?

13 MR. MELDRUM: No. Your Honor, other than the citation  
14 to the article, we don't.

15 THE COURT: Did you read the article entirely?

16 MR. MELDRUM: Yeah, I believe I read this before we  
17 filed the brief, yes.

18 THE COURT: Okay. But you read the -- the citation  
19 for that is the Hamilton and Cavazos article entitled "The  
20 Venue Reform Debate" from the ABI Committee News in July 2012.

21 MR. MELDRUM: Yes.

22 THE COURT: Right?

23 MR. MELDRUM: Yes.

24 THE COURT: And you point out that they say that the  
25 biggest problem with the current venue concentration -- a venue

**PATRIOT COAL CORPORATION, et al.**

35

1 rule is the concentration of bankruptcy filings here and the  
2 unfortunate results of this concentration are in the increase  
3 in the cost of bankruptcy and an inability of many stakeholders  
4 to have any meaningful participation in the process. But once  
5 again, you have no evidence of that, right?

6 MR. MELDRUM: No, I don't.

7 THE COURT: Okay. And in fact, if you read that  
8 entire article, it's premised on so-called scholarly research.

9 MR. MELDRUM: That's right.

10 THE COURT: That, in fact, also does not contain  
11 accurate facts about the conduct of cases in this district  
12 versus other districts, correct?

13 MR. MELDRUM: I think that's correct.

14 THE COURT: All right. So I'm going to disregard that  
15 entirely.

16 MR. MELDRUM: I think that's fair.

17 THE COURT: Okay. Let's go to the next page, page 4.  
18 It's the one that has the map of the location of Patriot Coal  
19 operations, just to --

20 MR. MELDRUM: Thank you.

21 THE COURT: -- aid you in our keeping together here.

22 MR. MELDRUM: I appreciate that.

23 THE COURT: Okay. On the second paragraph -- first  
24 full paragraph on that page, you say, "West Virginia law will  
25 control many of the issues relating to the debtors' operations

**PATRIOT COAL CORPORATION, et al.**

36

1 and much of the litigation anticipated in this case." I take  
2 it that you're largely referring to the environmental laws from  
3 your perspective --

4 MR. MELDRUM: Well, I think --

5 THE COURT: -- because the debtors -- I think there's  
6 been a lot of discussion about contracts controlled by New York  
7 law, right?

8 MR. MELDRUM: Yeah. There's no doubt that there's  
9 evidence of both states having --

10 THE COURT: Right.

11 MR. MELDRUM: -- that law. I think what we're talking  
12 about here are the -- we're getting into my -- let me start  
13 with this. I think we're probably talking --

14 THE COURT: You can bring up your co-counsel.

15 MR. MELDRUM: My environmental robot.

16 THE COURT: I'm happy to have the two of you stand  
17 there together. It's fine.

18 MR. MELDRUM: Blaine, why don't you come on up, if you  
19 don't mind.

20 I can say that one of the things we're referring to is  
21 about fights regarding mineral leases which are probably almost  
22 entirely governed by -- probably almost entirely -- if they're  
23 West Virginia real estate --

24 THE COURT: Okay.

25 MR. MELDRUM: -- it's going to be governed by West

**PATRIOT COAL CORPORATION, et al.**

37

1 Virginia real property law and --

2 THE COURT: Okay. But do we have it -- do we know how  
3 likely there are going -- it is that there are going to be  
4 disputes with respect to those?

5 MR. MELDRUM: No, we don't, we don't.

6 THE COURT: If I had a guess, I would say they're  
7 probably likely -- they're going to be assumed or rejected, and  
8 there are going to be issues about cure costs and rejection  
9 damages, right?

10 MR. MELDRUM: I think that's right.

11 THE COURT: Okay. But I guess the larger point is  
12 that there are clearly a lot of issues that are going to be  
13 governed by West Virginia law.

14 MR. MELDRUM: Yes.

15 THE COURT: There are some issues that are going to be  
16 governed by New York law. Of course, there's the overarching  
17 bankruptcy law, but isn't that what bankruptcy courts do all  
18 the time? We, each and every one of us, interpret state law;  
19 that's what we're required to do, right?

20 MR. MELDRUM: Yes, yes, you're right.

21 THE COURT: So that's another one where it's six of  
22 one, half a dozen of the other, right?

23 MR. MELDRUM: Yeah. I mean, I think the point here is  
24 there's no clear weight to New York because there are a lot of  
25 West Virginia connections. And with any one of these factors,

**PATRIOT COAL CORPORATION, et al.**

38

1 I think they probably wash out pretty close. That's why I  
2 wanted to --

3 THE COURT: Okay.

4 MR. MELDRUM: -- talk specifically about the one  
5 we're -- the environmental impact on the ground that Mr.  
6 Early's expert in. But on a lot of these on the edges, I think  
7 we put them in here to show that we're not -- we don't have  
8 zero. We might not have a winner, but we don't have nothing.

9 THE COURT: Okay.

10 MR. MELDRUM: But taking them all together, which is  
11 what you're asked to do here is to kind of weigh it all, and  
12 that's a tough decision. I recognize that, so --

13 THE COURT: Okay. Let me keep going. If you keep  
14 paging along with me, maybe that's the best way to do this.

15 MR. MELDRUM: Sure.

16 THE COURT: If you get to a couple pages after that,  
17 there's a heading D, the majority of debtors' assets and  
18 creditors are outside New York.

19 MR. MELDRUM: Yes.

20 THE COURT: Okay. Now, the unsecured creditors'  
21 committee has objected to the motions to transfer.

22 MR. MELDRUM: They have, yes.

23 THE COURT: What's your suggestion as to what weight I  
24 should give that?

25 MR. MELDRUM: Your Honor, you obviously have to give

**PATRIOT COAL CORPORATION, et al.**

39

1 it weight. How to put a number on how you count heads in this,  
2 I have no idea. I don't -- counting heads isn't an enumerated  
3 factor in any of these cases, yet every case seems to do it to  
4 some extent. I think what we say here is certainly true. I  
5 explained about the 2.9 billion dollars of assets in the ground  
6 in West Virginia. That doesn't mean they don't have assets  
7 elsewhere; it means they have little, if any, here in New York.  
8 And regarding creditors, obviously the DIP agents have  
9 connections to New York.

10 THE COURT: Right.

11 MR. MELDRUM: But a lot of the pre-petition creditors  
12 have significant connections to West Virginia so --

13 THE COURT: Sure. Okay. All right. If you page over  
14 to -- into the argument III(b), as in boy, you -- at the bottom  
15 of that page -- are you there?

16 MR. MELDRUM: I think I am.

17 MR. EARLY: This is 17 to 26.

18 THE COURT: B, the convenience of the parties supports  
19 transfer of venue?

20 MR. MELDRUM: Yes.

21 THE COURT: Okay. And then you make the statement  
22 that "analysis of these factors in light of the undisputable  
23 facts in this case, demonstrates that the convenience of the  
24 parties and the interest of justice require a transfer to West  
25 Virginia." So what are the undisputable facts that support the

**PATRIOT COAL CORPORATION, et al.**

40

1 notion that the convenience of the parties requires a transfer  
2 to West Virginia? Lots of creditors joined --

3 MR. MELDRUM: Yeah.

4 THE COURT: -- the debtors' motion, and we're going to  
5 get to that.

6 MR. MELDRUM: Well, that's phrased like the statute is  
7 phrased, in the disjunctive. And we, I think, and I'm telling  
8 you here, put more weight on the interest of justice side of it  
9 because of the localized interest of West Virginia. I would  
10 say to Your Honor that, without getting into a debate about  
11 which airline tickets are cheaper or not cheaper, I had hoped  
12 we wouldn't have that --

13 THE COURT: We're not.

14 MR. MELDRUM: -- that occur as well. I don't think  
15 Charleston is inaccessible. So it may not be --

16 THE COURT: Nor do I.

17 MR. MELDRUM: -- the most convenient place for every  
18 single creditor, but I don't think that's the test. I think it  
19 takes it all together and weighs them against one another. I  
20 think it's roughly as accessible as New York. It's more  
21 accessible for some folks like the debtors' COO who lives and  
22 works there. For an engineer who we might have to call as a  
23 witness to a proceeding about a plan that attempts to  
24 transfer --

25 THE COURT: Okay, but that's a --



**PATRIOT COAL CORPORATION, et al.**

41

1 MR. MELDRUM: -- some assets and retain others.

2 THE COURT: -- one-off thing, right? I mean,

3 that's --

4 MR. MELDRUM: That's true --

5 THE COURT: Right? It's true so --

6 MR. MELDRUM: -- but there could be a series of one-  
7 off things, and we don't know.

8 THE COURT: Right. But you have all these folks that  
9 I'm looking at here today going there versus certainly people  
10 that we're going to want to hear from occasionally going  
11 somewhere else.

12 MR. MELDRUM: You're right.

13 THE COURT: Right?

14 MR. MELDRUM: Yes.

15 THE COURT: I mean, it's -- this is tough stuff,  
16 right?

17 MR. MELDRUM: It is.

18 THE COURT: Well, not to sound like, again, a broken  
19 record, but turn a couple more pages to subheading 3 where you  
20 say, "transferring these cases to the West Virginia Bankruptcy  
21 Court will allow more economical administration and will be  
22 more convenient for many witnesses and many creditors." Are  
23 you there?

24 MR. MELDRUM: I'm here.

25 THE COURT: Okay. Once again, you say, "it will be

**PATRIOT COAL CORPORATION, et al.**

42

1 considerably more economical to administer the debtors' estates  
2 in West Virginia." There is no evidence of that, is there?

3 MR. MELDRUM: Well, I think there's evidence that  
4 makes that a reasonable conclusion because of the connections.

5 THE COURT: Well, then you have the burden.

6 MR. MELDRUM: Right, I understand.

7 THE COURT: So you need to convince me.

8 MR. MELDRUM: I understand. And as I tried to explain  
9 at the outset, an important factor in the interest of justice  
10 standard is the interest of West Virginia and having it decided  
11 there.

12 THE COURT: I agree.

13 MR. MELDRUM: So we've got that.

14 THE COURT: Okay.

15 MR. MELDRUM: We also have an abundance of connections  
16 with West Virginia, an abundance. I read them off when I stood  
17 up here.

18 THE COURT: But I'm focusing on the economical: "It  
19 will be considerably more economical to administer the debtors'  
20 estates in West Virginia." I need to understand what the  
21 evidence is that supports that.

22 MR. MELDRUM: I think the evidence that I mentioned at  
23 the outset, about the connections between this debtor and the  
24 State of West Virginia, in addition to the other bullet point  
25 lists that folks have submitted in their moving papers. I

**PATRIOT COAL CORPORATION, et al.**

43

1 think it's reasonable to conclude that those connections, which  
2 I submit are at least by number, connect this case to West  
3 Virginia easier than it connects it to New York make that a  
4 reasonable conclusion. Now, the fact is that lawyers -- the  
5 debtors filed here first, and we have New York law firms  
6 involved, and I recognize that it's not -- it's probably not as  
7 easy as it sounds and as we made it sound in the brief. I  
8 agree with that.

9 THE COURT: All right. I'm almost done. I appreciate  
10 your patience.

11 MR. MELDRUM: All right. Thank you.

12 THE COURT: All right. I think I don't have anything  
13 more for the moment from your main brief, but let me take a  
14 moment to look at your reply brief, if you would. And then I'm  
15 still happy to hear from Mr. Early.

16 MR. MELDRUM: Thank you.

17 THE COURT: Okay. Let's go to your reply brief which,  
18 I'm happy to say, is numbered. And let's look at page 9.  
19 Second -- first full paragraph, you say -- you talk about why  
20 this is an example of bootstrapping that has become so  
21 controversial in the bankruptcy bar, "It is a self-serving  
22 practice at the expense of creditors." So this is not a  
23 hearing about venue generally but --

24 MR. MELDRUM: Right.

25 THE COURT: -- and it's a hearing about this case. So

**PATRIOT COAL CORPORATION, et al.**

44

1 what's the evidence that relates that statement to this case?

2 MR. MELDRUM: Well, I think what we mean by  
3 "bootstrapping" there is the movants on this kind of a motion  
4 have to -- especially on the convenience of the party have to  
5 show the -- I'm sorry, I'm feeding back apparently.

6 THE COURT: Somebody's BlackBerry might be too close  
7 to the microphone. Would that be one of you?

8 MR. MELDRUM: It could be. Mine's turned off.

9 THE COURT: All right. Somebody at counsel table  
10 maybe. Okay. Go ahead.

11 MR. MELDRUM: So once the case is filed here, that  
12 necessarily builds in a little bit of inertia because you have  
13 lawyers who are local here and you have a judge who is going to  
14 rule on first-day motions, get to learn about the case. That's  
15 the learning curve aspect. I think that's what bootstrapping  
16 means in this context, which is if you tie your -- the debtors'  
17 response brief was -- a lot of it was focused on how  
18 convenience it will be for professionals to get from A to B.

19 THE COURT: Right.

20 MR. MELDRUM: And that's not something anybody can  
21 possibly refute. That's built in. They get that advantage  
22 when they filed the case, and I think that's what bootstrapping  
23 means in this context.

24 THE COURT: Okay. I --

25 MR. MELDRUM: So we have to give a little bit less

PATRIOT COAL CORPORATION, et al.

45

1 weight --

2 THE COURT: Okay. But I'm focusing on -- I'm focusing  
3 mostly on -- and this was the same thing that Ms. Jennik and I  
4 talked about a lot yesterday -- at the expense of creditors, at  
5 the expense of creditors. This was the issue that she and I  
6 talked about --

7 MR. MELDRUM: Right.

8 THE COURT: -- the who's the "them" --

9 MR. MELDRUM: Right.

10 THE COURT: -- who's the "debtors". So can you give  
11 me your views on that?

12 MR. MELDRUM: My views are -- and my views on that  
13 colloquy yesterday are, we don't -- I think like everybody --  
14 doubt that the debtors attempted to do their best in selecting  
15 venue, and they obviously have a lot of considerations to  
16 balance. We don't think there was any sort of inside gaming  
17 going on for the benefit of somebody who hasn't been hurt.

18 THE COURT: So let's turn to page 10 of your brief,  
19 and at the end of that paragraph, you state the following: "In  
20 actuality, relevant parties include the hundreds of individuals  
21 who own the surface and/or mineral rights located in West  
22 Virginia and nearby mining regions" -- so we've talked about  
23 that a little bit --

24 MR. MELDRUM: Right.

25 THE COURT: -- "the debtors' 2,000 active coal miners,

**PATRIOT COAL CORPORATION, et al.**

46

1 1,500 of which" -- I think it's "whom" -- "both union and  
2 nonunion working in West Virginia, the 10,000 retirees of whom  
3 approximately 4,000 reside in West Virginia." So more live  
4 elsewhere than live in West Virginia by those numbers, right?

5 MR. MELDRUM: That's true.

6 THE COURT: It's true, right?

7 MR. MELDRUM: Yes.

8 THE COURT: So Kentucky's in the mix.

9 MR. MELDRUM: It is.

10 THE COURT: And it looks like at footnote 10 you cite  
11 me to an article, "UMWA Meeting with Patriot Miners in West  
12 Virginia and Indiana". Maybe Indiana's in the mix?

13 MR. MELDRUM: Yeah, I think that's right. Now, if the  
14 follow-up is why do we want West Virginia, I would say, and I  
15 think when you see the pictures we have here, for instance, the  
16 bulk, the center of gravity of the operations are there.  
17 That's what breaks the tie for us. I don't know what -- you  
18 have to make your own decision on that, obviously, so --

19 THE COURT: Okay. Over on page 12, you point out that  
20 "The first-day orders are in place and the substantive matters  
21 raised by the parties can be ably addressed by the court in  
22 Charleston." I want to make it perfectly clear that I  
23 thoroughly agree with that statement; however -- and you say  
24 that "there should be no cause for concern in the skill and  
25 knowledge of any West Virginia bankruptcy judge." Of course

**PATRIOT COAL CORPORATION, et al.**

47

1 not.

2 MR. MELDRUM: Right.

3 THE COURT: Yet -- and then you say "this would not be  
4 Southern District of West Virginia's first coal case, nor would  
5 it be the first coal case for the Southern District of New  
6 York."

7 MR. MELDRUM: That's right, too.

8 THE COURT: Right?

9 MR. MELDRUM: Yes.

10 THE COURT: There's Bethlehem Steel.

11 MR. MELDRUM: Yes.

12 THE COURT: There's Olga Coal. I think there are  
13 others. Nor would it be the first very large union case --

14 MR. MELDRUM: Right.

15 THE COURT: -- in the Southern District of New York.  
16 We've done airlines -- we are doing airlines, healthcare  
17 workers, entertainment entry, Teamsters. You name it, we've  
18 done it, right?

19 MR. MELDRUM: I understand and agree, yes.

20 THE COURT: So the Southern District of New York does  
21 know something about unions --

22 MR. MELDRUM: Absolutely.

23 THE COURT: -- and the culture of unions and the  
24 importance of unions, correct?

25 MR. MELDRUM: No question, no question at all.

**PATRIOT COAL CORPORATION, et al.**

48

1 THE COURT: No question, right?

2 MR. MELDRUM: Right.

3 THE COURT: So there's no implication that justice --  
4 there's no question about the ability of the West Virginia  
5 courts. There's no question about the ability of Southern  
6 District courts, right?

7 MR. MELDRUM: Agreed. It works both ways.

8 THE COURT: It does work both ways, doesn't it?

9 MR. MELDRUM: Yes.

10 THE COURT: All right. You're out of the hot seat.

11 MR. MELDRUM: Well, I appreciate that, Judge. Mr.  
12 Early will take it from here. If you have any questions for  
13 me --

14 THE COURT: Thank you very much.

15 MR. MELDRUM: -- please feel free to call me back up.

16 THE COURT: My daughter just started law school, so  
17 I'm very sensitive to the -- being the questionee. Thank you.

18 MR. EARLY: Thank you, Your Honor. Blaine Early for  
19 the four sureties identified previously by Mr. Meldrum.

20 To address some of the initial questions that you had,  
21 we understand that Section 2019 was filed December --

22 THE COURT: Rule --

23 MR. EARLY: I'm sorry -- docket number 373 for our  
24 firm --

25 THE COURT: Okay.



**PATRIOT COAL CORPORATION, et al.**

49

1 MR. EARLY: Maybe not Mr. Meldrum individually but for  
2 Stites & Harbison for the multiple representation, that was  
3 August 16th.

4 THE COURT: All right. We'll keep trying to track it  
5 down.

6 MR. EARLY: Okay. And to address the question the  
7 Court had about the sureties, again in very round numbers,  
8 Indemnity National is headquartered in Knoxville, Tennessee.  
9 It has approximately eleven million dollars in exposure, the  
10 bond penal amounts, collateral of about 5.8 million. West  
11 Chester Fire is based in Philadelphia. Its exposure penal  
12 amount is about five million. Houston Casualty, which is the  
13 parent of the U.S. Specialty Insurance Company, has a bond  
14 penal amount of about twenty-four million; it's based in  
15 Houston. And Argonaut or Argo Surety, Argonaut Insurance  
16 Company has a bond penal amount of about twenty-six and a half  
17 million; it's based in Houston and California.

18 THE COURT: Okay.

19 MR. EARLY: My purpose here is to talk about, as Mr.  
20 Meldrum said, the debtors' operations because we believe that  
21 in this context of "in the interest of justice" that place does  
22 have a very important part of the consideration. I'd like to  
23 address three aspects. First are the -- some of the legal  
24 framework that affects the debtors' operations, the regulations  
25 under which they function, to talk about what the operations

**PATRIOT COAL CORPORATION, et al.**

50

1 are, to describe some of the typical components and  
2 representative components, then really to follow up on some of  
3 the discussion that you and Mr. Meldrum had about the  
4 interaction, how these two might interact as this bankruptcy  
5 case proceeds.

6 We understand the debtors characterize this as a  
7 reorganization, and we certainly hope that that happens, a full  
8 reorganization with all of these environmental obligations  
9 taken care of. We do need to prepare though, and our clients  
10 are worried about the, well, what if, the possible down sides.

11 THE COURT: Can I ask you to stop for a moment? Do  
12 your clients also bond or insure Peabody obligations?

13 MR. EARLY: Peabody?

14 THE COURT: Did I say it wrong? Peabody.

15 MR. EARLY: Is that --

16 THE COURT: Yes.

17 MR. MELDRUM: I want to make sure I understood you  
18 correctly. I don't know if they bond Peabody or not. I'm not  
19 certain if they do or what the extent would be.

20 THE COURT: Okay. Go ahead.

21 MR. EARLY: Looking first at the law effective -- we  
22 described this in our initial memorandum, initial motion.  
23 There are three very important statutory programs in play here.  
24 One is the SMCRA, the Surface Mining Control and Reclamation  
25 Act, another is the Mine Safety Act, and the third's the Clean

**PATRIOT COAL CORPORATION, et al.**

51

1 Water Act. We're going to talk about each of those in  
2 sequence.

3 The SMCRA first, this is a federal statute, but by  
4 authority of the U.S. Department of Interior and its Office of  
5 Surface Mining, it can grant the states primacy or primary  
6 responsibility to administer that statute in their boundaries.  
7 That's what's happened here in West Virginia and Kentucky. So  
8 both West Virginia and Kentucky have primacy to see to the  
9 implementation of the SMCRA.

10 Now, I want to talk about three aspects in the SMCRA  
11 dealing with -- first with permitting, second reclamation, and  
12 then third just briefly with the idea of the financial  
13 assurance; that's where our clients come in.

14 We've cited in our papers about the importance of  
15 permitting. Because of the potential for environmental impact  
16 caused by the surface effects of mining, whether it's surface  
17 mining or underground mining, both the states and the federal  
18 government have adopt these regulations to contain that, to  
19 mitigate the harm and to make sure that the environment's  
20 restored after this process.

21 To do that, there must be a state-issued permit, and  
22 we'll talk about a lot of case. Whether it stays here or goes  
23 to Charleston, there will be a lot of discussions about permits  
24 and the requirements related to those. So there must be a  
25 state-issued permit. It authorizes specific activities in

**PATRIOT COAL CORPORATION, et al.**

52

1 specific geographic locales. Today, we're going to talk about  
2 some permits, say, for haul roads and surface mines and  
3 preparation plants and so forth. So there are specific  
4 activities authorized by these permits.

5 To get a permit, the applicant has to make a number of  
6 showings, and one of those is to prove or at least to make a  
7 showing that it has the legal right to be there and to mine,  
8 the legal right to access the surface, the legal right to take  
9 the coal out of the ground and to sell it. So there's a  
10 variety of different legal obligations or at least, I guess,  
11 legal rights that the permittee has to show to the state, West  
12 Virginia DEP before it will issue a permit.

13 THE COURT: All right. Can I just ask you to pause?  
14 We've solved the mystery of the 2019 statement. It was filed  
15 by your office in Tennessee on behalf of Bridgestone Tire.

16 MR. EARLY: Only Bridgestone?

17 THE COURT: No.

18 MR. EARLY: Oh.

19 THE COURT: But the docket heading description which  
20 is the way -- as you know, we look at this stuff on CM/ECF,  
21 says it was filed on behalf of Bridgestone Tire. So the search  
22 that folks may have done didn't show the four sureties, but  
23 they are, in fact, included in the 2019.

24 MR. EARLY: Okay. Thank you, Your Honor.

25 THE COURT: Just to relieve the suspense about the

**PATRIOT COAL CORPORATION, et al.**

53

1 issue of the 2019.

2 MR. HUEBNER: Thank you, Your Honor. I'd actually  
3 like to apologize. We actually found it the same way while the  
4 Court did. I was going to rise when he was done --

5 THE COURT: Okay.

6 MR. HUEBNER: -- to say that we found it the same way.

7 THE COURT: All right. Just so we take that off the  
8 table. All right. Keep going.

9 MR. EARLY: Thank you.

10 Then the last, and it's very important in  
11 considerations here, is that the permit has to include a  
12 precise mining and reclamation plan. Mining, of course, is  
13 this process that takes coal out of the earth, as the Court has  
14 already acknowledged, but in the context of this permitting  
15 process, the permittee, the individual, the entity that gets the  
16 permit, has to propose a sequence of mining and then the  
17 reclamation that comes along with that.

18 THE COURT: Okay.

19 MR. EARLY: So it's an integrated process.

20 THE COURT: Right.

21 MR. EARLY: Which brings us next to this reclamation.  
22 In the requirements in SMCRA, reclamation involves a variety of  
23 different activities. One of those is referred to as  
24 backfilling and grading, moving the earth back to fill in the  
25 holes that have been formed, cover over roads, things like

**PATRIOT COAL CORPORATION, et al.**

54

1 that. Another is revegetation, establishing the approved mix  
2 of plants, whether it's grasses, pasture or trees, whatever,  
3 but re-establish vegetation on this --

4 THE COURT: Okay.

5 MR. EARLY: -- disturbed earth. Third is to maintain  
6 or restore the hydrologic balance. Because of the disruption  
7 and the possibility of the introduction of pollutants in  
8 surface water, there are requirements for monitoring water  
9 quality and to establish and re-establish the water quality  
10 coming off the site.

11 When all the reclamation is completed, there is a  
12 process where the permittee proposes to get its permit released  
13 and its bonds released, its financial assurance released.  
14 There is a provision for public inspection or at least to  
15 accompany the inspector, and then if everything's in good  
16 shape, the permit can be completely released.

17 THE COURT: Okay.

18 MR. EARLY: One aspect to consider there, though, is  
19 that typically those permits will not be released unless all of  
20 those factors are met including maintaining the hydrologic  
21 balance, maintaining the water quality.

22 The third aspect, again, of this SMCRA that we wanted  
23 to talk about again is the financial assurance; that's where  
24 our clients come in. The SMCRA requires that that the permittee  
25 provide some form of financial assurance, and the way that

**PATRIOT COAL CORPORATION, et al.**

55

1 that's measured is it's supposed to be an amount sufficient to  
2 allow the state regulators in this case in West Virginia, the  
3 West Virginia DEP, to complete the reclamation if the permittee  
4 fails to do so, and there may be some problems with the actual  
5 calculations. There are varieties of mechanisms that can be  
6 used to meet those financial assurances. One is, of course,  
7 cash; the state governments are always happy to have cash,  
8 letters of credit or surety bonds issued by commercial  
9 assurers, as our clients are.

10 The other two programs, again, just very briefly, the  
11 Mine Safety Act, although that's largely for the protection of  
12 human health, miners, and people who live near mines. The  
13 place that it comes into importance here is because the Mine  
14 Safety Act is implemented by the Mine Safety and Health  
15 Administration or MSHA, also oversees the construction of the  
16 large dams that form the down-gradient portions of slurry  
17 impoundments where liquid coal waste is stored after coal  
18 processing. I'd like you to look at a photograph of one of  
19 those, but in order to maintain the integrity of those dams,  
20 there are specific requirements from MSHA in terms of design,  
21 in terms of implementation and maintenance.

22 The third program, the Clean Water Act, like the  
23 SMCRA, is -- although it's a federal program, it's administered  
24 by the individual states. In West Virginia, the West Virginia  
25 DEP administers that as well. The important aspect of the

**PATRIOT COAL CORPORATION, et al.**

56

1 Clean Water Act to this case is that there's a general  
2 prohibition of the discharge of pollutants into surface waters  
3 unless there's a permit that authorizes the discharge of  
4 specific identified pollutants, typically with specific  
5 effluent limitations. And so in some of the papers, there is  
6 discussion about the amounts of the pollutants. And so the  
7 Clean Water Act is important from that aspect.

8 Now, the -- so those are the -- that's kind of the  
9 statutory framework under which all these debtors' operations  
10 take place.

11 I would like to focus on some examples, again, just to  
12 show what the debtors do because although many of the  
13 businesses the Court has addressed about -- covered in cases in  
14 this district or other courts, for that matter, not many of us  
15 have experience with these particular mining operations and  
16 their scope. That's why in our reply we included the  
17 declaration of Roland Doss, Barry Doss. He's an engineer from  
18 West Virginia. Mr. Doss is in the courtroom, and he's  
19 available if the Court has any questions for him.

20 In his declaration, and that was attached as an  
21 Exhibit A to our reply memorandum, on pages 2 through 4, he  
22 describes many of the items that we had mentioned both in our  
23 initial memorandum and in our reply of components of the mining  
24 operations, things like surface mining and sediment control  
25 structures, high walls, and so on. He, at our request,



**PATRIOT COAL CORPORATION, et al.**

57

1 conducted a review of the West Virginia permitting database and  
2 found 264 -- approximately 264 permits issued to the various  
3 Patriot entities in West Virginia in some form that's not  
4 "completely released". In other words, if you look at the  
5 permitting database, there are many --

6 THE COURT: I understand.

7 MR. EARLY: Okay. So these are "active permits" from  
8 the standpoint they're still on the books. 157 of the permits  
9 authorized under the Clean Water Act are the so-called NPDES  
10 permits. There are arguably twelve total mining complexes  
11 identified, none of these in West Virginia, three of them in  
12 Kentucky.

13 He then went on in some detail as a representative of  
14 these complexes in West Virginia to talk about what the debtors  
15 refer to as the Paint Creek complex. And in that, he found  
16 that there were roughly fifty-seven permits associated with  
17 that. In the Paint Creek complex and its vicinity, there are  
18 twenty-eight surface mining permits, ten underground mining  
19 permits, and nineteen other permits consisting of things like  
20 haul roads, preparation plants, and refuse or waste facilities.

21 THE COURT: All right. So, Mr. Early, I appreciate  
22 all this, of course. I guess my question is -- I don't think  
23 anybody's disputing any of this.

24 MR. EARLY: Okay.

25 THE COURT: And I certainly appreciate the background

**PATRIOT COAL CORPORATION, et al.**

58

1 and the information. How does this connect up to your position  
2 that there are -- I agree with you that there is a very  
3 complex, multilayered web of permitting and regulation and  
4 environmental concerns. I totally agree with you. It's  
5 complicated. Environmental law is complicated; it's very  
6 complicated. But where am I supposed to go with it, and  
7 therefore what?

8 MR. EARLY: Okay. Well, Your Honor, not only is it  
9 complicated, but because of the very nature of the debtors'  
10 business, what it does, mining coal, we think that the scope is  
11 important, as well. It's not just a matter of the  
12 interrelationship between environmental law itself and the  
13 different statutory programs and how that interacts with  
14 bankruptcy law but also in looking at this interest-of-justice  
15 question and the connection or interest that the forum has, the  
16 sheer magnitude and the impact of these operations on West  
17 Virginia are important. And that's what we'd like to give,  
18 again, the Court just a flavor of one of these nine West  
19 Virginia complexes and its size.

20 For example, this Paint Creek complex, just the  
21 permitted areas, is about 15,000 acres. That's about  
22 twenty-three square miles. And as I understand it, if we look  
23 at just the land area of the island of Manhattan, it's about  
24 twenty-three square miles. So we're talking about enormous  
25 impact.

**PATRIOT COAL CORPORATION, et al.**

59

1 And I would -- Mr. Doss included some aerial photos.  
2 These are from an agricultural database taken in 2011. Those  
3 are in the record --

4 THE COURT: Yes.

5 MR. EARLY: -- by the stipulation. We do have some  
6 demonstrative photographs. I'd like to have Mr. Doss come up  
7 and to accommodate the cameras and the microphones, I'd like  
8 to --

9 THE COURT: To what end? Why -- they're in your  
10 papers. I saw them. They're in full color. I'm happy to  
11 listen, but I just need to understand why, what it is that  
12 you're asking me to look at.

13 MR. EARLY: Okay. Well, in looking -- for example,  
14 looking at Exhibit B, which is an aerial of the entire section,  
15 again, it gives an idea of the relationship of the total  
16 permitted area to not only themselves, not only the debtors'  
17 operations but also the proximity of neighboring communities  
18 and so on.

19 In looking at the following four photographs, focusing  
20 in on specific features, these somewhat abstract terms like  
21 hollow fills and haul roads and high walls are shown there in  
22 detail, and we'd like to point those out just so that they  
23 don't exist as a word isolated out of reality but show what  
24 they actually look like.

25 THE COURT: Okay. Go ahead.

**PATRIOT COAL CORPORATION, et al.**

60

1 MR. EARLY: Thank you, Your Honor.

2 Mr. Doss, please.

3 THE COURT: Let me stop to inquire of the other  
4 parties to the stipulation. Is this in any way at odds with  
5 the stipulation, because when we started yesterday you told me  
6 that everything was stipulated. So I'm very happy to see this  
7 and have it come in, but I don't want to run afoul of what the  
8 parties agreed to.

9 MR. HUEBNER: Sure. Your Honor, for the record, only  
10 because you asked, this is certainly very surprising to us. We  
11 think the reason we stipulated was to avoid having to have, for  
12 example, the lawyers spend thirty-five minutes restating what  
13 was in the declaration that we admitted without objection. Why  
14 he's now going to be going through all the exhibits, the  
15 declaration, when I think everybody agrees we mine a lot of  
16 coal in West Virginia, we have many permits in West Virginia,  
17 our complexes are very large in West Virginia, there's a lot of  
18 abatement.

19 THE COURT: Well, I think, Mr. Heubner, that it's  
20 fair --

21 MR. HUEBNER: But we're not going to object.

22 THE COURT: -- that the parties want to have the  
23 opportunity, visually, to make their point about what it  
24 actually looks like. I think that's fair. So I don't think  
25 we're going to spend two hours doing this, but I'm happy to

**PATRIOT COAL CORPORATION, et al.**

61

1 listen.

2 MR. EARLY: Thank you, Your Honor.

3 THE COURT: Hold on. One at a time.

4 Ms. Schwartz, you were up first.

5 MS. SCHWARTZ: We have no objection, Your Honor.

6 THE COURT: All right. Ms. Jennik.

7 MS. JENNIK: The union has no objection.

8 THE COURT: All right. Thank you.

9 All right. Now, we're going to --

10 MR. HUEBNER: We can't see the easel though, Your  
11 Honor. That's a different issue.

12 THE COURT: Okay. There's a gentleman rising with  
13 copies of what is on the easel. Are these exactly what was  
14 copied to the declaration?

15 MR. EARLY: These are taken from the declaration.  
16 They are from the exact PDF files printed.

17 THE COURT: Okay.

18 MR. EARLY: So we do have multiple copies.

19 THE COURT: All right.

20 MR. EARLY: And these are exactly as those in the  
21 record.

22 THE COURT: All right. Now, the way the -- I'd like  
23 to have copies because my colleague up here is in my line of  
24 sight, and she can't move because she's recording the  
25 proceedings. And for the purpose of -- yes. For the purpose

**PATRIOT COAL CORPORATION, et al.**

62

1 of what folks can see. Give me a moment, please.

2 All right. I think you've -- I've been handed copies  
3 of the larger versions of what you have up there, but if you  
4 moved it over here to the witness box, then my view would be  
5 less obstructed. So I'm happy to look at these versions that  
6 you gave me or you can move your easel over here and I can look  
7 at them over here.

8 MR. EARLY: We'll be glad to move them, Your Honor.

9 THE COURT: All right. Sure. Or if you like, you can  
10 turn them around to the folks in the courtroom who may not have  
11 the copies that you just handed out. Just to be clear, what  
12 the camera can see is the bench and the podium. So the folks  
13 who are with us remotely will not be able to see these, but  
14 they're in the record; they're attached to the declaration.

15 MR. EARLY: Thank you. And for that reason, I will  
16 try to describe the location on the photographs. We had  
17 understood that having it here would be in the camera, but we  
18 appreciate the Court's accommodation.

19 THE COURT: Well, unless you want to stand behind them  
20 and speak from behind them, I don't think we can pull that off.  
21 So let's keep going, please.

22 MR. EARLY: Okay. Thank you.

23 This first photograph -- again, this is Exhibit B to  
24 Mr. Doss's declaration. This is -- the orientation is north-  
25 south with a long axis. The aerial photograph is taken from an

**PATRIOT COAL CORPORATION, et al.**

63

1 agricultural database. This is dated 2011. And what Mr. Doss  
2 and his staff have done is to overlay this aerial photograph  
3 with some light red or salmon hatching indicating the permit  
4 boundaries of the surface disturbance. So this is the roughly  
5 15,000 acres in this one Paint Creek complex, one of the nine  
6 complexes.

7 The area subscribed by the red dash line is roughly  
8 eleven miles by eight miles. Of course, not all of that is  
9 affected by the ongoing Patriot operations, just the cross-  
10 hatched areas.

11 THE COURT: Are the -- in very small font, are the  
12 names on here towns, Leewood, Holly, Red Warrior, or are those  
13 names of mining complexes, or what are those?

14 MR. EARLY: Those are communities.

15 THE COURT: Communities. Okay.

16 MR. EARLY: Yes, they are.

17 THE COURT: All right. Is there anything else on this  
18 slide?

19 MR. EARLY: No, Your Honor.

20 THE COURT: Okay.

21 MR. EARLY: Moving next -- and this is not going to be  
22 in sequence with the five that came from the declaration,  
23 although this one is. Exhibit C --

24 THE COURT: Okay.

25 MR. EARLY: -- which is the next exhibit.

**PATRIOT COAL CORPORATION, et al.**

64

1 THE COURT: And I should be holding it sideways,  
2 right?

3 MR. EARLY: This -- its proper orientation is  
4 horizontal, yes.

5 THE COURT: Okay.

6 MR. EARLY: In the upper left is a north-south arrow.

7 THE COURT: Right.

8 MR. EARLY: A scale bar in the lower left. And the  
9 importance of this, this is an unreclaimed valley fill and  
10 orient the viewer's -- if you begin at the upper left-hand  
11 corner of the northwestern corner of this photograph, there  
12 is -- appears to be a crease running across from northwest  
13 to -- I'm sorry -- from northeast to southwest.

14 THE COURT: Northeast, hold on.

15 MR. EARLY: And it's a valley at the -- up in the  
16 upper portion, the receiving stream.

17 THE COURT: Okay.

18 MR. EARLY: Mr. Doss. Then running from that in an  
19 angle from the upper left to the lower right is what used to be  
20 a valley neighbored on each side by the currently existing  
21 forest. The sort of beige triangular-shaped structure, that is  
22 the unreclaimed hollow fill or valley fill.

23 THE COURT: All right. What's the difference between  
24 the beige triangular structure and the lighter-colored area  
25 just to the right of that?



**PATRIOT COAL CORPORATION, et al.**

65

1 MR. EARLY: Well, the lighter-colored area, if you  
2 begin at the upper right-hand part of the photograph --

3 THE COURT: Right.

4 MR. EARLY: -- and work away kind of like a comma  
5 around to the lower portion of the photograph, those are areas  
6 where mining has occurred. The overburden has been removed.

7 THE COURT: Okay.

8 MR. EARLY: Much of the coal has been taken out. If  
9 you extend from the triangular-shaped, unreclaimed hollow fill  
10 and continued down from upper left to lower right, that is  
11 where the valley was that has now been filled in by this  
12 process of mining.

13 THE COURT: All right.

14 MR. HUEBNER: Your Honor, may I be heard just for a  
15 minute. I really do apologize, but frankly, everybody on this  
16 side is yelling at me to stand up, and so I'm going to take the  
17 risk and do it. This is the most extensive testimony I have  
18 ever heard from somebody who is not the witness. Now, he's  
19 violating the stipulation extensively by testifying and going  
20 through a detailed Q and A explaining the exhibits to -- an  
21 affidavit of which he is not the witness. The agreement of the  
22 parties was that the documents were going in on the papers, not  
23 that he would literally testify. My next exhibit, Your Honor,  
24 is XYZ. Because not relevant and because we all agree, we --

25 THE COURT: Well, I think it's relevant, Mr. Heubner.

**PATRIOT COAL CORPORATION, et al.**

66

1 I think it is relevant. I think it's relevant to have an  
2 understanding of, in a visual sense, of what's been described  
3 to me yesterday and since 10 o'clock today, and it's helpful to  
4 the Court to see visually what's being said. However, I take  
5 your point that this is not testimony; this is not -- I can't  
6 take this as evidence. Yes, I'm asking you questions because I  
7 like to know the facts, but it isn't testimony, so how should  
8 we resolve this problem?

9 MR. HUEBNER: And that's our only point, Your Honor --

10 THE COURT: Okay. Thank you.

11 MR. HUEBNER: -- is he's trying to testify where he  
12 really wouldn't be.

13 THE COURT: From his perspective -- I'll speak for  
14 you, Mr. Early -- he's trying to explain, but there's a  
15 technical point here that's correct, but I'm trying to  
16 accommodate you here. So tell me how you think we should  
17 resolve this dilemma.

18 MR. EARLY: Your Honor, it was my understanding that  
19 with the admission of these various declarations and exhibits  
20 that that was all in evidence --

21 THE COURT: It is.

22 MR. EARLY: -- and that we could point to specific  
23 aspects of these. We could point out evidence --

24 THE COURT: Well, you could point to them in the sense  
25 of here's Exhibit A to Mr. Doss's declaration, this is a

**PATRIOT COAL CORPORATION, et al.**

67

1 picture of blank; next. But we've embarked on your filling in  
2 the details, and I followed you because I'm interested, but  
3 it's additional information. I'm not sure that it -- unless  
4 someone has a reason to believe that what you're telling me is  
5 inaccurate, but it's not evidence. What you're telling me now  
6 is not evidence, right? I mean, you agree with that, right?

7 MR. EARLY: I agree with what I say is not evidence.

8 THE COURT: Right.

9 MR. EARLY: What I'm trying to point out is what is in  
10 Mr. Doss' declaration and to point to specific parts of the --  
11 for example --

12 THE COURT: Okay. So why don't we do it that way.

13 MR. EARLY: Okay.

14 THE COURT: Why don't we -- I have Mr. Doss's  
15 declaration, so why don't we try to do it by looking at the  
16 slides -- I call them slides still -- and you pointing me --  
17 tying it to the statement in Mr. Doss's declaration, and maybe  
18 we can --

19 MR. EARLY: Okay.

20 THE COURT: -- get it done that way.

21 MR. EARLY: Thank you.

22 THE COURT: All right.

23 MR. EARLY: Looking at paragraph 12 of the  
24 declaration, this is on page 6 --

25 THE COURT: Right. Okay. I see it.

**PATRIOT COAL CORPORATION, et al.**

68

1 MR. EARLY: If --

2 THE COURT: That's the -- so that ties to the third --  
3 the next slide.

4 MR. EARLY: That ties to this Exhibit C to his  
5 declaration, which is the photograph that's up --

6 THE COURT: Okay.

7 MR. EARLY: -- on the easel.

8 THE COURT: Okay. All right.

9 MR. EARLY: So maybe we could do this. He mentions in  
10 here an unreclaimed valley fill.

11 THE COURT: Right.

12 MR. EARLY: If Mr. Doss could point that out.

13 THE COURT: Okay.

14 MR. EARLY: Downstream sediment ponds.

15 THE COURT: All right. We have nonverbal  
16 communication going on here. Mr. Doss is pointing, and of  
17 course, the record can't reflect that. So we're just going to  
18 generally state that as you go through this, Mr. Doss is  
19 pointing to various areas of the photograph, but I don't have a  
20 way of recording that. All right. So I'm just going to follow  
21 along. All right?

22 MR. EARLY: Would it be acceptable if I describe the  
23 location?

24 THE COURT: No. I mean, he's -- I can see it. He's  
25 pointing to it, and there's just no way to record that in the

**PATRIOT COAL CORPORATION, et al.**

69

1 record other than the fact that he is pointing to an area. I  
2 don't think it's worth worrying much about this, so let's keep  
3 going.

4 MR. EARLY: All right. The internal haul roads.

5 THE COURT: Okay.

6 MR. EARLY: An open area of high wall.

7 THE COURT: Okay. All right. That covers --

8 MR. EARLY: Next --

9 THE COURT: -- photograph 12. Shall we turn to the  
10 next slide?

11 MR. EARLY: Yes. And we can -- to organize this to  
12 show the contrast of the unreclaimed and reclaimed valley  
13 fills --

14 THE COURT: Okay. Now, these were --

15 MR. EARLY: -- this is a little bit out of sequence.

16 THE COURT: -- given to me in a different order. So  
17 you want me to skip to the one that's on the easel right now?

18 MR. EARLY: Yes, Your Honor. That would be Exhibit F.

19 THE COURT: Okay. All right. That's this one.

20 MR. EARLY: And this is a regraded but unvegetated  
21 valley fill.

22 THE COURT: Okay.

23 MR. EARLY: And areas of open high walls.

24 THE COURT: Okay.

25 MR. EARLY: Next, this would be Exhibit D to his

**PATRIOT COAL CORPORATION, et al.**

70

1 declaration. That's paragraph 13.

2 THE COURT: Hold on. Let me get there.

3 MR. EARLY: And the exhibit numbers are shown in the  
4 lower left of the photographs under the scale bar.

5 THE COURT: So this is exhibit which one?

6 MR. EARLY: D, as in dog.

7 THE COURT: D, as in dog. Give me a moment. Okay.  
8 That's this one?

9 MR. EARLY: Yes.

10 THE COURT: Okay. Go ahead.

11 MR. EARLY: The coal preparation plant.

12 THE COURT: Okay.

13 MR. EARLY: The coal stockpiles, conveyer belts, and  
14 an in-stream sediment pond.

15 THE COURT: Okay.

16 MR. EARLY: And then finally the -- this is Exhibit E,  
17 paragraph --

18 THE COURT: All right. That's this one.

19 MR. EARLY: Paragraph 14 of the Doss declaration.  
20 This is a combination coal refuse disposal area and slurry  
21 impoundment.

22 THE COURT: Okay.

23 MR. EARLY: And again, Mr. Doss has described the  
24 various functions of those components, making up these that are  
25 typical --

**PATRIOT COAL CORPORATION, et al.**

71

1 THE COURT: Right.

2 MR. EARLY: -- of the debtors' operations --

3 THE COURT: Okay.

4 MR. EARLY: -- and their variety of impacts.

5 THE COURT: All right. Thank you.

6 MR. EARLY: I think we're finished.

7 THE COURT: Okay. Thank you, Mr. Doss.

8 MR. EARLY: That brings us to sort of the third topic,  
9 the wrap up, and how these factors come into play in this  
10 particular question before the Court and may play out ahead as  
11 the case continues.

12 Again, looking at the reclamation obligations, those  
13 photographs, again, typical of the debtors' operation, show the  
14 earth disturbance. We know that from the debtors' 10Q filing  
15 that they estimate roughly 297 million dollars in acknowledged  
16 reclamation costs. I would argue that those costs are based on  
17 estimates of continued mining and reclamation as I talked about  
18 earlier with the integrated mining and reclamation plan. If,  
19 for some reason, mining were to stop midstream, as it were,  
20 then those estimates, I would submit, are very, very low  
21 because the reclamation usually continuing assumes that there  
22 will be spoil from future operations to be used to reclaim and  
23 regrade and resurface the areas previously disturbed by mining.  
24 If you just drop-dead stop, it leaves everything undone, and  
25 it's much more expensive to reclaim. So we submit that those

**PATRIOT COAL CORPORATION, et al.**

72

1 estimates are probably pretty low if they call a halt to  
2 operations in one of these sites.

3 THE COURT: All right. But that means that you have  
4 an interest in a successful reorganization of the company and  
5 the continued operations, right?

6 MR. EARLY: Absolutely, we do.

7 THE COURT: So we all agree with that, right?

8 MR. EARLY: Yes, yes.

9 THE COURT: Okay. That's the goal of this proceeding,  
10 right?

11 MR. EARLY: To have them emerge, to have all the  
12 permitted obligations --

13 THE COURT: Right.

14 MR. EARLY: -- continue on to the reorganized debtor,  
15 yes, Your Honor.

16 THE COURT: Right. Okay.

17 MR. EARLY: Water treatment costs. The debtor --  
18 again, the 10Q filing focusing primarily on the selenium  
19 treatment. We talked about --

20 THE COURT: Right.

21 MR. EARLY: -- in our moving papers about the consent  
22 decree. Their 10Q filed in August describes a variety of  
23 different ongoing litigation and obligations to treat for the  
24 heavy metal selenium, not even counting their other water  
25 treatment hydrologic balance expenses. We don't know what



**PATRIOT COAL CORPORATION, et al.**

73

1 those costs are yet. But specifically for treating the  
2 selenium-related discharges, the debtors estimate 440 million  
3 dollars for that. Total 737 million dollars which, as Mr.  
4 Meldrum described, that's extraordinary. It's more than all  
5 the unsecured debt right now. And although the reclamation  
6 expenses, as we talked about, the drop-dead costs may be  
7 larger, the existing almost 300 million dollars and  
8 acknowledged reclamation costs are part of their business going  
9 forward, part of their duty to comply with the state laws  
10 related to mining and reclamation. And it's because of these  
11 enormous acknowledged liabilities that our clients, the  
12 sureties, are nervous. We're concerned that they may try to do  
13 what the Court has already acknowledged that they are not able  
14 to do, and that's to walk away from these. And we're concerned  
15 about that. We don't want those kinds of opportunities to  
16 happen.

17 In light of the --

18 THE COURT: But we're in agreement on that, so that's  
19 not going to happen --

20 MR. EARLY: Thank you.

21 THE COURT: -- because that's not the law, right?

22 MR. EARLY: We agree.

23 THE COURT: But the company wants to reorganize, and  
24 if you were here yesterday, we talked about the unfortunate  
25 fact that bankruptcy courts don't have money-printing machines,

PATRIOT COAL CORPORATION, et al.

74

1 right?

2 MR. EARLY: Yes.

3 THE COURT: So there's lots of liabilities, and  
4 there's lots of responsibilities that the debtor is trying to  
5 figure out how to balance and how to figure out a way to  
6 increase the value or increase the pot that can be made  
7 available to the creditors, right?

8 MR. EARLY: Yes.

9 THE COURT: Right. So there are many, many competing  
10 interests that have to be balanced. What's bad for the  
11 environment might result in more dollars being freed up because  
12 the company has to pay less, which I'm not suggesting is the  
13 right result. Those all have to be balanced, and the  
14 Bankruptcy Code dictates how bankruptcy courts are charged with  
15 doing that. It's extremely complicated, makes my head hurt,  
16 the intersection of bankruptcy law and environmental law. Few  
17 things make it hurt more with the possible exception of tax. I  
18 think a lot of lawyers are agreeing with me.

19 MR. EARLY: It is complicated, Your Honor, and it's  
20 premature to get into the specific arguments at this time  
21 because --

22 THE COURT: It is.

23 MR. EARLY: -- we don't know yet what the facts are.

24 THE COURT: Right.

25 MR. EARLY: But these are issues that face West

**PATRIOT COAL CORPORATION, et al.**

75

1 Virginia, the scope, again, of the exposure in West Virginia  
2 and the regulators and the people, the land there, the water,  
3 all there in West Virginia.

4 THE COURT: But just to be blunt, you have no reason  
5 to believe that a court outside of West Virginia will, I'll use  
6 the word "care" any less about making it right, making the land  
7 right, making sure folks are healthy and not drinking water  
8 that has pollutants in it. You have no reason to believe that  
9 any bankruptcy court anywhere wouldn't try to do the right  
10 thing, do you?

11 MR. EARLY: I have no concern about that, Your Honor,  
12 no.

13 THE COURT: Okay. Good.

14 MR. EARLY: And that's the end of my --

15 THE COURT: Okay.

16 MR. EARLY: -- presentation. Thank you.

17 THE COURT: All right. Thank you.

18 All right. I think that we are now to the joinders to  
19 the two motions. Am I correct? Does everyone agree that  
20 that's where we are? So we have AEP. Is AEP here today? All  
21 right. Then I guess they don't want to speak.

22 We have the West Virginia Attorney General. All  
23 right. We have the Kentucky Department of Natural Resources.

24 MR. WOOD: Here, Your Honor.

25 THE COURT: Yes. Mr. Wood, would you like to be

**PATRIOT COAL CORPORATION, et al.**

76

1 heard, sir?

2 MR. WOOD: Your Honor, I just wanted to make one  
3 point, and that is that as a regulator for the state agency  
4 that we have a tremendously limited budget, and it is very  
5 difficult for us to travel, and West Virginia would be more  
6 convenient or the Commonwealth of Kentucky to travel to than  
7 New York and obviously cheaper for us.

8 THE COURT: All right. Mr. Heubner, yes, you're  
9 rising.

10 MR. HUEBNER: Yeah, two very small tiny -- actually  
11 just one tiny little point, Your Honor. The Kentucky DNR is  
12 actually not a joining party. What they've filed --

13 THE COURT: Oh, you're quite right.

14 MR. HUEBNER: -- is a pleading that says --

15 THE COURT: They filed a statement in support, but  
16 they specifically said that they were not joining.

17 MR. HUEBNER: Correct. And they indicated that if the  
18 pro hac was granted, they might supplement the record. Our  
19 records reflect that it was granted virtually immediately, and  
20 they have filed no further pleadings.

21 THE COURT: Okay.

22 MR. HUEBNER: So what we're left with is a --

23 THE COURT: A statement in support.

24 MR. HUEBNER: -- a statement in support.

25 THE COURT: Okay. All right.

**PATRIOT COAL CORPORATION, et al.**

77

1 Mr. Wood, anything else?

2 MR. WOOD: No, Your Honor.

3 THE COURT: Okay. Thank you.

4 MR. WOOD: Thank you.

5 THE COURT: All right. I've got the interested  
6 shareholders who've made the motion to appoint an equity  
7 committee.

8 MR. CARNEY: We don't have anything on this --

9 THE COURT: All right. Thank you, Mr. Carney.

10 And finally, I believe I have the joinder of the  
11 pension trust.

12 MR. HUEBNER: Your Honor, while Mr. Goodchild is  
13 making his way to the podium, I do want to be clear, depending  
14 on where he goes -- I obviously don't know what his remarks are  
15 going to be -- I may be rising with procedural objections on  
16 several grounds, one of which being that the joinder was  
17 untimely, but depending on his approach, there may be a far  
18 more serious objection as well.

19 THE COURT: All right.

20 MR. HUEBNER: I hope not to make it.

21 THE COURT: We'll see what happens.

22 All right. Mr. Goodchild, go ahead, please.

23 MR. GOODCHILD: Your Honor, John Goodchild, Morgan,  
24 Lewis & Bockius. I represent the UMWA Health and Retirement  
25 Funds. There are several funds to that. In an abundance of

**PATRIOT COAL CORPORATION, et al.**

78

1 caution, we did file a 2019 statement on July the 18th.

2 Your Honor, from everything that's gone on so far, I'd  
3 like to ask the Court's indulgence and ask the Court to ask Mr.  
4 Heubner to identify the debtors' witnesses in the room because  
5 I think we should hear from the debtors' witnesses.

6 THE COURT: The stipulation informed the Court that  
7 there were not going to be any witnesses.

8 MR. GOODCHILD: I'm not a party to that stipulation,  
9 Your Honor.

10 THE COURT: I'm sorry?

11 MR. GOODCHILD: My clients are not a party to that  
12 stipulation.

13 THE COURT: Do you wish to cross-examine a witness?

14 MR. GOODCHILD: I wish to call a witness, Your Honor.

15 THE COURT: This would have been nice to know.

16 Generally speaking, before a hearing, the Court and the parties  
17 are all informed about what witnesses you intend to call.

18 Stipulation was presented. Let's see. You're quite right,  
19 you're not listed, but it would have been nice to know that you  
20 intended to call a witness. Why didn't you share this  
21 information with all the parties? This is not -- we don't have  
22 trial by ambush here.

23 MR. GOODCHILD: Your Honor, because until yesterday I  
24 didn't intend to call any witnesses.

25 THE COURT: What occurred yesterday that caused you to

**PATRIOT COAL CORPORATION, et al.**

79

1 change course, Mr. Goodchild?

2 MR. GOODCHILD: What happened yesterday, Your Honor,  
3 was, at least in my estimation --

4 THE COURT: The stipulation was filed on the 10th,  
5 right?

6 MR. GOODCHILD: Your Honor, I knew nothing about the  
7 stipulation before it was filed, nothing.

8 THE COURT: Okay. Well, I'm a little confused. So  
9 you and Ms. Jennik are going to have to help me because you  
10 filed a joinder -- I'm sorry -- I don't need to point. You  
11 filed a joinder to the United States Trustee's motion, not to  
12 the union's motion, right?

13 MR. GOODCHILD: That's right, Your Honor.

14 THE COURT: Right. And that's something I want to  
15 talk about, but help me out as to why, when this hearing has  
16 been on the calendar for as long as it has and the stipulation  
17 was filed on the 10th, that I'm hearing at twenty minutes to 12  
18 on the 12th for the first time that you want to call a witness.

19 MR. GOODCHILD: Well, Your Honor, there's two answers  
20 to that. The first is I did not know about the stipulation,  
21 and the second answer is I did not intend to call a witness  
22 until yesterday. And what happened yesterday was it became  
23 clear, at least in my view, it became clear that Your Honor  
24 believes that there is more to the debtors' intent than simply  
25 incorporating --

**PATRIOT COAL CORPORATION, et al.**

80

1 THE COURT: You don't know what I believe. You only  
2 know what questions I asked.

3 MR. GOODCHILD: Your Honor, that's why I phrased it in  
4 terms of my own view. My view is that what's happened so far  
5 illustrates a hole in the record. And if you had asked me  
6 yesterday in the morning, I would have said that the relevant  
7 facts on the interest of justice -- because we've only joined  
8 the United States Trustee's motion -- that the relevant facts  
9 are that the debtors formed those two entities for no purpose  
10 other than to be able to file their bankruptcies in this  
11 district.

12 THE COURT: Okay. And that is in the stipulation.

13 MR. GOODCHILD: That's right, Your Honor.

14 THE COURT: Okay.

15 MR. GOODCHILD: But, Your Honor -- and Your Honor, of  
16 course, I can't speak for Your Honor, but it appears that there  
17 is a hole in the record in terms of what the debtors thought,  
18 why they did what they did, what they considered before they  
19 made their decisions, who made the decision, whether there were  
20 alternatives considered, what were the positives in New York,  
21 what were the negatives. I don't know the answers to those  
22 questions, Your Honor.

23 THE COURT: Okay. But you -- the movants have the  
24 burden of proof. I said that enough times yesterday, I think,  
25 so that everybody heard me on that. So the movants have the



**PATRIOT COAL CORPORATION, et al.**

81

1 burden of proof, and those have been the facts on the ground  
2 since this motion was filed. Ms. Jennik's papers completely  
3 acknowledge that. She completely acknowledged that. You're  
4 not going to disagree with that. So I'm just trying to  
5 understand why it is that, based on questions I asked, the  
6 pension trust now, for the first time, has decided that it  
7 wants to call a witness.

8 MR. GOODCHILD: Your Honor, the pension trust decided  
9 that it wants to call a witness because the comments in the  
10 courtroom so far suggest, first, that the Court may be  
11 questioning those very same things, second, that the debtors  
12 don't intend to call a witness, and third, that the debtors  
13 intend to make an argument that is based primarily on burden of  
14 proof. And before this side of the house sits down, I want  
15 there to be sufficient --

16 THE COURT: Mr. Heubner, have a seat. Thank you.

17 MR. GOODCHILD: -- I want there to be sufficient  
18 evidence.

19 THE COURT: Well, this hearing is about fairness and  
20 justice, and that includes procedural fairness. So let's start  
21 from the beginning. It was surprising to the Court that  
22 notwithstanding the entry of a scheduling order or the filing  
23 of a scheduling notice, the United States Trustee's motion came  
24 in when it did. I didn't raise that with Ms. Schwartz. Your  
25 joinder came in late. Now you're telling me technically it

**PATRIOT COAL CORPORATION, et al.**

82

1 didn't come in late because you didn't join the UMWA's motion,  
2 but it came in late. So once again, now you're late, but that  
3 being the case, I think it's important to give parties an  
4 opportunity to be heard when they represent important  
5 constituencies which you unquestionably do.

6 So now, let me hear from Mr. Heubner and anybody else  
7 who wishes to be heard on this issue of the witness.

8 But one moment, Mr. Heubner.

9 So what witness would you like to call, Mr. Goodchild?

10 MR. GOODCHILD: Well, Your Honor, I don't know who the  
11 debtors have in the courtroom, and that's why I was asking Your  
12 Honor's indulgence in having them identified.

13 THE COURT: Okay. Mr. Heubner, you first.

14 MR. HUEBNER: Your Honor, with all due respect, I  
15 think that this takes Lewis Carroll and "Through the Looking  
16 Glass" to an entirely new level.

17 The movants, and I guess the late joinders, as well as  
18 the earlier ones, had the burden of proof. He says, I want  
19 this, I want that, I want this, I want that. Did he serve any  
20 discovery on us? No. Did he ever call and say, I have  
21 unanswered questions like he just told the Court now? No. Did  
22 he serve a trial subpoena on us which is what lawyers actually  
23 do when they say they want a witness to be heard at a trial?  
24 No. Has he even --

25 THE COURT: But he's not suggesting that we go in the

**PATRIOT COAL CORPORATION, et al.**

83

1 back room and issue a trial subpoena. He wants to know who's  
2 here.

3 MR. HUEBNER: Correct. Well, I'll get there in a  
4 minute.

5 THE COURT: Okay.

6 MR. HUEBNER: In other words, the ambush is --

7 THE COURT: And I don't know who's here.

8 MR. HUEBNER: -- the ambush is even worse. Like you  
9 just tell me who you've got, and then I'll decide who I want to  
10 put on the stand. Exactly as Your Honor pointed out -- and I'm  
11 going to get more specific in a moment about who this party  
12 is -- the stipulation was filed on Monday. I imagine Mr.  
13 Goodchild was watching the docket. Did he call and say I don't  
14 agree with this; I have a problem; I think I want evidence?

15 We would have said no at the time, and we would have  
16 said how dare you, after taking no discovery, seeking no  
17 depositions, demanding this --

18 THE COURT: All right. Let's keep the rhetoric down  
19 to a dull roar here. Okay?

20 MR. HUEBNER: Fair enough, Your Honor. But the fact  
21 is, he didn't do any of these things. And let's also pause for  
22 one more minute, because I think it's important to note that  
23 Mr. Buckner -- and this is a little bit complicated, but it's  
24 there in his declaration for the union -- Mr. Buckner -- and  
25 this is going to get a little complicated too -- Mr. Buckner is

**PATRIOT COAL CORPORATION, et al.**

84

1 the union's representative on the creditors' committee.

2 THE COURT: Not the pension trusts.

3 MR. HUEBNER: Mr. Buckner is the union's trustee on  
4 the pension trust, which is a real cause for concern for us,  
5 which is not today's issue. Mr. Buckner had both his  
6 creditors' committee counsel signing Monday's stipulation, and  
7 the union's counsel sign the stipulation, saying no witnesses,  
8 no cross-ex. Now his third guy, in his guise as pension  
9 trustee, is coming in and saying I didn't sign that. I want to  
10 cross-examine the witnesses.

11 So there's also an identity of interests between these  
12 parties that we all noted when they didn't join their own  
13 union's pleading. But the same guy has two other law firms  
14 that he is in part connected to, admittedly, each one in a  
15 different role. But for Mr. Goodchild to come now at trial and  
16 say I demand a witness, when all these things have happened  
17 with no notice to anybody, is extremely, profoundly, far  
18 outside the bounds of fair play.

19 THE COURT: All right. Thank you.

20 One at a time, please. Ms. Schwartz, you were next.

21 MS. SCHWARTZ: Thank you, Your Honor. Your Honor, I  
22 know who has the burden on the proof on the United States  
23 Trustee's motion. I put in the proof. Your Honor has a  
24 stipulation. Your Honor has all the declarations in. I'm very  
25 well aware -- I said it yesterday -- the burden of proof is a

**PATRIOT COAL CORPORATION, et al.**

85

1 preponderance of the evidence; it's not clear and convincing  
2 evidence, the more exact --

3 THE COURT: Okay. But --

4 MS. SCHWARTZ: But, Your Honor --

5 THE COURT: -- to coin a phrase, this is not about  
6 you. This is about --

7 MS. SCHWARTZ: No, no. I'm --

8 THE COURT: -- what is your view on the request by the  
9 pension trust to call a witness in the person of somebody who  
10 may be here from Patriot?

11 MS. SCHWARTZ: Your Honor, I don't think, from a  
12 procedural standpoint, that it's appropriate at this juncture.  
13 I think, as Mr. Huebner said, when you have a trial, you issue  
14 a trial subpoena, and you determine what witness you're going  
15 to call. I mean, all of the things that Your Honor noted at  
16 the outset, I think that in fairness to all of the parties  
17 here, everybody tried to work together to present their cases  
18 and their positions in a collegial and efficient manner.

19 And I stated it earlier, that the United States  
20 Trustee is of the view that whether or not the debtor -- Your  
21 Honor has great questions, and that's the province of the Court  
22 to ask whatever questions, but Your Honor states it correctly.  
23 The movants have the burden of proof. We carefully thought  
24 through what the burden requires, what evidence had to go in.  
25 We are comfortable that we put in the evidence that sustains

**PATRIOT COAL CORPORATION, et al.**

86

1 our motion. The burden of proof is the burden of production,  
2 which we absolutely put forth for the Court. And we don't  
3 believe that at this point -- to the extent that the Court has  
4 questions of the debtors, it's pretty evident the Court's going  
5 to ask those questions of the debtors.

6 And Your Honor made it clear yesterday that you had a  
7 lot of questions for the debtors. And the debtors would -- I'm  
8 sure they recognize -- be obligated to be able to have people  
9 here that could provide evidence to the Court, not just  
10 lawyers' statements, in the event that the Court asked certain  
11 questions. I have confidence that they, in fact, have thought  
12 about that for today. So we are comfortable, Your Honor --

13 THE COURT: Okay.

14 MS. SCHWARTZ: -- with the evidence that's in on our  
15 motion.

16 THE COURT: All right. Thank you, Ms. Schwartz.

17 Ms. Jennik, you're next.

18 MS. JENNIK: The union has no position on the request  
19 of the trust to call a witness. I rise in order to address the  
20 comments that were made by Mr. Huebner about the role of Mr.  
21 Buckner --

22 THE COURT: Please.

23 MS. JENNIK: -- and the relationship between the union  
24 and the trust.

25 THE COURT: All right. Is Mr. Buckner here today?

**PATRIOT COAL CORPORATION, et al.**

87

1 MS. JENNIK: No, he is not.

2 THE COURT: Okay.

3 MS. JENNIK: The trusts, of course, are Taft-Hartley  
4 trusts that are jointly managed by union trustees and employer  
5 trustees. In fact, in these trusts, the union trustees have  
6 counsel and the employer trustees have counsel. And Mr.  
7 Goodchild is the counsel to the employer trustees. He is  
8 appearing here today as the representative and counsel to the  
9 trust as a whole. But I just wanted you to know how it works  
10 in the trust.

11 Mr. Buckner is, indeed, one of the union trustees on  
12 these funds. Mr. Buckner is also a consultant to the union.  
13 Union, and management trustees, for that matter, are well aware  
14 that they have different roles to play when they are acting as  
15 a union representative and when they are acting as a trustee.  
16 They wear different hats, is the saying. They are well aware  
17 of the possible conflicts that arise in that position --

18 THE COURT: The possible conflicts -- I mean, you keep  
19 telling me about my learning curve -- but the possible  
20 conflicts to me, seem to be tremendous; the potential conflicts  
21 seem to be enormous. Are they -- is that not true?

22 MS. JENNIK: I don't -- I mean, they're always  
23 enormous. Because when the trusts, for example, are dealing  
24 with contributions that are supposed to be paid by an  
25 employer --

**PATRIOT COAL CORPORATION, et al.**

88

1 THE COURT: Right.

2 MS. JENNIK: -- that employer may very well sit as a  
3 trustee on the funds. And the trusts may very well have an  
4 interest in what happens in contract negotiations. And both  
5 sides sit as trustees on the funds; but in their role as  
6 trustees of the funds, they act for the benefit of the  
7 participants and beneficiaries, not for the benefit of their --  
8 who they are representing: the union or the employers. And  
9 they are all educated about that. And they are all very much  
10 familiar with the duty and their obligation to keep those roles  
11 separate.

12 THE COURT: Do they recuse themselves from particular  
13 votes?

14 MS. JENNIK: Yes, they do, Your Honor.

15 THE COURT: In other words, when the interest of the  
16 pension trust is completely at odds with the interest of the  
17 union, meaning the current worker -- unionized workers, do they  
18 recuse themselves in those instances?

19 MS. JENNIK: Yes. There would be instances when they  
20 would do that.

21 THE COURT: Okay. All right, thank you. Anyone else?

22 Mr. Goodchild, did you want to respond to what's been  
23 said?

24 MR. GOODCHILD: Thank you, Your Honor. There's no  
25 requirement that any party take any discovery. And that was



**PATRIOT COAL CORPORATION, et al.**

89

1 our election. There was also no requirement that there be  
2 trial subpoenas issued. Those are only to secure the presence  
3 of witnesses for their purpose of being called. The witnesses  
4 are here, at least I think they are.

5 I apologize to Mr. Huebner, but as I said to Your  
6 Honor, this came up yesterday.

7 THE COURT: No, but that's the thing. It didn't come  
8 up yesterday. The only thing that came up yesterday was what  
9 always happens in a hearing. Everyone comes; they're prepared,  
10 as is the Court; and the Court asks questions. And the only  
11 thing that happened yesterday was that you, I think, tried to  
12 read the tea leaves of what I was asking. And you then decided  
13 that maybe you better call a witness because, in your view,  
14 maybe the moving parties didn't discharge their burden.

15 So now, if you -- if this had come up on Monday, if  
16 you had reached out and said nobody told me about the  
17 stipulation; I don't agree to that; I want a witness; I think  
18 what would have happened is we would have had a conference  
19 call; we would have scrambled. Maybe I would have made the  
20 debtors produce someone for a deposition, because the parties  
21 would want to know where you're going and what you're going to  
22 ask. And the debtors would have wanted to prepare whoever the  
23 witness is, just as you would do, but none of that happened.

24 So now you're putting me in a position I hate to be  
25 in, which is I've got, on the one hand, procedural fairness;

**PATRIOT COAL CORPORATION, et al.**

90

1 and I've got on the other hand, the suggestion that there's  
2 some information that the Court should have, that the Court is  
3 not going to have.

4 MR. GOODCHILD: Well, Your Honor, I apologize for  
5 putting you in the position. And I don't intend to do that,  
6 but the hypothetical that you articulated is a hypothetical.  
7 The fact is, when the stipulation was filed, I wasn't a party  
8 to it; I didn't know about it; and that didn't matter to me,  
9 because on Monday I did not intend to call any witnesses.

10 THE COURT: You are counsel of record in this case.  
11 You better be following the docket.

12 MR. GOODCHILD: I am, Your Honor.

13 THE COURT: And it moves quickly. I know there are  
14 hundreds of pleadings. But that's part of your job.

15 MR. GOODCHILD: Your Honor, I did see the stipulation  
16 when it was filed. What I'm attempting to say, and perhaps  
17 this is my fault for not being clear, on Monday I did not  
18 intend to call a witness. So the stipulation among other  
19 counsel was not relevant to me.

20 Yesterday, on Tuesday, after Your Honor articulated  
21 numerous times that Your Honor was troubled by the stipulation  
22 and that there were unanswered questions --

23 THE COURT: I don't think I said I was troubled. I  
24 think I made observations about the stipulation and reserved my  
25 rights, if you will, to ask questions. That's it.

**PATRIOT COAL CORPORATION, et al.**

91

1 For better or worse, we're not nearly done here.

2 We've -- it's getting to be minutes to 12. We're getting close  
3 to the point where I'm going to give the parties a break. But  
4 we're not nearly done. We've got a long way to go. I've got  
5 to hear from the committee. I've got to hear from the joinders  
6 to the debtors' position, and I have to hear from the debtors.

7 So we've got a long way to go, so Mr. Huebner, one  
8 more time from you.

9 MR. HUEBNER: Yes, Your Honor. Just -- there's one  
10 more fact that I also think is pretty relevant here. I'm going  
11 to leave aside really the fact that the movant has settled and  
12 does not support what he's doing, whether a joining party,  
13 especially a late one is even allowed to say -- although I  
14 stapled myself to your motion, let's leave that aside.

15 After we said in the stipulation this chambers  
16 directed that all the witnesses be available in court in case  
17 the Court needed them, the union wrote in and said Mr. Buckner  
18 can't make it Tuesday. I think he had to be at the rally in  
19 Charleston. He'll be here Wednesday. You were just advised  
20 that Mr. Buckner is not here.

21 THE COURT: Okay. Mr. Huebner, you're telling me  
22 things that I don't know.

23 MR. HUEBNER: No, Ms. Jennik just said it on the  
24 record.

25 THE COURT: No -- yes, she did. But you're quite

**PATRIOT COAL CORPORATION, et al.**

92

1 right that the stipulation arrived, and then chambers  
2 communicated the general rule that when there are declarants  
3 they're available in the courtroom. That's the general rule.  
4 That's the way it's usually done. You people do this a lot.  
5 You know that that's the case.

6 MR. HUEBNER: Correct. And my only point is the  
7 asymmetry here is just beyond it all, especially since Mr.  
8 Buckner is --

9 THE COURT: Well --

10 MR. HUEBNER: -- trustee of the pension trusts, and  
11 he's not here in case the Court has questions.

12 THE COURT: Well, you know, that's a slightly  
13 different issue, okay? That's a slightly different issue.  
14 Yes, if I -- if some time by the end of today the Court decides  
15 that there are questions to ask of Mr. Buckner, we'd have to  
16 continue this until he was here, which I don't want to do, and  
17 I don't know that it's going to happen.

18 Look, we're off on -- we're off to the races here.  
19 It's five minutes to 12. This is what we're going to do.  
20 We're going to take an early lunch break. You people are going  
21 to talk to each other. You're either going to resolve this or  
22 you're going to come back in an hour and you're going to tell  
23 me you haven't resolved it, in which case I'll tell you what  
24 the answer is.

25 All right? My first choice is always that the parties

**PATRIOT COAL CORPORATION, et al.**

93

1 work it out. So I think that's what we're going to do. Give  
2 me a moment.

3 All right. It's five minutes of 12. I would ask that  
4 somebody stop by chambers at ten minutes to 1 and let us know  
5 if you've resolved the issue or not.

6 MR. MELDRUM: Your Honor?

7 THE COURT: Yes.

8 MR. MELDRUM: If I may be heard for one moment. The  
9 sureties' declarant, Mr. Doss --

10 THE COURT: We can't pick you -- we're not recording  
11 you. You need to come up to a microphone, any microphone.

12 MR. MELDRUM: I'm wondering if Your Honor would excuse  
13 Mr. Doss, the sureties' declarant. We're done with him, and if  
14 anybody else --

15 THE COURT: Anybody have anything further with Mr.  
16 Doss?

17 UNIDENTIFIED SPEAKER: No, Judge.

18 THE COURT: That's fine. Thank you very much.

19 All right. That's the game plan.

20 MR. GOODCHILD: Your Honor, yes, one question.

21 THE COURT: Yes.

22 MR. GOODCHILD: For planning purposes, we noted that  
23 there are other things on the Court's calendar for 2 o'clock  
24 this afternoon.

25 THE COURT: Not anymore.

**PATRIOT COAL CORPORATION, et al.**

94

1 MR. GOODCHILD: Okay.

2 THE COURT: They've been moved to another day. We're  
3 all going to be together until we finish here today. I'd like  
4 to finish by 5 o'clock for the convenience of the courts in  
5 West Virginia and St. Louis, but I don't know that we will.  
6 But we're going to try, because I have a full calendar  
7 tomorrow.

8 MR. GOODCHILD: Understood, Your Honor.

9 THE COURT: All right? You're welcome to use this  
10 courtroom and any of the breakout rooms that I hope we've  
11 gotten for you. All right?

12 I'll see you at 1 o'clock.

13 MR. GOODCHILD: Thank you, Your Honor.

14 THE COURT: Thank you.

15 (Recess from 11:58 a.m. until 1:09 p.m.)

16 THE COURT: All right. You folks have had an  
17 opportunity to talk during the lunch break?

18 MR. GOODCHILD: That's right, Your Honor, we have --

19 THE COURT: Okay.

20 MR. GOODCHILD: -- have not reached an agreement.

21 THE COURT: All right. Does anyone else want to say  
22 anything more on the issue of calling a witness?

23 All right, I've thought about the request and I'm  
24 going to deny the request for the following reasons. First of  
25 all, I think it's clear that all the parties have known this

**PATRIOT COAL CORPORATION, et al.**

95

1 hearing was coming for a long time. And the pension trust,  
2 several weeks ago, could have decided that they may want to  
3 call a witness and could have selected one or more witnesses  
4 and served a trial subpoena by way of a reservation of rights  
5 to do so, depending upon what developed. That was way before  
6 the stipulation was a twinkle in anyone's eye. So that's one  
7 thing that could have been done and wasn't.

8           Secondly, on Monday the 10th when the stipulation was  
9 put on the docket, you could have contacted the debtors and  
10 told them then that you wanted to call a witness because you're  
11 not -- you don't sign onto the construct or the substance of  
12 the stipulation. So that didn't happen.

13           Then yesterday we were here together in the afternoon,  
14 and you were obviously listening to what was going on, and at  
15 no point yesterday did you tell the Court or, as far as I can  
16 tell, the debtors that you may want to call a witness today.  
17 So now we're here today and, as far as I can tell, I don't --  
18 it doesn't appear that you even mentioned it to the debtors or  
19 the other parties this morning, so that we were all hearing  
20 this in real time.

21           And finally, the United States Trustee, whose motion  
22 it is that you've joined, opposes the request, and the UMWA has  
23 indicated that they take no position.

24           So as a matter of procedural fairness, I'm going to  
25 decline to allow you to call a witness.

**PATRIOT COAL CORPORATION, et al.**

96

1 MR. GOODCHILD: Your Honor, I understand your  
2 position. So that the record --

3 THE COURT: It's more than a position.

4 MR. GOODCHILD: Oh, I'm sorry. Your ruling.

5 THE COURT: It's a ruling.

6 MR. GOODCHILD: I apologize, Your Honor. I understand  
7 your ruling. I have one thing that I'd like to place on the  
8 record, and I would like -- with Your Honor's permission, I  
9 would like the record to reflect the questions that I intended  
10 to ask.

11 THE COURT: I'm not going to do that. What's the  
12 point of that? You can make whatever argument you like, and  
13 we've yet to hear that. So you can make an argument and I'll  
14 listen to it, but I don't know what I do with unasked,  
15 unanswered questions.

16 MR. GOODCHILD: Your Honor, I think I have a right to  
17 make a complete record for any proceedings that might happen  
18 later. And Your Honor is making a procedural ruling denying  
19 the presentation of evidence, and I believe I have a right to  
20 identify what it is that I wanted to elicit.

21 THE COURT: Do you intend to go through literally  
22 question by question by question, or are you going to tell me  
23 what subject areas you would cover?

24 MR. GOODCHILD: Six things, Your Honor.

25 THE COURT: Anybody want to be heard?



**PATRIOT COAL CORPORATION, et al.**

97

1 Well, subject -- Ms. Schwartz, go ahead.

2 MS. SCHWARTZ: Your Honor, I think Your Honor made her  
3 ruling --

4 THE COURT: I did.

5 MS. SCHWARTZ: -- with respect to it, and we had  
6 stated our position, and that --

7 THE COURT: I'm sorry. Pull the microphone towards  
8 you.

9 MS. SCHWARTZ: I'm sorry, Your Honor. Sorry. Your  
10 Honor made her ruling, and we respect the Court's ruling.

11 THE COURT: Mr. Huebner?

12 MR. HUEBNER: Your Honor, just one thing. I think  
13 that the words of Mr. Goodchild's joinder actually probably  
14 matter for the specific further relief or special favor he's  
15 asking for.

16 THE COURT: Hold on --

17 MR. HUEBNER: Let me just read --

18 THE COURT: Hold on. Let me get the joinder.

19 Okay, I have it.

20 MR. HUEBNER: Your Honor, with the exception of two  
21 background paragraphs, Mr. Goodchild's joinder -- or his  
22 clients' joinder, I should say, consists of basically two  
23 sentences, and I think they're actually very important  
24 sentences; the first one says, "Based on the testimony provided  
25 at the 341 meeting and the arguments set forth in the UST

**PATRIOT COAL CORPORATION, et al.**

98

1 motion, the UMWA Health and Retirement Funds agree with the  
2 United States Trustee that the Southern District of New York is  
3 an improper venue to hold the debtors' cases, and contend that  
4 the cases should be transferred to an appropriate  
5 jurisdiction." So in the first paragraph he actually tells you  
6 what his joinder is based on: evidence that is already in the  
7 record.

8 His second paragraph, though, paragraph 6, is even  
9 more important: "Therefore, the UMWA Health and Retirement  
10 Funds hereby join in the UST motion and adopt and incorporate  
11 by reference all of the legal and factual arguments set forth  
12 therein."

13 THE COURT: Okay.

14 MR. HUEBNER: Well, the U.S. Trustee has spoken; they  
15 have the facts they need, they're in the record, they've made  
16 their legal argument. There is simply nothing more to be said  
17 based on the joinder they chose, admittedly a week late, to  
18 file.

19 THE COURT: Okay, but Mr. Goodchild apparently wants  
20 to make a record to preserve an error that presumably he might  
21 be able to take up on appeal at the end of the day, depending  
22 upon what happens, which none of us know what's going to  
23 happen. Is that the point?

24 MR. GOODCHILD: Well, Your Honor, that is the  
25 procedural point. There's one other reason why. The fact is

**PATRIOT COAL CORPORATION, et al.**

99

1 that even the parties that stipulated promised that they would  
2 bring a witness that could answer questions if the Court had  
3 any.

4 THE COURT: Where is that promise reflected? I don't  
5 know what everybody's talking about.

6 MR. GOODCHILD: Well, Your Honor, the parties have  
7 represented it to you here.

8 MS. SCHWARTZ: Your Honor, maybe I could be of a  
9 little bit of help to Your Honor, and that is that in the  
10 stipulation we --

11 MR. HUEBNER: I have it.

12 MS. SCHWARTZ: -- stipulated that --

13 THE COURT: Hold on.

14 MS. SCHWARTZ: Okay, I have it also and I'll point it  
15 to Your Honor.

16 THE COURT: Give me a moment, Ms. Schwartz.

17 MS. SCHWARTZ: Yeah.

18 THE COURT: Let me find it. Okay, I have it.

19 MS. SCHWARTZ: It's paragraph 2, Your Honor, on page  
20 2, docket number 546. And it states, "The parties have agreed  
21 to not examine, either through direct or cross, any of the  
22 declarants, including with respect to 1, 2 and 3."

23 THE COURT: Right.

24 MS. SCHWARTZ: It says, "However, the parties reserve  
25 their rights to examine any witness that the Court" --

**PATRIOT COAL CORPORATION, et al.**

100

1 THE COURT: Right --

2 MS. SCHWARTZ: -- "may examine."

3 THE COURT: -- but he's not a party to the  
4 stipulation.

5 MS. SCHWARTZ: Well, that -- when you say what the  
6 promise is of bringing witnesses to the court, the -- what the  
7 stipulation --

8 THE COURT: Right, so if at the --

9 MS. SCHWARTZ: -- envisioned is if the Court had  
10 questions, it would be --

11 THE COURT: So we're -- so once again I don't know  
12 who's in the courtroom but, if I were to have questions, then  
13 that would open the door to additional examination. So the  
14 debtors haven't risen to argue yet, so we don't know if that's  
15 going to happen. Or we could get to the end of the day and I  
16 might say I want to hear from a particular person, either by  
17 name or by description, and then we'll be in a different place.

18 But other than this, I don't know what you're  
19 referring to, Mr. Goodchild, in terms of a promise.

20 MR. GOODCHILD: Well, the promise was made not just in  
21 that document but also here. We do know that the people that  
22 signed the stipulation undertook to bring a witness or  
23 witnesses here to the court, which is exactly why the sureties  
24 were asking you to excuse their witness. We know that the  
25 parties, obviously, prepared to answer the Court's questions by

**PATRIOT COAL CORPORATION, et al.**

101

1 way of testimony.

2 THE COURT: There's a big difference, though, between  
3 their understanding that the Court may have questions and their  
4 lack of understanding that you intended to examine those  
5 witnesses, and that's the focus of what this issue is and what  
6 my ruling is.

7 MR. GOODCHILD: Yes, I understand that.

8 THE COURT: I'm content to allow you to incorporate  
9 into your argument, which is not evidence, the questions that  
10 you might have asked, but I don't understand what that does  
11 other than perhaps expose areas in which the movants, in your  
12 view, may not have carried their burden of proof. So I'm not  
13 quite sure where this is going. But nothing that you say at  
14 this point would be evidence, but I'm perfectly happy to give  
15 you latitude to make your argument. I haven't even heard your  
16 argument yet. But we have a very peculiar situation here  
17 because the party whose motion that you've joined says that she  
18 objects to what you're doing now. So it's very peculiar.

19 MR. GOODCHILD: You're right, Your Honor, it is a very  
20 peculiar thing, but my perspective on it is that the Court,  
21 having made a procedural ruling that I, the 1974 Pension Trust,  
22 cannot call this witness for the reasons that you stated --

23 THE COURT: Yes?

24 MR. GOODCHILD: -- which at this stage we are not  
25 rearguing --

**PATRIOT COAL CORPORATION, et al.**

102

1 THE COURT: Okay.

2 MR. GOODCHILD: -- still leaves the question of  
3 substance. And --

4 THE COURT: It is what it is.

5 MR. GOODCHILD: Well, no --

6 THE COURT: We've all agreed with that. We -- there's  
7 a burden of proof; everybody knew what the burden of proof --  
8 it's straightforward, it's -- and it was left to the various  
9 parties to fill that vessel, and we're not done yet.

10 MR. GOODCHILD: Yeah, but, Your Honor, I, again,  
11 respectfully, I don't agree that it is what it is. Let's see  
12 what the "it" is. Your Honor is --

13 THE COURT: Are you arguing your joinder now, or are  
14 we still talking about the witness point? I just want to have  
15 the right mindset as I listen to you.

16 MR. GOODCHILD: In the right mindset, Your Honor, I  
17 would like the opportunity to tell Your Honor what the six  
18 questions are that I wanted to ask.

19 THE COURT: Okay, I'm going to listen. Go ahead.

20 MR. GOODCHILD: And I was about to explain why.

21 THE COURT: Okay.

22 MR. GOODCHILD: The reason is because, procedure  
23 aside, whether I'm the right person to ask the questions or  
24 not, I frankly don't have a dog in that hunt. I'm here in the  
25 courtroom yesterday, I'm here in the courtroom today, and my

**PATRIOT COAL CORPORATION, et al.**

103

1 perception is that the record is not complete from a  
2 perspective of fleshing out the debtors' decision-making  
3 process.

4 MS. SCHWARTZ: Your Honor --

5 MR. GOODCHILD: It doesn't matter to me whether --

6 THE COURT: Hold on.

7 Ms. Schwartz, you know better.

8 MS. SCHWARTZ: No, no --

9 THE COURT: You --

10 MS. SCHWARTZ: I was going to object, Your Honor.

11 That's --

12 THE COURT: Well, I know you were going to object, but  
13 I'm telling you to wait until he's finished speaking, and then  
14 you all can tell me what your objections are, okay?

15 Go ahead.

16 MR. GOODCHILD: And from my perspective, Your Honor,  
17 it doesn't matter to me whether I'm the one asking the  
18 questions or Your Honor is the one asking the questions. My  
19 perspective is, if Your Honor feels that there are questions  
20 that are unanswered about the debtors' decision-making and the  
21 debtors' intent, then I do not want there to be a technical  
22 situation in which there is a failure of evidence that would  
23 allow an argument that simply for failure to meet a burden of  
24 proof --

25 THE COURT: It's not simply for failure to meet a

**PATRIOT COAL CORPORATION, et al.**

104

1 burden of proof. This is a biggie, okay? This is a biggie.  
2 There's a burden of proof; the parties have the burden of  
3 proof, they know what it is, and decisions should be made by  
4 courts based on parties' failure, or not, to fulfill their  
5 burden of proof. I'm not supposed to be putting my thumb on  
6 the scale in that regard; that's what the adversary system is  
7 about.

8 Now, you can tell -- you've all suffered through --  
9 now we're going on six hours of this and we've got a lot more  
10 to go -- that I ask a lot of questions. I do ask a lot of  
11 questions; maybe too many questions. But I'm not going to  
12 hijack the presentation of the evidence to that extent. If I  
13 have questions when the debtors stand up, when the committee  
14 stands up and when the other parties stand up, I'm going to ask  
15 them; and if they can't answer the questions, it's going to be  
16 their call whether or not they suggest that I speak to somebody  
17 from Patriot. I don't know what's going to happen yet.

18 MR. GOODCHILD: Your Honor, I agree with that, and  
19 that's the reason why it was our view that it was appropriate  
20 for a party to the proceeding to call the witness.

21 But in any event, these are the six things that I  
22 thought to ask. The first is, was there an analysis done  
23 regarding where to file the debtors' Chapter 11 cases, and what  
24 was that analysis? Two, who was involved in that decision and  
25 who ultimately made the decision for each of the debtors?



**PATRIOT COAL CORPORATION, et al.**

105

1 Three, when was that decision made? Four, what information and  
2 considerations were taken into account in making that decision?  
3 Five, what alternatives, in terms of venue, were considered by  
4 the debtors? And six, why choose New York? What were the  
5 positives and what were the negatives in that decision? Those  
6 were the things that I wanted to ask.

7 THE COURT: Okay. Let's keep going.

8 MR. GOODCHILD: Thank you, Your Honor. Your Honor has  
9 asked a question about why it was that the 1974 plan and the  
10 other UMWA Health and Retirement Funds didn't join the union's  
11 motion. I want to try to take that upfront.

12 THE COURT: Okay.

13 MR. GOODCHILD: The union represents the interests of  
14 the individual retirees. So from the perspective of  
15 convenience of the parties, that was an argument that was best  
16 made by the union as the representative of those individuals.  
17 Now, those people -- some of those people may happen to be the  
18 beneficiaries of one or more of the UMWA Health and Retirement  
19 Funds, but the truth of it is that my clients are a pension  
20 fund and three healthcare funds; and they differ in lots of  
21 ways that we could get into, but that's not very relevant here  
22 today.

23 But really we didn't think that the question of  
24 convenience was one that we were best placed to make. The UMWA  
25 Health and Retirement Funds are based in Washington, DC and

**PATRIOT COAL CORPORATION, et al.**

106

1 they're administered by a staff, and they have counsel and one  
2 of their lawyers is in Washington and the other lawyer, me, is  
3 in Philadelphia. So as much as we have some connection to the  
4 union, the question of convenience wasn't one on which we had a  
5 view.

6 Two --

7 THE COURT: So your view is aligned with the U.S.  
8 Trustee's view that the case shouldn't be in New York, but you  
9 express no view as to where it should be?

10 MR. GOODCHILD: Well, Your Honor --

11 THE COURT: I mean, that's what the U.S. --

12 MR. GOODCHILD: -- we have not so far taken --

13 THE COURT: -- Trustee has told me.

14 MR. GOODCHILD: And we have joined in that and we have  
15 taken no position on the record in terms of where we would like  
16 the case to be transferred.

17 THE COURT: Okay.

18 MR. GOODCHILD: The UMWA Health and Retirement Funds  
19 appear in bankruptcy cases frequently. I know I've been doing  
20 this for about twenty years for them, and I've been all over  
21 the country, so I do have experience in these sorts of cases in  
22 lots of different bankruptcy courts. I'll tell you that a  
23 greater number of beneficiaries of the pension fund reside in  
24 West Virginia than in any other state. I'll also tell you that  
25 the pension fund --

**PATRIOT COAL CORPORATION, et al.**

107

1 THE COURT: But we -- just two sentences ago you told  
2 me --

3 MR. GOODCHILD: Yes.

4 THE COURT: -- that you don't have a position on  
5 where.

6 MR. GOODCHILD: You're right, Your Honor.

7 THE COURT: You just have a position on not here.

8 MR. GOODCHILD: You're right, Your Honor, and that's  
9 exactly what I said to you; I said --

10 THE COURT: Okay.

11 MR. GOODCHILD: -- we have not taken a position in  
12 terms of where the cases should go.

13 THE COURT: All right, so notwithstanding that you  
14 just told me that most of your folks live in West Virginia,  
15 it's not your position that the case should go to West  
16 Virginia?

17 MR. GOODCHILD: Our druthers would be West Virginia;  
18 of course they would, but --

19 THE COURT: But -- no, no, no.

20 MR. GOODCHILD: -- we have not taken an official  
21 position --

22 THE COURT: Stop.

23 MR. GOODCHILD: -- on it.

24 THE COURT: Stop. Stop. You filed a pleading. Your  
25 pleading joined the U.S. Trustee. Your pleading didn't join

**PATRIOT COAL CORPORATION, et al.**

108

1 the union. And now you're telling me your druthers are "of  
2 course they would". I don't know that. That's not what your  
3 pleading says.

4 MR. GOODCHILD: You're right, Your Honor. I'm not  
5 backing away from the pleading. I have told you we have not  
6 taken an official position on where the cases should go.

7 THE COURT: Okay.

8 MR. GOODCHILD: We joined the U.S. Trustee's motion  
9 because when it became clear that the only reason for the  
10 incorporation of the two New York debtors was to take advantage  
11 of getting relief under Chapter 11 in this court, we felt that  
12 the interests of justice were not served by having the cases  
13 stay here. The timing of the joinder followed the timing of  
14 the United States Trustee's joinder. We filed -- or the United  
15 States Trustee's motion. We filed --

16 THE COURT: But that doesn't make sense to me,  
17 Mr. Goodchild, because I actually don't remember the order in  
18 which they were filed. But the sureties filed their motion and  
19 the union filed its motion, and each of them very strongly made  
20 the case that it wasn't just about the convenience; it was the  
21 interest of justice. So I don't understand why at what I  
22 consider to be the eleventh hour, the U.S. Trustee made its  
23 motion. And I understand procedurally that as a policy matter  
24 the Office of the U.S. Trustee doesn't file joinders; that's  
25 not news to me. But be that as it may, they filed their own

**PATRIOT COAL CORPORATION, et al.**

109

1 motion.

2 So the interest-of-justice argument was out there from  
3 the beginning and you didn't step up; you didn't file your  
4 motion. So this whole series of events has been mystifying to  
5 me, and it remains mystifying to me right now. The U.S.  
6 Trustee is the -- I don't want to use the wrong word, but has  
7 an oversight function, charged with overseeing the integrity of  
8 the bankruptcy process; they're pretty consistent on that  
9 score, okay? And they chose to file that pleading. But you're  
10 the guardian of your clients' interests, right? So it's just  
11 not adding up to me why it was that the U.S. Trustee's motion  
12 prompted you to action. And the union's motion and the  
13 sureties' motion, which are much longer, more detailed if you  
14 will -- some might say strident, but I wouldn't -- why that  
15 didn't prompt you to act.

16 So it's just not adding up, to me. And I'll give  
17 you -- we can keep going so you can make me understand, but I'm  
18 just -- it's not adding up to me.

19 MR. GOODCHILD: All I can do to try to demystify the  
20 situation is to tell you what happened, from our perspective.  
21 The United States Trustee filed her motion. The United States  
22 Trustee took an examination of the debtors under Section 341.  
23 In the 341 meeting, from our perspective --

24 THE COURT: When did the 341 meeting occur?

25 MR. GOODCHILD: I forget the date.

**PATRIOT COAL CORPORATION, et al.**

110

1 THE COURT: Was it after the filing of the initial  
2 motions? Ms. Schwartz?

3 MS. SCHWARTZ: It was after the -- it was on August  
4 23rd, I believe, and it was after we filed our motion. It was  
5 before --

6 THE COURT: After you filed your motion, or after  
7 the --

8 MS. SCHWARTZ: Yeah. August 23rd.

9 MR. HUEBNER: Yes, Your Honor. The order is the union  
10 motion --

11 THE COURT: The sureties' motion.

12 MR. HUEBNER: -- then the surety motion; then the  
13 trustee's motion; then the 341 --

14 MS. SCHWARTZ: Yeah.

15 MR. HUEBNER: -- and then several days after that, the  
16 untimely joinder of Mr. Goodchild's clients.

17 THE COURT: Okay.

18 MR. GOODCHILD: Okay.

19 THE COURT: Go ahead.

20 MR. GOODCHILD: And we filed our joinder the next  
21 business day after the 341. We did that because my co-counsel  
22 attended the 341. From our perspective, that was the first  
23 time that it was clear that the debtors' only motivation, only  
24 purpose for the two entities, was so that Chapter 11 relief  
25 could be afforded in this district. And from our perspective,

**PATRIOT COAL CORPORATION, et al.**

111

1 that offends principles of interests of justice. And so, Your  
2 Honor, that explains the timing.

3 THE COURT: But you see, then we get to the question  
4 that I asked Ms. Jennik, and she patiently listened so many  
5 times yesterday, which was, and what you were getting to  
6 before, which was the analysis of the cost and benefits to your  
7 client. Right? So there's the issue of what the debtors'  
8 thinking was; there's the issue of what the union's thinking  
9 is. The U.S. Trustee is here defending a principle of justice,  
10 and she told me that, yesterday when we had her argument, that  
11 if there's an extra cost, there's an extra cost; convenience  
12 doesn't trump justice. But you have a client that you're  
13 representing.

14 MR. GOODCHILD: Yes, Your Honor.

15 THE COURT: So if your analysis was that the law in  
16 this district was better and that the outcome for your clients  
17 would be better, I wouldn't expect you to be standing there.  
18 So you must have done some analysis.

19 MR. GOODCHILD: Your Honor, we have.

20 THE COURT: And it's not just that you're carrying a  
21 flag for justice.

22 MR. GOODCHILD: Well, Your Honor --

23 THE COURT: I'm being totally honest.

24 MR. GOODCHILD: Well --

25 THE COURT: I'm a straight shooter. So --

**PATRIOT COAL CORPORATION, et al.**

112

1 MR. GOODCHILD: Well --

2 THE COURT: -- you got to help me with this.

3 MR. GOODCHILD: -- I'd like to be a straight shooter  
4 right back to you. Your Honor, I just told you that my clients  
5 appear in bankruptcy cases all the time. And where those  
6 bankruptcy cases matters -- where those bankruptcy cases happen  
7 matters. I can't say what will happen in this case. I can't  
8 say what will happen if it stays with you, Your Honor. I can't  
9 say what will happen if it goes to a different judge, Your  
10 Honor. But I can say, from bitter experience, that my clients  
11 fare differently in different jurisdictions.

12 And so, Your Honor, the principle that the U.S.  
13 Trustee is articulating from the perspective of justice is one  
14 that has a very real interest to my clients, not just in this  
15 case but in a lot of other cases to be filed. So we do care,  
16 Your Honor.

17 THE COURT: I hear you. I still -- I'll have to mull  
18 it over, because you've got a fiduciary duty, your clients have  
19 a fiduciary duty to the beneficiaries of those trusts. And it  
20 seems to me that putting affirmative bad faith or other such  
21 matters to one side which are not in issue here, that your  
22 clients would want to be in the best place for them, without  
23 regard to how anybody else does. Unsecured creditors,  
24 environmental authorities, they want to be where they will come  
25 out and do the most; and sure, that's going to vary from one



**PATRIOT COAL CORPORATION, et al.**

113

1 place to the other and no one knows how things are going to  
2 turn out. But I would have expected that that would be the  
3 driver of the position that you're taking. The union very  
4 clearly believes and urges that this case ought to be in West  
5 Virginia. You're not saying that. You're just saying not  
6 here. And if that's your position, I accept it as your  
7 position, and I'm obviously going to consider it, but --

8 MR. GOODCHILD: Your Honor, I appreciate what Your  
9 Honor is saying. I want to be careful not to reveal a  
10 privilege here.

11 THE COURT: Of course.

12 MR. GOODCHILD: But I'd like Your Honor at least to  
13 consider the possibility that our view is that, on the  
14 substance of the law, we should come out just about the same no  
15 matter where.

16 THE COURT: Okay. That supports the notion, though,  
17 perhaps the unanswered question or the unasked question, that  
18 there was nothing sharp, if you will, in the debtors' analysis  
19 that this venue was not selected because there happens to be  
20 particularly strong Second Circuit law, as opposed to Fourth  
21 Circuit or Fifth Circuit or Sixth Circuit or all those other --

22 MR. GOODCHILD: Well, Your Honor --

23 THE COURT: -- circuits.

24 MR. GOODCHILD: -- I probably wouldn't go quite that  
25 far.

**PATRIOT COAL CORPORATION, et al.**

114

1 THE COURT: Okay.

2 MR. GOODCHILD: The treatment of my client is one of a  
3 lot of different points of law. And, Your Honor, it is very  
4 much the case that there are significant differences among the  
5 circuits in areas that do matter in this case.

6 THE COURT: Okay. All right, are there any other  
7 points that you'd like to make?

8 MR. GOODCHILD: Yes, Your Honor, thank you.

9 THE COURT: Okay.

10 MR. GOODCHILD: Your Honor asked some questions of  
11 counsel yesterday along the lines of is this a slippery slope.  
12 Here we have the facts that are undisputed. The debtors  
13 incorporated these two entities within thirty days before the  
14 bankruptcy. And Your Honor, I think, quite appropriately asked  
15 the question, well, how far back do you have to go before  
16 you're not tainted?

17 Your Honor, I don't think timing is the issue. Here  
18 you have a very, very clear-cut set of facts. The facts are  
19 that the debtors have admitted that there's no purpose for  
20 those two entities other than availing themselves of relief  
21 under the chapter. Our view of that is that where the facts  
22 are so incredibly clear-cut, I'm not sure this is ever going to  
23 come up again, Your Honor, that you're going to have a debtor  
24 who comes in and, I'd say, almost proudly admits that, of  
25 course we filed; we created these entities so that we could be

**PATRIOT COAL CORPORATION, et al.**

115

1 here in New York, as if that were a good thing. I'm not sure  
2 you'll ever have that again.

3 And you don't need to worry about slippery slope from  
4 my perspective. You got a black-and-white situation where the  
5 debtor has admitted that the only intent in creating those  
6 entities was so that those entities could seek protection under  
7 Chapter 11 and, with them, the affiliates.

8 I think, in the interest of justice, Your Honor should  
9 transfer the cases. And consider what would happen if Your  
10 Honor rules for the debtors. The ruling is going to be, as  
11 long as you -- it doesn't matter how many debtors you -- it  
12 doesn't matter how many affiliates you have, doesn't matter  
13 where you are, doesn't matter --

14 THE COURT: How do you know what the ruling would be?  
15 Judges narrowly tailor rulings. That's not necessarily what  
16 the ruling would be. Read what Judge Drain did in Winn-Dixie;  
17 it's very narrowly tailored to that situation. Houghton  
18 Mifflin is very narrowly tailored to that situation. Both of  
19 those judges went out of their way to say it's narrowly  
20 tailored to that situation.

21 MR. GOODCHILD: I understand.

22 THE COURT: So it doesn't necessarily follow that that  
23 would be the case.

24 MR. GOODCHILD: Your Honor, while it is certainly true  
25 that Your Honor would tailor in any way Your Honor sees fit,

**PATRIOT COAL CORPORATION, et al.**

116

1 the facts are stipulated on this point. And, Your Honor, in  
2 the record, you have the intent of the debtors in forming those  
3 entities.

4 THE COURT: No, I don't --

5 MR. GOODCHILD: Those entities --

6 THE COURT: -- think that I do, actually.

7 MR. GOODCHILD: Well, and that was my point, Your  
8 Honor, and that was exactly why I was saying that perhaps there  
9 should be a witness here. But I'll tell you what we do have  
10 stipulated. What we do have stipulated is those entities have  
11 no other purpose.

12 THE COURT: Mr. Goodchild, the possibility or the  
13 issue of intent, the ability to inquire into it, the relevance  
14 of it, has been in issue or possibly in issue -- or possibly in  
15 issue -- from day one of this case. It's a coal case that's  
16 filed in New York. Day one, everybody knew that those entities  
17 were what they were, and nothing has changed. So I just don't  
18 understand why now, at twenty minutes to 2 on September 12th,  
19 now you're saying it's so compelling that we have to fill this  
20 hole in the record. That issue was there for the taking up  
21 since the very beginning of this case, and nobody elected to  
22 raise it. I don't know why these folks didn't call you about  
23 the stipulation. I was not aware that the stipulation was  
24 occurring. But the stipulation nowhere has the word "intent"  
25 in it.

**PATRIOT COAL CORPORATION, et al.**

117

1 MR. GOODCHILD: You're right, Your Honor, but what is  
2 stipulated -- what is stipulated is that those two entities  
3 have no other purpose.

4 THE COURT: Yeah. Correct.

5 MR. GOODCHILD: Now, Your Honor, with one of the  
6 counsel yesterday, Your Honor was talking about what if the  
7 debtors were to go out and -- I think that it was fracking that  
8 you were talking about --

9 THE COURT: Right.

10 MR. GOODCHILD: -- Your Honor.

11 THE COURT: Acquire a business to engage in --

12 MR. GOODCHILD: Sure.

13 THE COURT: -- in fracking.

14 MR. GOODCHILD: I understand that. And I'm not sure  
15 exactly what the response you got was, but I'll just give it to  
16 you from my perspective. From my perspective --

17 THE COURT: The response was that it was a far-fetched  
18 hypothetical. But other than that, I don't remember either.

19 MR. GOODCHILD: Well, Your Honor, I'm going to stick  
20 with the straight shooter thing, okay? My view of it is, if  
21 the debtors have a legitimate business purpose, even if it's  
22 one of many and one of the other ones happens to be -- to get  
23 venue in a potential Chapter 11 case, then my clients are not  
24 going to make a motion.

25 THE COURT: Right. So we're done. So the answer to

**PATRIOT COAL CORPORATION, et al.**

118

1 my question was that's not this case. That's the answer to the  
2 question.

3 MR. GOODCHILD: Exactly.

4 THE COURT: Okay.

5 MR. GOODCHILD: It's not this case. Here you have a  
6 really hard case; you have a debtor, you have a -- no, you have  
7 a really difficult case, because, frankly, the debtors couldn't  
8 come up with any other scintilla of a reason why those two  
9 debtors exist. Right? You've got -- you have the stark, black  
10 and white, nonslippery slope case. Debtors deliberately --  
11 I'll take "deliberately" off the table. Debtors -- without any  
12 record on intent, debtors create two entities whose sole  
13 purpose is to seek relief under Chapter 11. Now --

14 THE COURT: That's not what the stipulation says. The  
15 stipulation says the debtors formed both PCX and Patriot Beaver  
16 Dam to ensure that the provisions of Section 1408(1) --

17 MR. GOODCHILD: And for no other purpose.

18 THE COURT: -- of the Bankruptcy Code were satisfied  
19 and for no other purpose.

20 MR. GOODCHILD: And for no other purpose.

21 THE COURT: Right.

22 MR. GOODCHILD: Okay, Your Honor --

23 THE COURT: Okay.

24 MR. GOODCHILD: -- we can say it exactly the way that  
25 the stipulation says it. I'm not sure that that makes any

**PATRIOT COAL CORPORATION, et al.**

119

1 difference. In fact, I don't think it does make any  
2 difference. I think that stipulation is an admission that the  
3 only purpose for the entities --

4 THE COURT: Okay. Yes, they agree. That's why they  
5 stipulated to it. So, okay.

6 MR. GOODCHILD: Your Honor, I remember -- and you  
7 probably do as well; I remember about a decade ago we had a lot  
8 of jurisprudence around bad-faith filing. Happened in the  
9 single-asset real-estate cases. And there was a whole  
10 jurisprudence around whether it was proper to file a bankruptcy  
11 for any reason other than a legitimate reorganization purpose.  
12 I think there's an analogy here. I know everybody else has  
13 said that they don't challenge bad -- or challenge good faith,  
14 or anything like that. I'm not exactly sure what that goes to,  
15 but I do know this: if you can't file Chapter 11 for a reason  
16 other than legitimate reorganization purpose, like, for  
17 example, tactically to stop litigation, then why is it that you  
18 can go and create legal entities for the sole purpose of  
19 getting yourself relief under Chapter 11? Because that's the  
20 debtors' argument.

21 THE COURT: That's not what they did. They created  
22 the entities for the purpose of establishing venue in this  
23 district. No one has disputed the fact that Patriot Coal is  
24 properly a debtor in a Chapter 11 proceeding. The only  
25 question is where. The only question is where. They're

**PATRIOT COAL CORPORATION, et al.**

120

1 eligible to be a debtor.

2 MR. GOODCHILD: I agree.

3 THE COURT: They've got a lot of liabilities; they've  
4 got a lot of issues to work out. The only question is where.

5 MR. GOODCHILD: I agree.

6 THE COURT: Okay, so --

7 MR. GOODCHILD: I agree. But what we have here --

8 THE COURT: And I see lots of cases where cases are  
9 filed on the eve of foreclosure or because they're having a  
10 dispute with one creditor. I know what that looks like, all  
11 right?

12 So, I'm sorry, I lost track of what your point was.  
13 So there was an -- you said there was a body of jurisprudence  
14 about bad-faith filing.

15 MR. GOODCHILD: Yeah, Your Honor, I was only drawing  
16 an analogy between that body of case law, which essentially  
17 says, to avail yourself of Chapter 11, you need to have a  
18 legitimate reorganization purpose. And I was saying there's  
19 some analogy to this situation in which the creation of the two  
20 entities did not have a valid business purpose; it had the  
21 purpose of permitting the debtors to file their case here, at a  
22 time when the debtors had -- I don't know what the record is  
23 exactly on this -- eight or nine other choices. And Your Honor  
24 acknowledges, as I think all the counsel in the room  
25 acknowledge, that the judges of all of those other districts



**PATRIOT COAL CORPORATION, et al.**

121

1 are capable of handling this case.

2 So you have to ask yourself, again, why? Why would  
3 you go out of your way to create a tenth choice or an eleventh  
4 choice under those circumstances? And if to do so you had to  
5 create entities whose purpose has nothing to do with the  
6 business of your company, is that right? Is that just? And my  
7 view of that is it's not.

8 THE COURT: Doesn't the answer to that question depend  
9 on what the reason was for doing it?

10 MR. GOODCHILD: Well, Your Honor, all I can say is I  
11 really hope that you ask the debtors that question, because you  
12 have ruled that I can't.

13 THE COURT: I guess we'll find out.

14 MR. GOODCHILD: I should be clear and say I think, on  
15 these facts even as stipulated, you have a black-and-white  
16 situation that calls for a transfer. I agree that you have  
17 discretion in the matter. I agree that justice is the  
18 standard. But Your Honor, if this case stays here, then what  
19 that says is anybody can file for bankruptcy anywhere. No,  
20 Your Honor, I understand that you have said --

21 THE COURT: You say that that's what it says.

22 MR. GOODCHILD: But, Your Honor, I --

23 THE COURT: I don't necessarily agree with it.

24 MR. GOODCHILD: Okay, Your Honor, I understand.

25 THE COURT: Mr. Goodchild, I'd like you to wrap it up,

**PATRIOT COAL CORPORATION, et al.**

122

1 all right? And you can reserve some time for after we've heard  
2 from some other parties.

3 MR. GOODCHILD: Thank you, Your Honor, I will do that.

4 THE COURT: All right, thank you.

5 All right, I think that that takes care of all the  
6 parties on the side of the movants. Am I correct? Yes? All  
7 right. I think it's time to hear from the debtors.

8 Mr. Huebner, give me a moment. I need to adjust my papers  
9 here.

10 Okay, I'm ready when you are.

11 MR. HUEBNER: Good afternoon, Your Honor. For the  
12 record, I am Marshall Huebner of Davis Polk & Wardwell, on  
13 behalf of the Patriot debtors.

14 Your Honor, I had a very detailed oral argument ready  
15 to go for yesterday's hearing, covering a very broad array of  
16 issues. But one of the things that I have slowly learned,  
17 sometimes at very great cost, is that it virtually always makes  
18 sense to talk about what the judge wants to talk about, not  
19 what you want to talk about. So we --

20 THE COURT: We can do both.

21 MR. HUEBNER: So we stayed up --

22 THE COURT: I'm perfectly happy for you to try to  
23 deliver your prepared remarks, just as everyone else has. And  
24 you know I'll interrupt you whenever I want.

25 MR. HUEBNER: Thank you, Your Honor. What we did

**PATRIOT COAL CORPORATION, et al.**

123

1 actually, with that goal in mind, a huge bunch of us stayed up  
2 a good chunk of the night, gutting and regutting, reordering  
3 our argument, to try to give you what we think you want to talk  
4 about. So there is a structure and flow.

5 But let me tell you, right off the bat, six things  
6 that I'm going to address, so there's no doubt that you'll be  
7 hearing our views. One, what is the evidence actually before  
8 the Court on this matter, and whose burden was it to provide  
9 it? Two, why were these cases filed in New York, and what is  
10 the record evidence on that point? Three, what is the  
11 interest-of-justice standard, and how does saving these  
12 companies and maximizing their value for the stakeholders  
13 factor into interest of justice? Four, how do Patriot's  
14 financing needs and financial need of restructuring factor into  
15 the 1412 question that is before us today? Five, should you  
16 establish the per se rule, which I believe is exactly what the  
17 U.S. Trustee is advocating, without regard to the motives of  
18 the debtor or the consequences to the estates and their  
19 creditors? And six, what are the eleven independent reasons  
20 why this case should yield a different outcome than Judge  
21 Drain's ruling in Winn-Dixie?

22 Moreover, Your Honor, since we heard unbelievable  
23 amounts of unsupported lawyer testimony both yesterday and  
24 today, including many facts that are just flat wrong --

25 THE COURT: Okay, I'm going to stop you because I

**PATRIOT COAL CORPORATION, et al.**

124

1 don't think we heard unbelievable amounts of lawyer testimony.  
2 I don't take anything lawyers say as testimony; you know that.  
3 And if that were happening, I would have heard more objections.  
4 So everything I heard yesterday was argument and I want to  
5 hear, and I keep saying this like a broken record, what's the  
6 evidence, what's the evidence, what's the evidence. So --

7 MR. HUEBNER: Right.

8 THE COURT: -- nothing that the lawyers say is  
9 evidence.

10 MR. HUEBNER: Well, what I'm going to do today, Your  
11 Honor, and it might even get irritating at points, I'm going to  
12 give you record citations for virtually every single thing I  
13 say where I believe it's a fact question and not a law  
14 question.

15 THE COURT: All right, well, that's excellent, because  
16 one thing that I'm thinking about, and I haven't made a final  
17 decision on it yet, is what I may want by way of post-hearing  
18 submissions.

19 MR. HUEBNER: Right.

20 THE COURT: Because I haven't had the benefit of any  
21 live testimony and I have a documentary record and there's been  
22 so much discussion about the record and the evidence and the  
23 burden, I may well ask the parties here to make brief post-  
24 hearing submissions; I'm not sure yet but, to the extent that  
25 that makes a difference on how people take notes or approach

**PATRIOT COAL CORPORATION, et al.**

125

1 the rest of the afternoon, I wanted to put that out here.

2 I also want to say that you should -- if it's not  
3 obvious, you should not be expecting a ruling today. In many  
4 cases when time is of the essence and transactions need to  
5 close and there are deadlines that we're up against, we stay up  
6 all night also and deliver decisions. But this is not such a  
7 case. We're going to move it along as quickly as possible.  
8 But just to set everybody's expectations.

9 MR. HUEBNER: And, Your Honor, to be fair, one of the  
10 things that I hope to do, and whether I succeed or not is for  
11 posterity, is to convince you that the evidence that in fact is  
12 appropriate for this hearing I will try to pull together for  
13 you and convince you that hopefully you have what you need --

14 THE COURT: Okay.

15 MR. HUEBNER: -- or what they needed to prove was not  
16 proven.

17 But I need to say one thing before I start any of  
18 that, and that's as follows. Patriot well understands that its  
19 employees and retirees all around the country are very  
20 concerned about their jobs, their benefits and the future of  
21 this company. So is Patriot. We understand that this is a  
22 very uncertain and difficult time. And our job, exactly as the  
23 Court suggested yesterday, is to care about the entire  
24 enterprise, the unionized employees, the majority who are not  
25 unionized, the retirees who are unionized, the retirees who are

**PATRIOT COAL CORPORATION, et al.**

126

1 not unionized, and actually all stakeholders. And as I'm going  
2 to get to in a little while and talk to you about the evidence  
3 in the record on the topic, that's exactly why we chose New  
4 York, to which we have long and varied ties, not the other  
5 jurisdictions, because our view as fiduciary, and I will give  
6 you record evidence on it, is that we were guided by the  
7 considerations that we should have been maximizing value for  
8 creditors, making it convenient for the majority of our  
9 creditors, and securing financing so that these companies  
10 survive.

11 Let's first talk, now that we turn to the issues at  
12 bar, to who the parties are to today's hearing, because I think  
13 you'll hear later in my argument who the parties are matters a  
14 lot in terms of the way the law breaks down in terms of the  
15 governing standards. So who do we have on the movants' side?  
16 First we have the Washington, DC based union that represents  
17 approximately forty-two of our employees. And as the record  
18 evidence makes clear --

19 THE COURT: Forty-two percent --

20 MR. HUEBNER: Forty-two percent.

21 THE COURT: -- not forty-two.

22 MR. HUEBNER: I apologize, Your Honor. As the record  
23 evidence makes clear, Schroeder -- venue declaration at 36 and  
24 38 -- is a counterparty to only --

25 THE COURT: Is it [Shro-der] or [Shray-der]? I'm

**PATRIOT COAL CORPORATION, et al.**

127

1 sorry. I don't mean to be --

2 MR. HUEBNER: Unbelievable.

3 THE COURT: -- exceedingly giving you --

4 MR. HUEBNER: I've been yelling at --

5 THE COURT: -- an exceedingly hard time.

6 MR. HUEBNER: -- Mr. Moskowitz --

7 THE COURT: But --

8 MR. HUEBNER: -- for days that it's [Shray-der].

9 THE COURT: -- I've been saying [Shray-der].

10 MR. HUEBNER: It is absolutely [Shray-der]. I  
11 apologize, Your Honor. Of course it's [Shray-der]. And I  
12 apologize even more so to Mr. Schroeder, who -- I've been  
13 correcting everybody else for weeks, and then I do it myself.

14 THE COURT: It's okay.

15 MR. SCHROEDER: Thank you, Your Honor.

16 MR. HUEBNER: So, Your Honor --

17 Et tu, Brute?

18 So as the Schroeder venue declaration says at 36 and  
19 38, the union is counterparty only to nine of the ninety-nine  
20 debtors in these proceedings.

21 THE COURT: But, Mr. Huebner -- I'll stop you right  
22 off the bat. But the union doesn't want the case here, so why  
23 does that matter?

24 MR. HUEBNER: What it matters, Your Honor --

25 THE COURT: The union's speaking very loudly. They

**PATRIOT COAL CORPORATION, et al.**

128

1 don't want the case here.

2 MR. HUEBNER: Yes, Your Honor. But what if there are  
3 huge debtors with massive operations and substantial creditors,  
4 where the union is not a creditor at all, entities that are  
5 based not in West Virginia, whose assets are only in Kentucky  
6 that are incorporated only in Delaware? We're not saying it's  
7 dispositive, but the fact that there are ninety-nine debtors  
8 who have different creditors, different asset locations,  
9 different jurisdictions of incorporation --

10 THE COURT: Right.

11 MR. HUEBNER: -- suggests that their argument is more  
12 powerful for the nine where they're actually a creditor. But  
13 they're sort of --

14 THE COURT: All right, but let's try to keep a  
15 separate pile of our apples and oranges here, okay? The apples  
16 are should it be in New York; and the oranges are where else  
17 might it go, where else it could it have gone, should it go.  
18 Right?

19 MR. HUEBNER: Agree.

20 THE COURT: So all of that doesn't say anything about  
21 why New York and why New York's the best choice, a proper  
22 choice, a sustainable choice. Right? That's just where the  
23 assets are, where the employees are, right?

24 MR. HUEBNER: Yes --

25 THE COURT: Right.



**PATRIOT COAL CORPORATION, et al.**

129

1 MR. HUEBNER: -- Your Honor.

2 THE COURT: Okay.

3 MR. HUEBNER: Of course. The point I was making,  
4 though, and I guess I'll give the analogy -- maybe it'll be  
5 more articulate than what I failed at -- if the only movant was  
6 one trade creditor of one debtor and there were ninety-eight  
7 other debtors who were not in West Virginia and had non-West  
8 Virginia creditors, that would change the complexion, I would  
9 think, of the hearing.

10 THE COURT: Absolutely.

11 MR. HUEBNER: That's the only point I'm making, that  
12 there are --

13 THE COURT: Okay.

14 MR. HUEBNER: -- ninety other debtors where there's no  
15 union possibility of a claim with substantial assets and  
16 substantial creditors.

17 THE COURT: Okay.

18 MR. HUEBNER: Nothing more than that, Your Honor.

19 Then we have the union funds, who we obviously just  
20 spent some time on; they, too, are not based in West Virginia;  
21 they are outside Washington, DC. And we're going to talk later  
22 about why I think their location, under the law, actually  
23 matters quite a bit to courts in this jurisdiction and  
24 elsewhere.

25 Then we have four surety bond providers, not one of

**PATRIOT COAL CORPORATION, et al.**

130

1 which is based in West Virginia, with very hypothetical and  
2 contingent claims that someday, if for the first time in its  
3 history Patriot ever has to have a surety bond called on and  
4 it's not covered by the LCs issued under the New York DIP  
5 facility with New York lenders with BofA, may possibly end up  
6 with a claim.

7 And, Your Honor, in terms of record evidence --

8 THE COURT: Well, it's not a New York DIP facility.  
9 It's a DIP facility. And it's been -- and there are lenders.  
10 So I don't want to go down the path of characterizing the  
11 lenders as the New York lenders. They're big financial  
12 institutions who are in a lot of places, including New York.

13 MR. HUEBNER: That is true, Your Honor.

14 THE COURT: Right?

15 MR. HUEBNER: Although I think -- absolutely it's  
16 true, full stop. It is also true, as I'll talk about later,  
17 that the record reflects that this DIP was negotiated in New  
18 York, opposite New York counterparties, and is governed by New  
19 York law. And I believe the majority of the lenders are New  
20 York institutions.

21 THE COURT: Okay, but --

22 MR. HUEBNER: Right. It may not -- it may not move  
23 you much.

24 THE COURT: But if the case moves somewhere else, you  
25 can still continue to talk to those lenders in New York.

**PATRIOT COAL CORPORATION, et al.**

131

1 MR. HUEBNER: Absolutely.

2 THE COURT: And to their New York counsel and  
3 negotiate exit financing and plan issues and everything else  
4 that needs to occur in New York. The only thing that would  
5 happen someplace else is, as you told me on the very first day  
6 that you appeared -- and I missed the very first day of this  
7 case and Judge Gropper covered for me -- that you hope that  
8 everything is consensual.

9 MR. HUEBNER: Yes.

10 THE COURT: So where the lenders are, and their  
11 counsel are, I don't know that that moves me that much.

12 MR. HUEBNER: Fair enough, Your Honor. Then I'll  
13 emphasize it less than I would have.

14 THE COURT: Mr. Huebner, you can -- it's not at all  
15 disrespectful to a court, or this Court, to argue. That's what  
16 you're here to do, so --

17 MR. HUEBNER: Fair enough.

18 THE COURT: -- go for it.

19 MR. HUEBNER: Your Honor, to continue on the surety  
20 point, they claim to have approximately sixty-nine million  
21 dollars of surety bond exposure. I would direct the Court to  
22 the [Shro-der] declaration at --

23 THE COURT: [Shray-der], Mr. Huebner.

24 MR. HUEBNER: Schroeder.

25 THE COURT: Do you want a little Post-it with a long

**PATRIOT COAL CORPORATION, et al.**

132

1 "A" on it over there?

2 MR. HUEBNER: I'll just -- I'll take a knife.

3 So we know that those are the numbers. Also relevant  
4 is that, according to the Schroeder first-day declaration, also  
5 in evidence in schedule 5, we have 238 million dollars of  
6 outstanding surety bonds. So again, just for context, this is  
7 69 out of 238; about twenty-nine percent of the total.

8 Moreover, Your Honor, the venue Schroeder declaration  
9 at paragraph 20 tells us that none of their contracts are  
10 governed by West Virginia law, and that's very important  
11 because they make a big deal, and they tell you again and again  
12 without evidence -- and you asked them about it this morning --  
13 "Why do you keep saying everything is governed by West Virginia  
14 law?" It's important to note that none of their own  
15 contracts --

16 THE COURT: Right.

17 MR. HUEBNER: -- were governed by West Virginia law.

18 THE COURT: Right. But I think that their argument  
19 was that it's not so much the governing contract law so much as  
20 the environmental regulation scheme that they were really  
21 worried about, right? Isn't that what they said?

22 MR. HUEBNER: It's what they argued.

23 THE COURT: Okay.

24 MR. HUEBNER: But our argument back is there will be a  
25 lot under New York law. In fact, ironically, one of the four,

**PATRIOT COAL CORPORATION, et al.**

133

1 and also paragraph 20, not only has New York law, but New York  
2 forum selection. They made us promise that any and all  
3 disputes would be brought within the boundaries of the State of  
4 New York. So there's a fair amount of irony here that one of  
5 the four of them, a non-West Virginia company, made us promise,  
6 as the indemnitor in the bond, we will only bring legal  
7 proceedings in the State of New York. And now here we are and  
8 they're saying, "How dare you. We want to go to West Virginia  
9 which our own contracts didn't bother to use that law."

10 Then there are three utilities, Your Honor: AEP --  
11 I'm going to get this one wrong, for sure, it's going to make  
12 Schroeder look like a walk in the park -- Monongahela Power  
13 Company, and Hope Gas. AEP, which is the only one of those  
14 three in the top fifty, is also not from West Virginia, a fact  
15 whose legal import I will argue later. That's ECF number 98,  
16 which is our top fifty list.

17 Then there's the Attorney General of West Virginia who  
18 I believe is not here but filed a pleading, that is, in fact, a  
19 joinder to the unions.

20 And then there is the Kentucky DNR, which we  
21 discussed. It's not joinder, it's sort of a statement of  
22 support, and we certainly respect that.

23 And then, Your Honor, and just to pick up on your own  
24 comments and then move on, because I don't want to make more of  
25 it than this, but after the Court-imposed deadline had passed,

**PATRIOT COAL CORPORATION, et al.**

134

1 and after, actually, asking us in writing for an extension and  
2 acknowledging the deadline, we then got, without prior notice,  
3 the motion of the United States Trustee.

4 Your Honor, the last thing is the group of  
5 shareholders. There, too, after all, I think, applicable  
6 deadlines, there is a joinder by the group of shareholders who  
7 are primarily from Darien and Old Saybrook, Connecticut; also  
8 from Virginia. That's ECF 529, their 2019 statement.

9 So in terms of the timely filings, we have one non-  
10 West Virginia union; four non-West Virginia surety providers;  
11 three utilities, the biggest one of which, and the only one in  
12 top fifty is not from West Virginia; and the West Virginia  
13 Attorney General. Our of our thousands and thousands of  
14 creditors, with everybody on their side saying West Virginians  
15 want this in West Virginia, the only two private creditors from  
16 West Virginia even joining them are the two minor utilities  
17 that filed a joinder under AEP and are not on the top fifty  
18 list.

19 Your Honor, there is an argument, one of many I will  
20 make, that this alone ends the inquiry. Because, as Judge  
21 Gonzalez ruled in Enron-II --

22 THE COURT: Well, but hold on. But you're talking  
23 only about geography and you're not talking about ignoring all  
24 that geography and focusing on the propriety of the New York  
25 venue. That's all geography. For the purposes of this little

**PATRIOT COAL CORPORATION, et al.**

135

1 segment, we can agree it's all over the map.

2 MR. HUEBNER: Right.

3 THE COURT: A lot of it is in West Virginia, a lot of  
4 it's other places. Some of it's governed by West Virginia law;  
5 some of it's governed by New York law, right?

6 MR. HUEBNER: Your Honor, I --

7 THE COURT: Creditors, employees geographically in  
8 West Virginia, elsewhere -- all over the map. And you heard me  
9 this morning and yesterday go through a lot of numbers. And I  
10 think the record is unclear as to whether or not there are a  
11 majority of the workers, employees -- union and nonunion --  
12 within West Virginia's borders.

13 MR. HUEBNER: Your Honor, I guess --

14 THE COURT: So I hear you, but we haven't even begun  
15 to talk about the sustainability of New York as a venue choice,  
16 as opposed to all that. Right?

17 MR. HUEBNER: And Your Honor, absolutely. And I will  
18 most certainly get there. But remember, I have to address both  
19 the convenience of the parties' prong --

20 THE COURT: Right.

21 MR. HUEBNER: -- and the second one.

22 THE COURT: Right.

23 MR. HUEBNER: And on the convenience of the parties'  
24 prong, what Judge Gonzalez ruled -- and I'll give you a little  
25 more case law in a minute -- is that when the creditor is not

**PATRIOT COAL CORPORATION, et al.**

136

1 from the forum it's seeking transfer to, or, in his words --  
2 I'll just use them -- "The governing standard is the proximity  
3 of creditors to the court" --

4 THE COURT: Which Enron?

5 MR. HUEBNER: -- "not the creditors' choice of forum."

6 THE COURT: Which Enron? Enron-I, II, or III?

7 MR. HUEBNER: This is -- I apologize -- I'll give you  
8 the pin cite for it, Your Honor. This is Enron-II, 28 B.R.  
9 376.

10 UNIDENTIFIED MALE SPEAKER: 284.

11 MR. HUEBNER: 284 B.R. 376, 400.

12 And so the fact that we have a lot of non-West  
13 Virginia creditors seeking transfer to West Virginia for,  
14 essentially, not because of their own proximity, but because  
15 they think it's better --

16 THE COURT: What's the page number again?

17 MR. HUEBNER: It's page 400, Your Honor.

18 THE COURT: Give me a moment.

19 And what's your -- what's the quotation again?

20 MR. HUEBNER: Your Honor, the quotation from that  
21 decision is: "The governing standard is the proximity of  
22 creditors to the court, not the creditors' choice of forum."  
23 And the sureties are not near the court. The other parties, by  
24 and large, are not near the court. They're just saying, we  
25 want that forum more under our convenience argument. That



**PATRIOT COAL CORPORATION, et al.**

137

1 argument works when you're from West Virginia. And if you look  
2 at Winn-Dixie, which is a great example, Jacksonville, Florida,  
3 people came and said, "This isn't fair to us. We're small.  
4 We're here. You took this far away from us." We didn't take  
5 it far away from Pennsylvania sureties. They're not allowed to  
6 choose the forum they like better. They're allowed to argue  
7 that it's more convenient for them.

8 THE COURT: You took it far away from all of the  
9 coalminers in West Virginia.

10 MR. HUEBNER: Which is why the union is arguably  
11 different, which is why I didn't list them just now. Except  
12 the union itself, Your Honor, is located in a suburb of  
13 Washington, DC. And I understand, and we're going to talk  
14 later --

15 THE COURT: Well, the union as an entity is.

16 MR. HUEBNER: Uh-huh.

17 THE COURT: But the union's constituents and the  
18 company's workers are in West Virginia.

19 MR. HUEBNER: Absolutely, Your Honor, and I'm actually  
20 going to address that head-on in a few minutes.

21 THE COURT: Okay.

22 MR. HUEBNER: And what courts had to say and what is  
23 the law in exactly this fact pattern, when there is a union,  
24 and there are constituents, and how do you weigh those two  
25 things.

**PATRIOT COAL CORPORATION, et al.**

138

1 Your Honor, less than a month ago -- and I apologize,  
2 because we just found it and we have copies -- Judge Walsh  
3 faced a similar fact pattern in a case called In re DBSI, Inc.  
4 2012 Bankruptcy LEXIS 3769, where several of the movants wanted  
5 transfer to a state --

6 THE COURT: Is that in your papers?

7 MR. HUEBNER: No, it's brand -- we just found it, Your  
8 Honor.

9 THE COURT: Okay.

10 MR. HUEBNER: It's law, it's not a fact.

11 THE COURT: Okay.

12 MR. HUEBNER: It's just a case that we happened to  
13 find. People wanted to move the case from Delaware to Idaho,  
14 and Judge Walsh said, but you're not in Idaho. The fact that  
15 you like it better is not the test. The test is are you there?  
16 What's your proximity?

17 And I think that the fact that most of the movants are  
18 not from West Virginia, and virtually zero movants are from  
19 West Virginia, is very, very telling. Courts should be  
20 skeptical when movants want to move cases to where they are not  
21 located.

22 Who opposes transfer?

23 THE COURT: Well, but I attempted to -- I tried to ask  
24 everybody a lot of questions about that for that very reason,  
25 and the surety's answer was, I mean, they -- my first question

**PATRIOT COAL CORPORATION, et al.**

139

1 was, "Who are you and where are you from?" Right?

2 MR. HUEBNER: Right.

3 THE COURT: And we got that. But then,  
4 notwithstanding the fact that they are from California and  
5 Houston and other non-West Virginia places, they said, we want  
6 it to be in West Virginia because that's where the assets are.  
7 That's where our exposure is. That's where the environmental  
8 framework is. That was their answer. I think it's a  
9 legitimate answer.

10 MR. HUEBNER: Your Honor, Ms. Schonholtz is going to  
11 address the accuracy of the underlying factual claims they made  
12 about where their exposure actually is, so we did divide things  
13 up a little bit.

14 THE COURT: Okay.

15 MR. HUEBNER: I think you'll be hearing about that.  
16 Your Honor, who opposes transfer? Because we think  
17 the lineup on this side is actually quite important. The  
18 ninety-nine debtors oppose transfer and we, of course, are  
19 fiduciaries for all parties.

20 The statutory fiduciary creditors' committee,  
21 appointed by the same U.S. Trustee seeking the discretionary  
22 transfer.

23 THE COURT: By a four-to-three vote.

24 MR. HUEBNER: Correct, Your Honor; we understand.  
25 There are arguments about whether the movants should have been

**PATRIOT COAL CORPORATION, et al.**

140

1 allowed to vote, but that's not my issue.

2 The senior and junior DIP lenders who have 802 million  
3 dollars on the line in this case, the --

4 THE COURT: How much funded exposure?

5 MR. HUEBNER: Your Honor, the DIP facility is  
6 primarily LCs.

7 THE COURT: Right.

8 MR. HUEBNER: Which backstop the, ironically, surety  
9 obligations.

10 THE COURT: Right.

11 MR. HUEBNER: One of the things you'll hear in a few  
12 minutes is that, for the sureties in no small part, the actual  
13 economic parties-in-interest are the DIP lenders. So the  
14 majority --

15 THE COURT: Isn't the net exposure to the sureties,  
16 after you take into account the DIP backstops, just about  
17 thirty million dollars? I think I saw that number in some of  
18 the pleadings -- in one or more of the pleadings.

19 Ms. Schonholtz?

20 MS. SCHONHOLTZ: Your Honor, I'll address it. It's a  
21 little bit less, but you're directionally correct.

22 THE COURT: Okay. All right.

23 MS. SCHONHOLTZ: Oh, and let me just add for the  
24 record, there is also a significant amount of funded debt under  
25 the first lien DIP facility. I think it's about --

**PATRIOT COAL CORPORATION, et al.**

141

1 MR. HUEBNER: Yeah, I'll get there.

2 THE COURT: Okay.

3 MR. HUEBNER: There's over 375 million dollars of  
4 actual --

5 THE COURT: Funded debt.

6 MR. HUEBNER: -- funded term debt.

7 THE COURT: Okay.

8 MR. HUEBNER: And then there are more than 300 million  
9 dollars, I believe, of --

10 THE COURT: Right.

11 MR. HUEBNER: -- existing LCs that could be called.

12 THE COURT: But -- and I know we'll get there -- but  
13 the DIP lenders are first in line.

14 MR. HUEBNER: They are, Your Honor.

15 THE COURT: That's the way it works.

16 MR. HUEBNER: Agreed.

17 THE COURT: Right? That's what they bargain for;  
18 that's what they get.

19 MR. HUEBNER: Agreed. They are at the top of the  
20 pile.

21 THE COURT: So, in a sense, one could make the  
22 argument that, of all the parties here, they have the smallest  
23 actual economic risk.

24 MR. HUEBNER: Your Honor, they are certainly at the  
25 top of the capital structure.

**PATRIOT COAL CORPORATION, et al.**

142

1 THE COURT: Yes.

2 MR. HUEBNER: No question about that.

3 THE COURT: Not the same thing.

4 MR. HUEBNER: To say that -- and --

5 THE COURT: They're at the top of the capital  
6 structure. They're at the top of the absolute priority, in  
7 terms of the absolute priority rule.

8 MR. HUEBNER: Yes, Your Honor. And the fact that they  
9 are concerned enough about this to be joining us here today and  
10 will be arguing on it tells you possibly how strongly the  
11 importance of the stewardship of this case.

12 THE COURT: Do you agree with the argument that the ad  
13 hoc consortium made, that one of the perils of transferring the  
14 case would be undoing the DIP? They were the only ones who  
15 made that argument.

16 MR. HUEBNER: Your Honor, it is not a default under  
17 the DIP for these cases to be transferred, and that's very  
18 important to us. And if it were, believe me, you would have  
19 heard it.

20 THE COURT: Right.

21 MR. HUEBNER: You know, I'm wary because I'm going to  
22 be hitting very hard that lawyers shouldn't be providing  
23 testimony and speculating. We are concerned about the  
24 stability of the company. If we need future DIP amendments,  
25 waivers, when we need to roll it at exit and replace it, we

**PATRIOT COAL CORPORATION, et al.**

143

1 think that the stable operating environment, which I'll get to  
2 in a little while, and our chances of reorganization will  
3 facilitate all of those things.

4 Am I going to stand here today even just as a lawyer  
5 and say, I think this DIP will explode if it were transferred?  
6 Absolutely not.

7 THE COURT: Okay.

8 MR. HUEBNER: We intend to hold them to their lending  
9 obligation. But we are concerned about transferring in ways  
10 that I will explain anon.

11 THE COURT: No, but that was not my question. My  
12 question was the ad hoc consortium raises the specter of the  
13 court in another jurisdiction rescinding this Court's orders.

14 MR. HUEBNER: Given the respect of bankruptcy judges  
15 for one another, even though West Virginia does not have  
16 guidelines that address rollups, and does not, in fact, have  
17 DIP guidelines at all, it's hard for me to believe that a judge  
18 would nuke our financing after accepting a case on transfer.

19 THE COURT: Could you use a different word besides  
20 nuke? Undo.

21 MR. HUEBNER: Retroactively --

22 THE COURT: Retroactively --

23 MR. HUEBNER: -- invalidate.

24 THE COURT: -- vacate the DIP order.

25 MR. HUEBNER: I think that's very unlikely.

**PATRIOT COAL CORPORATION, et al.**

144

1 THE COURT: Okay.

2 MR. HUEBNER: And, frankly, I think 364(e) suggests  
3 that, because of the exigent DIP order, you know, I'm not  
4 actually sure how that would even work, but I think the DIP  
5 lenders --

6 THE COURT: Okay.

7 MR. HUEBNER: You know, that's probably not -- it's --

8 THE COURT: All right. So I interrupted you. You  
9 were going through the parties that joined.

10 MR. HUEBNER: The list. Yes. Your Honor, then there  
11 is the indenture trustee for 250 million dollars of senior  
12 bonds.

13 THE COURT: Right.

14 MR. HUEBNER: They are not at the capital structure.

15 THE COURT: Um-hum.

16 MR. HUEBNER: And they have claims against each and  
17 every one of the ninety-nine debtors, which we actually think  
18 is quite important.

19 THE COURT: Right.

20 MR. HUEBNER: Then, and again, I want to hedge this  
21 one because timeliness matters to me, and I have a problem with  
22 people who, you know, don't meet deadlines. We found out on  
23 Monday through an e-mail that the indenture trustee for the  
24 convertible notes, which is 200 million dollars owing the  
25 parent company also told us and authorized us to represent that



**PATRIOT COAL CORPORATION, et al.**

145

1 they support us. But we're not going to be counting them.

2 THE COURT: But I've got no filed joinder.

3 MR. HUEBNER: Exactly.

4 THE COURT: Okay.

5 MR. HUEBNER: And that's exactly -- very straight.

6 THE COURT: Okay.

7 MR. HUEBNER: There's no joinder. They told us, but  
8 that only gets the weight that it gets, given the timing and  
9 procedure.

10 THE COURT: Okay.

11 MR. HUEBNER: Then, Your Honor, there's the ad hoc  
12 committee of senior bond holders who are owed more than one  
13 hundred million dollars.

14 THE COURT: Did they file a 2019?

15 MR. HUEBNER: They did, Your Honor. You asked Mr.  
16 Stark yesterday.

17 THE COURT: Okay.

18 MR. HUEBNER: He provided you the ECF number, which  
19 was 544.

20 THE COURT: Okay.

21 MR. HUEBNER: And we actually, you know, it's there.

22 THE COURT: Okay.

23 MR. HUEBNER: We checked it.

24 THE COURT: All right.

25 MR. HUEBNER: Your Honor, and this is important.

**PATRIOT COAL CORPORATION, et al.**

146

1 Because the union told you sort of look at big creditors; size  
2 matters. Frankly, I think there are things to say on both  
3 sides of that. I think disenfranchising small creditors, if  
4 that, for example, were a debtor's intent, would be a very bad  
5 thing that a court should weigh. I think it also is right that  
6 parties that have a lot on the line and will actually be  
7 participating fast, often, and intensely, deserve their own  
8 sort of special weighting.

9 But let me say this: this ad hoc group alone holds  
10 more than ten times the amount owed to every single one of the  
11 West Virginia creditors on the top fifty list put together.  
12 And in fact, five of the holders on this ad hoc committee  
13 alone, just each one of the five by themselves hold more  
14 Patriot debt than every single West Virginia creditor on the  
15 top fifty list put together. So when you're looking at sort of  
16 where the numbers are and where the parties are, we think that  
17 matters.

18 But let's now talk about West Virginia. There are --

19 THE COURT: Nope, not yet. Let's talk about the  
20 thirty-two other joinders --

21 MR. HUEBNER: That's where I was going.

22 THE COURT: -- that were filed.

23 MR. HUEBNER: Yes, Your Honor.

24 THE COURT: Okay? There -- by my count, there were  
25 thirty-two other joinders that were filed. Okay. You go

**PATRIOT COAL CORPORATION, et al.**

147

1 first.

2 MR. HUEBNER: So, Your Honor, there are twenty-two  
3 creditors from the State of West Virginia who filed joinders  
4 supporting the debtors. And then there are about twenty-eight  
5 other creditors -- I'm blending the ones who use the form, and  
6 the ones who filed their own joinders -- from fifteen other  
7 states including Alabama, Colorado, Delaware, Georgia,  
8 Illinois, Indiana, Kentucky, North Carolina, New York, Ohio,  
9 Pennsylvania, Tennessee, Texas, Virginia, and Wisconsin.

10 And, Your Honor, I'm ready to answer your questions on  
11 the joinders, but let me, before I get to that, let me just say  
12 one thing. This is almost unprecedented.

13 THE COURT: Well, let me -- let's stop for a moment,  
14 okay? The joinders -- you said the word form. They appear to  
15 be following a form. Where did that form come from?

16 MR. HUEBNER: It came from the debtors, Your Honor.

17 THE COURT: And how did that come about?

18 MR. HUEBNER: Absolutely delighted to tell you. When  
19 the union filed their motion, Your Honor, the debtors were very  
20 concerned because, as for reasons I will explain, the debtors  
21 do not want to go to West Virginia and believe that this is the  
22 forum most likely to give them the best process of  
23 reorganization. There was a very small group of the debtors  
24 that then reached out to various counterparties and said we  
25 would like your support on venue. We think it's very important

**PATRIOT COAL CORPORATION, et al.**

148

1 to our prospects.

2 THE COURT: But I have a problem with that, because  
3 sometimes to ask the question is to imply the answer, all  
4 right? So I don't know how many parties the debtor reached out  
5 to, how many parties said, sure, we want to help you. To me,  
6 it possibly is a heavy-handed question to ask a business  
7 counterparty for their help, because it could imply that, if  
8 you want to keep doing business with us -- hold on -- we need  
9 your help.

10 In addition, it creates an impression that may not be  
11 accurate because I've got a nice -- I've got a big binder of  
12 joinders and you're telling me, look -- look at all these  
13 parties that we do business with that want to be here.

14 So the process that you're describing makes it very  
15 difficult and challenging for me to know how much weight to  
16 give these joinders because this isn't a solicitation process  
17 for acceptances of a plan of reorganization.

18 I haven't heard from Mr. Rogoff that the committee  
19 reached out to the entire creditor body and asked the question:  
20 An issue has arisen in this case; should the case stay in New  
21 York, or should it go somewhere else? Let us know what your  
22 thinking is. That didn't happen, apparently -- what you're  
23 telling me. So instead, we have a number of parties to whom  
24 the debtor reached out, and I am not implying any bad intent,  
25 evil intent -- whatever you want to call it. I'm just

**PATRIOT COAL CORPORATION, et al.**

149

1 questioning the weight to afford this, given the process that  
2 you very straight forwardly are going to describe -- have  
3 described and are about to describe.

4 MR. HUEBNER: And, Your Honor, if I may, I'm only  
5 about twenty-five percent through describing the process,  
6 because the concerns you're raising were very much in our  
7 minds. And so I think it's important, if I can have one more  
8 minute --

9 THE COURT: Okay, keep going. I apologize for  
10 interrupting.

11 MR. HUEBNER: -- to get the facts out.

12 We were very clear with counterparties that we would  
13 not allow or agree to any quid pro quos in exchange for venue  
14 support. Several parties said, can you at least pay our legal  
15 fees? We want to support you, but this costs us money. The  
16 answer was, no, we will not do that.

17 Thirty-one, Your Honor, of the thirty-four filed  
18 joinders were filed by outside counsel. This was not the  
19 debtors going directly on the business level to the small  
20 counterparty down the block. And who were those outside  
21 counsel? Cadwalader, Winston & Strawn, Blank Rome, Vinson &  
22 Elkins, Andrews Kurth, Brown Rudnick, Vedder Price, Kaye  
23 Scholer, et cetera, et cetera, et cetera. Serious --

24 THE COURT: All firms that like having big cases in  
25 New York, Mr. Huebner.

**PATRIOT COAL CORPORATION, et al.**

150

1 MR. HUEBNER: Your Honor, when a law firm signs a  
2 pleading on behalf of a client saying my client wants this case  
3 in New York and supports the debtors, I make the assumption  
4 that the lawyer and their client believe that it was in the  
5 best interests of their client, exactly as you drilled Mr.  
6 Goodchild quite hard and said, isn't it your job -- isn't it  
7 your duty to only bring positions to court that you believe are  
8 in the best interests of your client in this matter? I'm not  
9 going to assume that this long list of major national firms  
10 tricked their clients into signing joinders.

11 THE COURT: I wouldn't suggest -- I'm not suggesting  
12 that that's the case.

13 MR. HUEBNER: So -- and also, and again, you told me I  
14 was allowed to make argument. I have to say, Your Honor,  
15 constituents seek support for their positions on important  
16 matters. We didn't -- we said we will not pay anybody's fees.  
17 Did we say we could make it cheaper for you since we're not  
18 going to pay your fees? The form only says, "We support the  
19 debtors." We didn't fill anybody's head with notions. Many of  
20 them actually customized it. In fact, some of them even left  
21 blanks and brackets in, which I'm sure they're embarrassed  
22 about, in retrospect, which only proves we didn't fill out the  
23 forms. There was a form e-mail that just said, if you would  
24 like to support us, and we would like your support, and you  
25 want to save money, here's a form you can use.

**PATRIOT COAL CORPORATION, et al.**

151

1 So I'm not going to overstate or understate. It's,  
2 obviously, a hundred percent the Court's province to decide.  
3 But I can tell you that, from fifteen states, almost fifty  
4 parties, which is more than Mother Enron, by the way, decided  
5 to come on-record, many of which with big, serious national law  
6 firms, to say, "We want this case in New York." We think that  
7 matters a great deal.

8 The fact that we went to seek allies, candidly, I'll  
9 take a risk here, you want to ask Ms. Jennik, did the union  
10 call anybody and see if they would support them? Maybe some of  
11 the political filings came after a phone call. I don't know  
12 the answer. I think they're entitled to. I think just we  
13 called the committee and said we want your support on this. We  
14 think this is deadly serious.

15 THE COURT: I think there is a difference. The debtor  
16 gets held to an extremely high standard of even-handedness and  
17 fiduciary duty, so I think there might be a difference.

18 I'm going to depart from my usual rule and ask you to  
19 pause for a minute because Ms. Schwartz at numerous points said  
20 she wanted to say something about this. So let's pause. I'd  
21 like to hear from her, if she has anything she wants to say  
22 further on this point.

23 MS. SCHWARTZ: Thank you, Your Honor, and thank you,  
24 Mr. Huebner. Just with respect to the joinders, I mean, I  
25 think Your Honor is hitting it head-on. I mean, on day one

**PATRIOT COAL CORPORATION, et al.**

152

1 Your Honor took the bench and said, I've got -- whatever the  
2 number was -- thirty-two identical joinders. I am not sure  
3 that what Mr. Huebner is stating as the factual record for how  
4 these joinders were, in fact, solicited is necessarily accurate  
5 in every circumstance. I know that I made a call, personally,  
6 because this was an issue that appeared to be of -- it was  
7 curious to me, certainly. And I made a call and I got a  
8 different rendition of how that came to be. But I think that,  
9 when Your Honor asks the question what weight should be given  
10 to these joinders, and Mr. Huebner is focused on the evidence,  
11 as am I, Your Honor doesn't have any evidence that there's any  
12 of the people that signed these joinders, the smaller parties,  
13 that they had a stake in this particular question. Rather,  
14 what Your Honor identified was this is their client, their  
15 customer, Patriot Coal, and there may well have been the  
16 feeling, oh, I want to keep this business, so, sure, I'll fill  
17 out one of these forms. And that there's really -- they  
18 don't -- it's not really that they have an interest that the  
19 case stays in New York. Because it was very curious to me.  
20 Why would a small company in West Virginia care whether or not,  
21 A, the case was in New York; and why would they want it in New  
22 York? I couldn't get -- I couldn't wrap my head around that.  
23 That's why I called one of them.

24 MR. HUEBNER: I'll tell you why.

25 MS. SCHWARTZ: Wait -- wait --



**PATRIOT COAL CORPORATION, et al.**

153

1 THE COURT: But let her finish and then you can tell  
2 me why.

3 MR. HUEBNER: I'm sorry. I thought she was.

4 THE COURT: And then I can tell you why I don't want  
5 to hear from you why. But let her go first.

6 MR. HUEBNER: Okay. S'il vous plait.

7 MS. SCHWARTZ: Okay. So, you know, because Your  
8 Honor, as Your Honor knows, I mean, our entire argument is  
9 based on the interest of justice. And the United States  
10 Trustee is not operating in a vacuum, Your Honor. We look at  
11 everything in the scope of the entire case. So I looked at the  
12 joinders; they're all identical. Well, not all identical, but  
13 a large majority of them are. I have a different number than  
14 Mr. Huebner. But I wanted to say to the Court, I am not sure  
15 that you should give very much weight at all to the identical  
16 joinders, because you don't have any evidence before you that  
17 the party that is being signed onto the identical joinder,  
18 really cares in terms that the cases are here in New York.

19 THE COURT: Well, here's my problem. I mean, I don't  
20 think I agree with that because I think that the notion that  
21 law firms and parties would submit a document to the Court that  
22 states their position, that's a serious undertaking.

23 MS. SCHWARTZ: Right.

24 THE COURT: You know how serious I view that.

25 MS. SCHWARTZ: Yes, I do.

**PATRIOT COAL CORPORATION, et al.**

154

1 THE COURT: Okay. So I am going to take the filings  
2 at face value.

3 MS. SCHWARTZ: Okay.

4 THE COURT: What I'm more concerned with is sampling  
5 error, all right? Sampling error, cherry-picking of data, a  
6 selective and imperfect creation of a body of support --

7 MS. SCHWARTZ: Right.

8 THE COURT: -- that does not -- as to which I'm not  
9 informed how much it's indicative, actually, of the universe  
10 that's out there, because the company has hundreds, if not  
11 thousands of counterparties, and I don't know what the answer  
12 would have been if the Kramer Levin firm had sent out to the  
13 entire matrix an e-mail --

14 MS. SCHWARTZ: Right.

15 THE COURT: -- that says we're counting heads.

16 MS. SCHWARTZ: Right.

17 THE COURT: Reply all to -- reply to this e-mail. How  
18 much is your claim? Okay?

19 MS. SCHWARTZ: Right.

20 THE COURT: And where you -- New York, check the box.  
21 We didn't do that. It's not a solicitation.

22 MS. SCHWARTZ: Right.

23 THE COURT: We're just -- this is not what we're  
24 doing. So that's the problem that I have. It's not, Mr.  
25 Huebner, that I think that these parties are telling less than

**PATRIOT COAL CORPORATION, et al.**

155

1 the truth.

2 MR. HUEBNER: Right.

3 THE COURT: I just don't know if I'm looking at, you  
4 know, that impressionist painting where you ask the child,  
5 what's your favorite thing in the museum, and they react by  
6 telling you what they saw at their eyelevel. I don't know  
7 if --

8 MR. HUEBNER: Right.

9 THE COURT: -- if this is an elephant or if this is a  
10 toe of an elephant.

11 MR. HUEBNER: Yes. And, Your Honor --

12 THE COURT: I don't know what it is.

13 MR. HUEBNER: And I think I can actually help you with  
14 that.

15 THE COURT: Okay.

16 MS. SCHWARTZ: Well, hang on a second.

17 MR. HUEBNER: Okay.

18 MS. SCHWARTZ: Because Mr. Huebner is not a fact  
19 witness here.

20 THE COURT: He's not.

21 MS. SCHWARTZ: And that is an important distinction,  
22 because we're talking a lot about evidence here.

23 MR. HUEBNER: No. It will all be from --

24 MS. SCHWARTZ: And, yes, well, I am talking --

25 THE COURT: Okay.

**PATRIOT COAL CORPORATION, et al.**

156

1 MS. SCHWARTZ: -- about --

2 THE COURT: Okay.

3 MS. SCHWARTZ: Okay. But one thing I want to mention  
4 to Your Honor --

5 THE COURT: Could you hold on for one second, please?  
6 Hold on for one second.

7 Go ahead.

8 MR. HUEBNER: Your Honor, let me address a few things  
9 here, because I think this is actually an important point.  
10 Number one, many of the law firms that file these joinders on  
11 behalf of their clients are non-New York law firms.

12 THE COURT: Understood.

13 MR. HUEBNER: Number two, this notion that each  
14 joining party is under the burden to prove that it really cares  
15 and is not a fraudulent finding --

16 THE COURT: I agree with you also.

17 MR. HUEBNER: -- is --

18 THE COURT: It's not a fraudulent --

19 MR. HUEBNER: -- it's ridiculous.

20 THE COURT: They're not fraudulent pleadings. I'm not  
21 going to go there.

22 MR. HUEBNER: Number three, I'm going to cite you to  
23 record evidence that I think will help you understand. For  
24 example, there are ten West Virginia entities listed on our top  
25 fifty list. We have these -- you know, that's in evidence in

**PATRIOT COAL CORPORATION, et al.**

157

1 this. Seven of the ten filed joinders. There are five secured  
2 creditors on our top five list, which is in evidence in this  
3 proceeding. Three of the five filed joinders. There are fifty  
4 creditors overall on our top fifty list. Twenty-four of the  
5 fifty filed joinders. Not one party on the top five list or  
6 the top fifty list filed anything on the other side.

7 THE COURT: Did you -- but the question is -- the  
8 question is the process. Did you reach out to every one of the  
9 fifty?

10 MR. HUEBNER: The answer, I believe -- I will confirm  
11 it for the Court this afternoon -- I believe the answer is yes.  
12 I believe the focus of the exercise was these are our biggest  
13 fifty creditors, these are our five biggest secured creditors.  
14 We want them on our side. We think it's important. And the  
15 calls were divvied up and people were called.

16 Now, let me be clear. This goes utterly without  
17 saying, but I want to say it out loud so that there's no doubt.  
18 I am totally comfortable with the integrity of this process and  
19 the fact that we refuse to even pay people's legal fees, let  
20 alone agree to any other sort of quid pro quo. If the other  
21 side wanted to take discovery on the joinder process, or  
22 thinks, or wants to allege that something not good happened,  
23 they could have done that, and they didn't. If the Court or  
24 anyone else wants to discount this because we went and sought  
25 help for something we thought was critical to our survival --

**PATRIOT COAL CORPORATION, et al.**

158

1 THE COURT: I'm not criticizing the company or you or  
2 any of the joinder parties for filing a pleading with the Court  
3 reflecting their position. That's not my concern.

4 My concern is the impression that's created by the  
5 existence of what I'm calling the identical joinders.

6 MR. HUEBNER: Right.

7 THE COURT: And on that point, you're saying that you  
8 don't know, and I know you're not going to tell me that you're  
9 going to testify about it, you don't know what the process was.  
10 So in other words, if a hundred requests went out, and these  
11 were the ones that came back, that's something that I could  
12 weigh in giving appropriate weight to this.

13 MR. HUEBNER: I agree, Your Honor.

14 THE COURT: And I don't -- and these were filed by law  
15 firms, by individuals, by parties who cared enough to do it. I  
16 take them at face value. But as a weight, to accord it weight  
17 in --

18 MR. HUEBNER: Yes.

19 THE COURT: -- what you're telling me, which is, to a  
20 certain extent you're telling me, as Judge Drain did in Winn-  
21 Dixie, and other courts have done, they count heads, they count  
22 dollars. They try to figure out --

23 MR. HUEBNER: Right.

24 THE COURT: -- who has what at stake and address those  
25 needs and concerns. So we're at a stalemate now. I'm open

**PATRIOT COAL CORPORATION, et al.**

159

1 to -- I'm open to giving this the weight that it deserves, but  
2 I do feel that it lacks --

3 MR. HUEBNER: Okay, so look I can't --

4 THE COURT: -- sufficient window dressing.

5 MR. HUEBNER: I can't say more than one thing I said  
6 and one new thing. Let's assume we reached out to a hundred  
7 parties, and the message was, we think this is very critical to  
8 us; please support us. And let's say seventy-five of them  
9 said, I disagree with you. I want to be in West Virginia  
10 because I think that's what's best for me and for these  
11 estates. How about the fact that not one of those parties  
12 cared enough to file a joinder on the other side? If we  
13 reached out to a small group and we got all of them, that's  
14 pretty darn good for us. If we reached out to a large group  
15 and we got twenty-four of the top fifty, three of the top five,  
16 and no one else we spoke to said I actually don't agree with  
17 you, and I think it's important that my voice be heard, I  
18 think, frankly, either way, Your Honor, maybe we don't get a  
19 whole loaf. Maybe we get two-thirds of a loaf. Maybe we get  
20 forty percent of all -- I doubt there is any case ever, where  
21 there has been a venue fight, where each filing sprung holy  
22 formed from the mind of the lawyer who had not spoken to other  
23 similarly situated parties.

24 THE COURT: Okay. I hear you, but I don't know what  
25 the facts are here. I don't know what the process was.

**PATRIOT COAL CORPORATION, et al.**

160

1 MS. SCHWARTZ: That's right.

2 THE COURT: So I've got a question mark.

3 MR. HUEBNER: Understood.

4 MS. SCHWARTZ: Your Honor?

5 THE COURT: So --

6 MS. SCHWARTZ: One thing with respect to all these  
7 numbers that Mr. Huebner is putting forth as argument to the  
8 Court, I want the Court to know that I also did an analysis of  
9 the joinders that were filed. One joinder is a duplicate. I  
10 called up the party and said, you have two joinders here. He  
11 said, oh, we didn't mean to do that. That was Raleigh Mine.  
12 There are two joinders for that.

13 Your Honor, also, there are four companies that filed  
14 joinders that were not filed by attorneys. We know that  
15 companies can't appear in this court without counsel. There's  
16 four of them. They are docket number 434, 487, 492 and 499.

17 So in addition, Your Honor, there's also a host of  
18 joinders where they were signed by law firms, but the law firms  
19 have not been admitted pro hac vice in this court, and they're  
20 not New York lawyers. So from a technical --

21 THE COURT: All right. Well, I don't want to -- I'm  
22 not going to elevate form over substance with respect to --

23 MS. SCHWARTZ: Okay. But I just --

24 THE COURT: -- with respect to those points. My focus  
25 is that on the process of creating the circumstances that lead



**PATRIOT COAL CORPORATION, et al.**

161

1 to the filing of the joinders. That's my focus.

2 MS. SCHWARTZ: Okay. And I heard you say that, Your  
3 Honor.

4 THE COURT: Okay?

5 MS. SCHWARTZ: I just wanted -- I just didn't want  
6 there to be a misperception or inaccurate information. And I  
7 heard what you said. That's the only reason I raised that.

8 But what I'm saying to you is you don't have any  
9 evidence before you as to what that process was. You have Mr.  
10 Huebner representing certain things. However, I could stay  
11 here and tell you about my conversation with the credit manager  
12 of one of the companies as to how he came to fill a joinder.  
13 And it doesn't reflect exactly what Mr. Huebner said.

14 So maybe a solution is that the debtors submit an  
15 affidavit of the appropriate party that has the personal  
16 knowledge as to what was done. But even if you get that,  
17 Judge, even if, at the end of the day, you get this process of  
18 gaining support, aren't we still going to that whole -- I mean,  
19 this is a little different -- but aren't we still going to that  
20 whole notion of creating the situation? I mean --

21 THE COURT: No.

22 MR. HUEBNER: No.

23 THE COURT: It's entirely different.

24 MS. SCHWARTZ: Okay.

25 THE COURT: It's entirely different.

**PATRIOT COAL CORPORATION, et al.**

162

1 MS. SCHWARTZ: Okay. I mean --

2 THE COURT: The debtor believes in its position. They  
3 believe in their position.

4 MS. SCHWARTZ: I'm aware.

5 THE COURT: And if I give Mr. Huebner half a chance,  
6 he's going to keep telling me about their position, okay? So  
7 the fact that I have this isn't of concern to me. I just need  
8 to understand the process --

9 MS. SCHWARTZ: Yes.

10 THE COURT: -- that gave rise to it, and then that  
11 informs how much weight --

12 MS. SCHWARTZ: Right.

13 THE COURT: -- I give it. I am not suggesting --

14 MS. SCHWARTZ: And I submit -- yeah.

15 THE COURT: I am not suggesting bad faith. I'm  
16 inquiring as to whether or not there was a little bit of a  
17 thumb on the scale in terms of causing these to happen. So  
18 just to be clear, I'm not suggesting that I think anybody did a  
19 bad thing here. I just need to know how to weigh it.

20 MS. SCHWARTZ: I'm not suggesting that, either, Your  
21 Honor. I'm saying that you just don't have the evidence before  
22 you in order to determine what the process was. And I think  
23 Your Honor is right, that that is important.

24 THE COURT: Well, on this point, this is different  
25 from the issue of whether or not there would be a witness

**PATRIOT COAL CORPORATION, et al.**

163

1 called today, because this issue wasn't raised until -- I mean,  
2 you started to want to raise it yesterday. I didn't let you  
3 because I wanted to wait until the debtor stood up so that we  
4 could do it this way. So now we've raised this issue. I think  
5 it's a sensible suggestion that if the debtors wish to continue  
6 to rely or urge that weight be given to these joinders, the  
7 debtors can submit an affidavit detailing the process.

8 MR. HUEBNER: Great.

9 THE COURT: And if Ms. Schwartz, or any of the other  
10 parties-in-interest have questions, we can deal with that then.

11 MR. HUEBNER: That's fine, Your Honor. And to be  
12 clear, I certainly -- the fact that nobody raised it until now,  
13 and they could have served questions on the joinder parties and  
14 the like, but clearly, we'll proceed the way the Court directs.  
15 That goes without saying in all cases.

16 THE COURT: Right. You have to try to -- you know, of  
17 something of this size and magnitude, if you -- you have to  
18 keep moving it forward.

19 MR. HUEBNER: We agree.

20 THE COURT: Otherwise, you'll never get there. So I  
21 think it's --

22 MR. HUEBNER: Right. But let's stick to the facts  
23 that -- and let me say one last thing. I have demonstratives  
24 here, Your Honor, which, for now, I'm actually going to hold  
25 on. But all the questions that Ms. Schwartz asked about: how

**PATRIOT COAL CORPORATION, et al.**

164

1 do we know there aren't double counting? How do we know that  
2 it's really twenty-four of the separate ones? How do we really  
3 know it's three of the five? It's all right here. We did not  
4 double-count anybody. There are all docket entries for the  
5 world to see. We're happy to go through with her later. These  
6 are just all facts in the record. There are these number of  
7 joinders.

8 MS. SCHWARTZ: That's fine.

9 MR. HUEBNER: This is how they line up to ECF number  
10 98, which is the amended top fifty list, period. There's no  
11 grounds for debate on this.

12 THE COURT: That's fine. Okay.

13 MR. HUEBNER: Your Honor, let's also talk about what  
14 there isn't, because I eluded to it a few minutes ago. There  
15 isn't anybody from the top fifty except AEP on the other side.  
16 There isn't anybody from the top ten West Virginia top fifty on  
17 the other side; nobody. There isn't anybody on the top five  
18 secured list on the other side. So even if you want to  
19 discount someone who we have on our side -- and I think,  
20 obviously, the major parties who are here in spades and have a  
21 lot at stake, you know, count more than you need -- what you  
22 have on the other side is, I think, pretty powerful.

23 The other thing I should note, Your Honor, and this is  
24 also clearly in the record, when we were doing the stipulation,  
25 I want to give credit -- I remember one of the movants called

**PATRIOT COAL CORPORATION, et al.**

165

1 us out on something that we had, you know, not gotten quite  
2 right. We said in Mr. Schroeder's original declaration at  
3 paragraph 47 that two of our top twenty trade vendors were from  
4 New York. So then they said, yeah, but you didn't say how many  
5 were from West Virginia. Will you look that up and tell us?  
6 Because, you know, it's always kind of New York versus West  
7 Virginia, and we'd like to know both. So we went back and did  
8 that and we looked it up. And so the stipulation now adds one  
9 more new fact. There aren't many new facts, but there's one,  
10 which is that, in addition to the two from New York, five of  
11 the twenty are from West Virginia. That's just a fact. It's  
12 in the stipulation; it's right there.

13 Now, you might have said to yourself, oh, the movant  
14 has got a good new fact now because they called the debtor out  
15 on the fact that five of the twenty largest trade creditors are  
16 from West Virginia. The problem is, Your Honor, two of those  
17 five, Raleigh and Phillips Machine, both filed joinders  
18 supporting us, and none of them filed anything supporting the  
19 other side.

20 So the way I sort of think about it, Your Honor, maybe  
21 you clipped some of our highways and byways, but all roads lead  
22 to Rome. Other than the movants in the courtroom today, who  
23 I'm going to talk about one-by-one in a few minutes, there is  
24 no creditor support and none from West Virginia for moving  
25 these cases to West Virginia.

**PATRIOT COAL CORPORATION, et al.**

166

1 Now let's talk about the burden of proof, because that  
2 seems to be an issue that we've spent a lot of time on and now  
3 it's my turn to discuss burden of proof.

4 The good news, Your Honor, certainly based on their  
5 papers, is that we all agree on the standard. It is black  
6 letter, governing Second Circuit law that the burden of proof  
7 is entirely on the movants, and that it is a very heavy burden  
8 of proof, and that the debtors' choice is not to be disturbed.  
9 Thus, although it's actually true, and I'm going to talk about  
10 it at some length in a little while, I don't need to prove that  
11 New York is more convenient than West Virginia. I don't need  
12 to prove New York is better for the debtors. I don't need to  
13 prove New York is better for the creditors.

14 THE COURT: Well, doesn't whether or not New York is  
15 better for the debtors go into the issue of why it's  
16 appropriate for the debtors to have done what they did to  
17 establish venue in New York?

18 MR. HUEBNER: It absolutely does, Your Honor.

19 THE COURT: Okay.

20 MR. HUEBNER: Which is why I said I do intend to  
21 address it.

22 THE COURT: Okay.

23 MR. HUEBNER: Absolutely. And I promise you, it was a  
24 top six issue, which is what does the record evidence show  
25 about why we filed in New York. But for right now, the

**PATRIOT COAL CORPORATION, et al.**

167

1 narrower issue is who had what burdens today. And their burden  
2 was to show, by a preponderance of evidence, that this case  
3 should go to West Virginia. Not only have they failed to carry  
4 their evidentiary burden, let's see how they tried to satisfy  
5 it. They --

6 THE COURT: Well, I'm sorry; I do apologize. I  
7 just -- their burden was to establish -- the U.S. Trustee's  
8 burden, and the joinder to the U.S. Trustee's motion was to  
9 establish that, by a preponderance of the evidence, that it's  
10 in the interest of justice to transfer the case.

11 MR. HUEBNER: Yes, Your Honor.

12 THE COURT: Okay. The other movants had the burden of  
13 establishing not only that it's in the interest of justice,  
14 but, in the alternative, that, for the convenience of the  
15 parties, it should transfer the case, right?

16 MR. HUEBNER: Absolutely.

17 THE COURT: It's slightly different than what you  
18 said.

19 MR. HUEBNER: Yes. And but what I'm going to argue  
20 when I get to the interest of justice standard, citing about  
21 seven Southern District cases, is that factors that are in  
22 evidence that they did not adduce or get facts against are, in  
23 fact, the relevant facts under that standard, as well.

24 THE COURT: Okay.

25 MR. HUEBNER: The reality is, they took no discovery.

**PATRIOT COAL CORPORATION, et al.**

168

1 No discovery.

2           When you look at their initial motions, Your Honor,  
3 the union attached a coal facts brochure. That was the  
4 entirety of their evidence in a motion seeking a facts-and-  
5 circumstances discretionary transfer.

6           Look at the initial motions of the sureties. They  
7 attached one environmental settlement and some pages from our  
8 SEC filings. No evidence of their own about really any of the  
9 factors under either interest of justice or convenience of the  
10 creditors.

11           Then on reply, for the first time, we get their  
12 declarations. And let's talk about what's in their  
13 declarations, because I actually think it matters a lot. What  
14 evidence did the parties bring you to show that these cases  
15 would be better off? That there would be a more economic and  
16 efficient administration of the estate in the best interests of  
17 creditors to move these cases to West Virginia? The union's  
18 declaration is about the union. It's not about anybody else.  
19 At the end of the day, it's one party trying to prove that, for  
20 them, even though they're based in DC, if they ever have to  
21 come to this court, they would find it more convenient to go to  
22 West Virginia. I understand. I didn't even quibble with it.  
23 We admitted it. We don't need to talk to their witness. But  
24 what they had to prove was that this Court should exercise  
25 discretion under 1412 in the interest of the entire estate, not



**PATRIOT COAL CORPORATION, et al.**

169

1 just one party. They didn't even speak about anyone else in  
2 their actual filed evidentiary declaration.

3 They do go on, and I told you I would get to it, and  
4 now I will, to --

5 THE COURT: Well, the reason that -- the primary  
6 reason that Ms. Jennik gave was that the case ought to be  
7 driven, if you will, by the needs and concerns of the miners.

8 MR. HUEBNER: And that's --

9 THE COURT: And I asked her a lot --

10 MR. HUEBNER: -- exactly where I'm going.

11 THE COURT: I asked her a lot about union versus  
12 nonunion and different geographical concerns. But when you say  
13 the union, I say the --

14 MR. HUEBNER: The workers.

15 THE COURT: -- the union members and the workers.

16 MR. HUEBNER: And that's, as I was just saying, I  
17 promised you I would get to your question.

18 THE COURT: Okay.

19 MR. HUEBNER: And now I'm, literally, what I'm about  
20 to do is get to it.

21 THE COURT: Okay.

22 MR. HUEBNER: Your Honor, as a matter of law, and as a  
23 matter of the positions the union has fervently taken in this  
24 case, they are the sole exclusive representative of all their  
25 retired workers. So what have courts done in prior cases when

**PATRIOT COAL CORPORATION, et al.**

170

1 unions have come and said, or representatives of workers more  
2 generally, have come and said, our people are all somewhere  
3 else? And let me be very clear. This is not in denigration in  
4 any way, shape, or form of our workers or of our union members.  
5 The issue is where should a bankruptcy proceeding take place,  
6 and whose convenience and whose geography matters.

7           So what did the Fifth Circuit say in CORCO, which  
8 every Southern District court has said is sort of the mother  
9 decision, because there's no directly governing Second Circuit  
10 1412? At page 1249, the Fifth Circuit said, and I quote: "The  
11 concern is with the corporation's employees who must appear in  
12 court, not with the employees who are on the production line."

13           Enron-II, Your Honor, Judge Gonzalez said exactly the  
14 same thing.

15           Then there's Winn-Dixie where, as Your Honor pointed  
16 out yesterday, Judge Drain, in about as strong as language that  
17 I've ever seen him use, said to a representative of workers,  
18 who said they all will have to come, he said, you're lying to  
19 them. If anybody is telling these people that the Court needs  
20 to be where they are because they will need to appear all the  
21 time, you better make sure that's not happening. The reality  
22 is we understand where our unionized workers are. That doesn't  
23 mean that our bankruptcy proceedings, to do all the things one  
24 needs to do in bankruptcy, should be physically where they are;  
25 it just doesn't.

**PATRIOT COAL CORPORATION, et al.**

171

1 THE COURT: Well, that's pause on that, because I  
2 think that we've established that it's certainly a possibility.  
3 It's a hope and a goal that everything would be resolved  
4 consensually. So that's a possibility that there, in this  
5 case, will never have to be a hearing that involves a union or  
6 a pension trust witness. So that's a possibility; we just  
7 don't know.

8 MR. HUEBNER: Yes.

9 THE COURT: But the interest of justice argument that  
10 was made, I think it went to both factors. In the papers, it  
11 was the necessity of appearing. And I think that I went back  
12 and forth with Ms. Jennik on that, and we talked about, and  
13 also with the sureties, when the argument was made that there  
14 would be engineers and other folks who had to give very  
15 specific testimony, that those were potentially one-off  
16 situations that may or may not occur.

17 But the interest of justice argument that the union is  
18 making I think is very different. And I think the argument  
19 they're making is not that they are -- it's not for the  
20 convenience of the witnesses who need to be present; it's in  
21 the interest of justice that the case be accessible to the  
22 workers who want to be present.

23 MR. HUEBNER: Right.

24 THE COURT: Wants versus needs. So it's not -- it's  
25 more in the interest of justice half than it is in the

**PATRIOT COAL CORPORATION, et al.**

172

1 convenience of the parties half. That's the way I think, and  
2 I'm sure she'll correct me if I've got it wrong, that that's  
3 the way I heard the union's argument.

4 MR. HUEBNER: Your Honor, I certainly think it's a  
5 blend. And, frankly, if my memory is correct, both CORCO and  
6 Enron-II were cases that involved, as here, both interest of  
7 justice and convenience of creditors. Winn-Dixie was certainly  
8 such a case. The question is just balancing.

9 Your Honor made comments yesterday that there are only  
10 X number of seats in here, and it will the lawyers who are  
11 sitting in here. And if the issue is observing, that may be in  
12 this room, in any event.

13 I certainly agree, Your Honor, let me be clear, all  
14 things being equal, if there were not very powerful good and  
15 valid reasons, in the best interests of all creditors,  
16 ironically very much including the union, why we thought New  
17 York was better, all things being equal, being in a place where  
18 more people could sit and watch the proceedings in person  
19 would, of course, be better. But the question is, in our  
20 business judgment, in our balancing of all of the factors that  
21 lead us to choose venue, as fiduciaries, there are many, many  
22 things that are very weighty. Allowing passive participation  
23 that is in person, as opposed to, for example, by videography,  
24 is one. I am not sure how much weight it gets, but what I do  
25 know is that the prior cases that have been faced with this

**PATRIOT COAL CORPORATION, et al.**

173

1 argument have said the factors under the law include  
2 convenience of the witnesses and the parties and all that  
3 stuff. Don't come to me and say, the underlying workforce is  
4 here, because we all know that's just not who's coming. It's  
5 just not.

6 And, Your Honor, by the way, my very next words, and I  
7 apologize, but here they are: moreover, we also hope never to  
8 have to be opposite the union in these proceedings. Our goal,  
9 as we have repeatedly and unequivocally stated, is consensual  
10 deals. There may never be any hearing where any union witness  
11 needs to actually come to this court to deal with matters that  
12 directly affect them.

13 So I agree, someday, if we can reach a deal and we  
14 have an 1113 or 1114, this one party, if you take their  
15 declaration at face value, will have several witnesses from  
16 West Virginia. But in terms of the convenience of the parties  
17 side of things, that's a tiny peppercorn of evidence as to  
18 whether the entire case, with thousands of creditors, should be  
19 moved.

20 I will address the interest of justice part when I get  
21 to that in the latter half.

22 THE COURT: All right. Are we approaching question  
23 two; why were the cases filed here? Or did you still have more  
24 on question one; the evidence?

25 MR. HUEBNER: I have a little bit more on question

**PATRIOT COAL CORPORATION, et al.**

174

1 one; the evidence.

2 THE COURT: Okay.

3 MR. HUEBNER: And then I'll be happy to proceed, if  
4 that's okay.

5 THE COURT: Let's just pause for a moment, because  
6 we've been here for almost two hours now, and let's discuss the  
7 rest of the day. We've got a lot more to do. I've got to hear  
8 from a lot of other parties. I don't know if we're going to  
9 finish by 5 o'clock. So I'm trying to balance a number of  
10 issues. One is I think we have to terminate the video feed, I  
11 believe at least to West Virginia, at 5 o'clock. Two, I have a  
12 full calendar tomorrow and I really think that you folks do not  
13 want to come here for another day. So I think that the best  
14 thing to do is going to be just barrel ahead and finish today.

15 MR. HUEBNER: Your Honor, clearly, we --

16 THE COURT: All right? With apologies to the folks  
17 who are watching. And I don't want to put a strain on the  
18 facilities and the arrangements that are possible in those  
19 jurisdictions, but I think the right thing to do is to stay as  
20 late as we can.

21 MR. HUEBNER: Your Honor, I'm getting one potentially  
22 helpful thought from the gallery, which is there is a dial-in  
23 number.

24 THE COURT: Yes, there is a dial-in.

25 MR. HUEBNER: So at least, to the extent that people

**PATRIOT COAL CORPORATION, et al.**

175

1 would like to continue to hear the audio feed --

2 THE COURT: Yes. There is a dial-in number. The  
3 slight impediment to that, of course, is that you need an  
4 account with CourtCall and there's a cost to that. So if folks  
5 here in the courtroom can come up with some way of coordinating  
6 that -- I believe the unsecured creditors' committee has a  
7 dial-in number for committee members.

8 MR. MAYER: That's correct, Your Honor. Yes.

9 THE COURT: Is that correct? Can you identify  
10 yourself for the record, please?

11 MR. MAYER: Yes, Your Honor; Thomas Moers Mayer of  
12 Kramer Levin Naftalis & Frankel, counsel for the creditors'  
13 committee.

14 THE COURT: All right, Mr. Mayer. So there is a dial-  
15 in number that -- would that be available to others who would  
16 wish to dial in?

17 MR. MAYER: I see no reason why we would not be able  
18 to make it available. It seems consistent with Section 1102.

19 THE COURT: Okay. Do you have the number so that I  
20 could state it on the record here, and the folks in West  
21 Virginia and St. Louis could avail themselves of it? Could you  
22 ask one of your colleagues for the number?

23 MR. MAYER: Yes. Ms. Wong, I believe you are on the  
24 line. If you could e-mail me the number, we can read it into  
25 the record, and the folks listening can then dial in.

**PATRIOT COAL CORPORATION, et al.**

176

1 THE COURT: Okay. All right. So just to be clear for  
2 everyone who is listening remotely, let me explain this. In  
3 addition to this video arrangement, we have the traditional  
4 arrangement in cases in which, via an organization, a company  
5 called CourtCall, interested parties can dial in and listen to  
6 the proceedings. You'll be put on what's called listen-only  
7 mode, which is -- means you can listen only and you can't  
8 speak. And because we're going to get the trunk line, if you  
9 will, that the unsecured creditors' committee has available,  
10 any of you who wants to dial in after we terminate the video  
11 feed can do that at no cost and expense. And it looks like Mr.  
12 Mayer is getting ready to tell me what the number is.

13 MR. MAYER: Well, I think this is correct. This is in  
14 my calendar for today. The dial-in is 1-888-757-2751. And the  
15 passcode is 2127159419#. And again, that's 1-888-757-2751.  
16 And then you type in the -- you punch in the passcode  
17 2127159419#, and we will attempt to take steps, one, to make  
18 sure there's enough capacity on the line; and, two, we may open  
19 a separate line. But we'll inform the Court before.

20 THE COURT: All right. Mr. Mayer, could you do me one  
21 more, and put on the record the e-mail address of your  
22 colleague whom parties can contact by e-mail in case they have  
23 experienced a glitch.

24 MR. MAYER: Certainly. It's Anita Wong. The e-mail  
25 address is awong@kramerlevin, that's K-R-A-M-E-R-L-E-V-I-N.com.



**PATRIOT COAL CORPORATION, et al.**

177

1 THE COURT: All right. Thank you very much, Mr.  
2 Mayer.

3 MR. MAYER: Thank you. Yes, that's a good point. My  
4 colleague, Jordan Kaye points out, people who dial in should  
5 keep their phones on mute for any number of reasons, including  
6 that everyone on the conference call will hear you, including,  
7 potentially, the Judge.

8 THE COURT: All right. Thank you very much.

9 MR. HUEBNER: Your Honor, I don't want to count beans  
10 like this, but I think it does bear mention, the movants took  
11 seven hours and we --

12 THE COURT: You're going to -- you have as much time  
13 as you want.

14 MR. HUEBNER: Thank you, Your Honor. Because this  
15 is --

16 THE COURT: I'm not going anywhere.

17 MR. HUEBNER: Thank you. I appreciate that.

18 THE COURT: And I'm sorry that it's getting to the end  
19 of the day, but we need to finish and I'm -- you know how late  
20 I work.

21 MR. HUEBNER: I do.

22 THE COURT: So for better or worse, you'll all invited  
23 to stay here for a very long time. And, if need be, we'll take  
24 a dinner break and we'll come back.

25 MR. HUEBNER: Okay.

**PATRIOT COAL CORPORATION, et al.**

178

1 THE COURT: And if anybody needs a break, you need to  
2 let me know.

3 MR. HUEBNER: Thank you.

4 THE COURT: Go ahead.

5 MR. HUEBNER: Your Honor, back to the evidence on  
6 prong one of 1412. Unless I misheard, you asked each of the  
7 movants what evidence they had, what evidence was actually in  
8 the record --

9 THE COURT: Right.

10 MR. HUEBNER: -- that these cases would be cheaper or  
11 more efficient if moved to West Virginia. At least as to the  
12 first factor of 1412, this, as I read it, respectfully, is the  
13 very, very core of their burden. This is what they had to  
14 prove. The answer was "none." There was a little bit of  
15 colloquy that perhaps some work might get pushed down to West  
16 Virginia counsel, and that would lower expenses. But in terms  
17 of evidence in the record, the answer was zero. In fact, Your  
18 Honor, I did a little bit of thinking last night about Your  
19 Honor's question of isn't it possible that the costs would go  
20 up very substantially, because many of the major parties would  
21 actually keep their existing counsel and wouldt have to  
22 supplement it. And again, I'm not going to testify, but I will  
23 tell you, since many people have taken much, much bigger  
24 liberties than this very small one, that we actually checked  
25 with the DIP lenders, the indenture trustee, our own clients,

**PATRIOT COAL CORPORATION, et al.**

179

1 several -- everyone said the same thing. They checked with  
2 their clients: you're not going anywhere. This is a very big  
3 case; we have a lot at stake. We will be supplementing you  
4 with local counsel, if the cases get transferred. I also --

5 THE COURT: All right. But that's -- I mean that's  
6 one of the questions that we're going to have to talk about  
7 more. Because the parties on the moving side basically said  
8 that tail shouldn't wag this dog. Right? They said it's not  
9 for the convenience of counsel and shouldn't be the case that  
10 you get to go out and hire lawyers in your preferred venue and  
11 then say bootstrapping onto that, oh, look, I hired these  
12 lawyers; they're great lawyers; I want to keep them.

13 MR. HUEBNER: I agree, Your Honor.

14 THE COURT: Right?

15 MR. HUEBNER: But the good news is, it's not what  
16 happened. Davis Polk, for example, has been Patriot's counsel  
17 since its inception. And long before bankruptcy was a  
18 possibility our venue was selected. While each --

19 THE COURT: Now, now wait. Stop. Was Davis Polk  
20 Patriot Coal's counsel in connection with the Peabody spin-off?

21 MR. HUEBNER: Yes. We were Patriot's counsel.

22 THE COURT: You were Patriot's counsel?

23 MR. HUEBNER: Correct, we were never Peabody's.

24 THE COURT: You were never Peabody's counsel?

25 MR. HUEBNER: That's correct.

**PATRIOT COAL CORPORATION, et al.**

180

1 THE COURT: Is anybody here representing Peabody?

2 MR. HUEBNER: Yes, Your Honor.

3 MR. BLACK: Yes, Your Honor.

4 THE COURT: Good afternoon, sir. I just wanted --

5 MR. HUEBNER: That was just a yes or no question?

6 THE COURT: -- to say hello and ask for the  
7 gentleman's name.

8 MR. BLACK: Yes, Your Honor, Carl Black of Jones Day  
9 on behalf of Peabody Energy Corporation.

10 THE COURT: All right, thank you very much.

11 MR. HUEBNER: Your Honor, Citibank had Weil, Gotshal  
12 long before venue was discussed or decided. BofA had Willkie  
13 Farr well before. This is not that fact pattern where look,  
14 Your Honor, they filed in New York so then everybody got New  
15 York counsel and now they're saying that would be wrong. But  
16 for many parties in this case that's not the fact pattern. And  
17 that's important. And by the way, again, this is anecdote so  
18 it just gets this much weight. One of the professionals was a  
19 key professional --

20 THE COURT: That's exactly the word I was struggling  
21 for before with respect to the joinders. Okay? The joinders  
22 are anecdotal evidence because of the sampling error issue.  
23 That's part of the problem that I have. But, I'm sorry, your  
24 use of the word reminded me that was the word I was struggling  
25 for before. But, but, so let's go to this point. So it may

**PATRIOT COAL CORPORATION, et al.**

181

1 cost more.

2 MR. HUEBNER: Um-hum.

3 THE COURT: It may cost more and that might be part of  
4 the debtors' analysis in why it wants to stay here.

5 MR. HUEBNER: But for today's purposes it was part of  
6 the movants' burden to give the Court proof that the economic  
7 administration of the estate would be better served by a  
8 transfer to West Virginia. Evidence proving that critical  
9 factual requirement under convenience of the parties,  
10 respectfully, I believe there is none. And you can't make a  
11 motion seeking discretionary transfer and just say it will cost  
12 more, it will be less efficient, it will be at the expense of  
13 creditors and submit no evidence. Nothing on the topic.

14 Your Honor, one last thing. In terms of what lawyers  
15 said to the Court yesterday versus what the evidence in the  
16 record of these cases is, I was a little bit shocked when Ms.  
17 Jennik told the Court yesterday, and it was -- I think it was a  
18 direct quote because I wrote it down immediately, that "the  
19 debtors had no trouble getting financing." I'm not sure where  
20 she got this, but the facts and the record evidence are  
21 emphatically to the contrary and it matters a great deal. And  
22 I'm going to explain why. Mr. Huffard testified at length at  
23 the DIP hearing that the debtors were lucky to get this  
24 financing and that it was extraordinarily challenging and that  
25 this was the only financing available.

**PATRIOT COAL CORPORATION, et al.**

182

1           Why does this matter? Because here's what the union  
2 told you in the opening lines of their reply brief. Page 1 and  
3 I quote: "The debtors were solvent at the time they filed  
4 these consolidated petitions. Thus this case is not primarily  
5 about the rights of creditors. Nor is it primarily about  
6 obtaining adequate financing. Instead, as debtor has  
7 repeatedly declared, this is a case about their obligations to  
8 unionized workers and retirees and West Virginia's interest in  
9 responsible environmental regulation of mining operations  
10 within its borders." That is about the biggest piece of  
11 testimony which is totally incorrect and totally without  
12 foundation in anybody's pleading.

13           The debtors are very insolvent. That's why they're in  
14 Chapter 11. This case is, like all appropriate Chapter 11  
15 cases, primarily about exactly the rights of creditors of which  
16 the union may be one and is certainly a very important  
17 counterparty in all of events. And this case, as the DIP  
18 hearing, the record evidence, made blazingly clear is most  
19 assuredly about the debtors' need to get financing. Which it  
20 got because it was lucky to have done so after much challenge.  
21 They say these things because they really think this is only a  
22 two-party dispute, and since they're one of the two parties it  
23 should go where they are. It's not. It's a multibillion  
24 dollar bankruptcy case with thousands of creditors, over a  
25 billion dollars of funded debt and the need for hundreds and

**PATRIOT COAL CORPORATION, et al.**

183

1 hundreds of million dollars of financing.

2 And this financing, Your Honor, ironically is one of  
3 the reasons we filed for Chapter 11 in New York. Because New  
4 York courts have a detailed set of guidelines on big, complex  
5 DIPs and roll-ups, which was the only financing that we were  
6 able to get. And West Virginia has no guidelines on DIP  
7 financing at all, let alone roll-ups, and as far as we could  
8 tell, no history of looking at mega-DIP financings. And if we  
9 didn't get this financing approved on day one --

10 THE COURT: Okay, but that doesn't necessarily mean  
11 that had you filed in West Virginia and gone in on the first  
12 day with Mr. Huffard and all of your other advisors and made a  
13 record there that the Court there or in one of the other  
14 jurisdictions, notwithstanding the lack of existence of DIP  
15 guidelines because, I mean, we can state it as a fact that  
16 there's a logic to all of this.

17 MR. HUEBNER: Right.

18 THE COURT: Everyone knows and agrees there are a lot  
19 of those kinds of cases here and there are fewer in other  
20 places. So needs drive what happens.

21 MR. HUEBNER: Right.

22 THE COURT: So but it doesn't necessarily follow that  
23 with the appropriate record that that Court would not have come  
24 to the only conclusion you say the Court should have come to,  
25 which was this is a big company, they need financing, these are

**PATRIOT COAL CORPORATION, et al.**

184

1 the only parties who would provide it, I better approve it.

2 MR. HUEBNER: Your Honor, I completely agree and I  
3 think -- I most assuredly did not say that it would not have  
4 been approved there. What I said was, which I feel very  
5 strongly about, here, this jurisdiction has guidelines that  
6 govern facilities just like this and a track record of how they  
7 view them. When weighing the risk of not getting a financing  
8 approved on the first day that could be life or death for the  
9 company, the fact that the company chose, for example, and  
10 there will be others, to file in a place where it thought it  
11 had a greater chance of getting the facility that it  
12 desperately needed to save the company for all parties, all  
13 creditors, and the union and the retirees is entitled to  
14 weight.

15 THE COURT: All right, but now you answered my  
16 question before that if there were to be a transfer you don't  
17 believe that another Court would unroll the DIP or undue the  
18 DIP. Right?

19 MR. HUEBNER: I think that that's right but I -- what  
20 I have less predictive ability about, Your Honor -- remember,  
21 what's at issue right now is when we filed this case, was it  
22 done in part for good reasons and in the best interest of  
23 creditors. So on one level I think I'm sort of entitled to say  
24 what matters is the pre-filing decisions. But then, of course,  
25 at the end of the day I answer whatever the Court asks me.



**PATRIOT COAL CORPORATION, et al.**

185

1 So I will also say with respect to your current  
2 question, I still do have concerns. Not those, and that's why  
3 they're not in my papers. But when we need to do a complicated  
4 amendment when there are issues about complex, weird exit  
5 financings, rights offerings, who knows, my guess is the same  
6 results will obtain. That in one jurisdiction there is just a  
7 much more robust track record of having experience. And, you  
8 know, this is sort of a variant but I think, frankly, a much  
9 less insulting one, of the learning curve issue. We're  
10 entitled to look at where there is well-established case law on  
11 relief that we think we may need. And getting financing both  
12 now and in the future was one of the things that went into that  
13 calculus. That's the only point I'm making and I think it is  
14 one that is important.

15 Your Honor, let me just quickly hit the sureties,  
16 because we're talking about evidence and burden and who  
17 presented what to you. So there, too, Your Honor, there was no  
18 evidence except the SEC filings with the initial motion. And  
19 then there is the expert declaration on reply. Now, the law  
20 obviously -- of course, you're, you know it much better than I  
21 do -- is that the courts don't actually have to consider any  
22 evidence that's submitted on the first time in reply. And we  
23 could have actually moved to strike all of the evidence on  
24 reply because it's procedurally inappropriate. But we didn't  
25 do that. Why? Because all the sureties proved in their reply

**PATRIOT COAL CORPORATION, et al.**

186

1 declaration by an engineering expert is that we have lots of  
2 mines in West Virginia and many permits in West Virginia and  
3 it's all pretty complicated.

4 THE COURT: Right.

5 MR. HUEBNER: We all agree.

6 THE COURT: We do.

7 MR. HUEBNER: What does that do as factual evidence  
8 that these cases could be more efficiently and economically  
9 administered in West Virginia or that it's in the best interest  
10 of all creditors to move to West Virginia? That I'm going to  
11 talk about in a few minutes. I don't think it --

12 THE COURT: All right. But I think it's part of  
13 the -- it's related to the learning curve point that we've  
14 addressed before and that you're alluding to. I think that  
15 their point is the bookend to your point about the complicated  
16 DIP financing and that the position that they take, which I  
17 didn't necessarily agree with, was that this Court would have a  
18 steep learning curve with respect to understanding the tangled  
19 web of those environmental concerns and would not be as well  
20 situated as the court in West Virginia to fully appreciate the  
21 needs of the land and the communities.

22 MR. HUEBNER: Right.

23 THE COURT: And I didn't agree with that proposition.

24 MR. HUEBNER: Yeah, and --

25 THE COURT: And I don't know that I agree with your

**PATRIOT COAL CORPORATION, et al.**

187

1 proposition about the learning curve on exit financing. So --

2 MR. HUEBNER: Right, I agree with you. My only point  
3 is at very best, and I think one difference that is real is  
4 that we know for a fact that our bankruptcy court will be  
5 called upon to resolve many issues of bankruptcy law and  
6 applying the Bankruptcy Code. How many environmental fights we  
7 will actually have during this case, given 959(b), we don't  
8 know that at all.

9 THE COURT: Right.

10 MR. HUEBNER: Like the union, there could be one  
11 dispute. There could be no disputes. Again, Patriot has never  
12 had one penny of surety bond called upon in its history. They  
13 weren't on the top fifty list because they've never been  
14 anything other than a remote contingent creditor since the day  
15 they were born and they have substantial LC backstop and are  
16 DIP requires compliance with environmental laws. So frankly  
17 what I think is fair to say is that no matter what you say we  
18 don't know, we do know that there's going to be a lot of  
19 bankruptcy stuff going on in our bankruptcy court and there may  
20 be very little, or certainly there almost has to be much less,  
21 nonbankruptcy complicated West Virginia environmental stuff. I  
22 mean, frankly, what their brief really says is the debtors may  
23 attempt to breach environmental laws and if they do, we need a  
24 West Virginia judge to stop them. Both halves of that, Your  
25 Honor, are offensive. They're just offensive to different

**PATRIOT COAL CORPORATION, et al.**

188

1 people.

2 Your Honor, the actual 1412 factors on convenience,  
3 which they didn't actually address in their argument, are  
4 important. Convenience to the debtors, convenience to the  
5 debtors' creditors, convenience to witnesses and efficient and  
6 economic administration of the estate.

7 What's more convenient for the debtors? Nobody  
8 actually talked about that yet, even though it's the first  
9 factor. What's more convenient for the debtors, Your Honor, is  
10 New York. The Schroeder declaration tells you at paragraph 8  
11 that the debtors' corporate headquarters and executive offices  
12 are not in West Virginia. This is a huge fact. The people  
13 that need to come do this case for the debtors are not in West  
14 Virginia. That's why the first factor is convenience to the  
15 debtors. Because it's real important and they have nothing.  
16 We have the Schroeder declaration that tells you that every  
17 single relevant corporate function -- this is paragraph 8 of  
18 the Schroeder venue declaration -- there's the facts.

19 Accounting, accounts payable, accounts receivable, financial  
20 reporting, treasury, tax, internal audit, legal, sales and  
21 market research, contract management, payroll, corporate  
22 development, planning, information services, human resources  
23 and benefits, not one of those departments is in West Virginia.  
24 Paragraphs 10 and 11 of Schroeder tell you that four of the six  
25 senior executives are outside West Virginia. They work,

**PATRIOT COAL CORPORATION, et al.**

189

1 basically, out of the St. Louis office. Now, somebody quipped  
2 before that the COO is in West Virginia. First of all, he's  
3 actually the president and COO. Let's not denigrate his title,  
4 Mr. Hatfield. But he runs the operations of the company. And  
5 so one of the things I did, Your Honor, because I really like  
6 what actually the record shows. I like that a lot. I had my  
7 team go back and look at every single hearing that has happened  
8 in this case so far. And then to be super-conservative we  
9 added all the official U.S. Trustee meetings, the 341, the  
10 initial interview, the meeting of creditors. Even including  
11 spectators. Do you know how many debtor representatives came  
12 from West Virginia to all of those things put together? Zero.  
13 No one from West Virginia has ever come yet in the two months  
14 of this case to a single hearing or a single meeting called by  
15 the U.S. Trustee from the debtors' side.

16 So we know pretty clearly, Your Honor, what's more  
17 convenient for the debtors. That's the only record evidence.  
18 We want to be in New York because we think it's more convenient  
19 and more cost effective for us.

20 Now let's talk about convenience of creditors. What's  
21 the record evidence? First of all, not one of the five -- top  
22 five secured creditors of this company is located in West  
23 Virginia. What's the record evidence? Schedule 2 to the  
24 Schroeder first day declaration as required by Rule 1007 is the  
25 list of creditors holding the five largest secured claims:

**PATRIOT COAL CORPORATION, et al.**

190

1 California, Illinois, Missouri, New Jersey and Ohio.

2 Two, not one member of the creditors' committee is  
3 from West Virginia. Think about that, Your Honor. The United  
4 States Trustee appoints an official committee it says is  
5 representative of all the creditors of the Patriot ninety-nine  
6 debtors. Not one of the people they picked is from West  
7 Virginia.

8 Three, as set forth in docket entry number 8 -- I'm  
9 sorry, the cite for that is Schroeder venue declaration 42 to  
10 43. Three, as set forth in docket number 98, that's the top  
11 fifty list. The top fifty creditors of the Patriot family,  
12 Your Honor, are from eighteen states. West Virginia creditors  
13 account for less than two percent of the dollars owed to the  
14 top fifty. I know it's stupid but I'm going to say it a  
15 different way. Ninety-eight percent of the money owed to the  
16 top fifty creditors of this estate are not from West Virginia.  
17 That's a pretty close match to the hundred percent of the money  
18 owed to the top five secured creditors, who are not from West  
19 Virginia. And to be clear, I don't have any burden on this  
20 point. I don't need to prove any of this. But this is what  
21 the evidence actually in the record agreed to by the parties  
22 for this contested hearing actually shows.

23 Then let's talk about the facts about the creditors  
24 contained in the Schroeder declaration, which amazingly, no  
25 movant has mentioned. Paragraphs 30 and 31 of the Schroeder

**PATRIOT COAL CORPORATION, et al.**

191

1 venue declaration tell you that 98 -- as far as we can tell  
2 from the sampling that GCG was able to get -- 98.3 million  
3 dollars of Patriot's bonds are held by creditors located in the  
4 State of New York. That's comprised of building up the two  
5 paragraphs together, Your Honor. One is the converts and one  
6 is the senior bonds. West Virginia entities appear to hold  
7 173,000 dollars. Less than two-tenths of one percent of the  
8 amount held by New York entities. Again, this is the  
9 uncontested record evidence admitted to and agreed by all  
10 parties. Not contested. Nothing on the other side.

11 Five, these bonds holders are in forty-nine states.  
12 Soundly proving, as we've told you all along, we have creditors  
13 throughout the land and indeed throughout the world. Now,  
14 ironically they are in Alaska and they are in Hawaii. The only  
15 state that gets a pass is Maine, which, happily, is not where  
16 we filed, although it's a darn beautiful place.

17 Let's talk about the next piece of record evidence,  
18 which is where does Patriot sell its coal? And let's talk  
19 about the record evidence on this point. Ninety -- nearly  
20 ninety-five percent of Patriot's coal is sold to customers  
21 outside of West Virginia -- Schroeder venue declaration  
22 paragraph 16 -- including nearly thirty percent that is sold  
23 internationally.

24 Sixth, and I'm going to do this real quick, because I  
25 know this point is more complex for Your Honor. We believe

**PATRIOT COAL CORPORATION, et al.**

192

1 that the parties on our side today, whether you count or don't  
2 count or discount or slightly weight the joinders,  
3 overwhelmingly also tell you what our creditors actually want.  
4 So with all due respect to the Attorney General of West  
5 Virginia and the other movants who have told you that West  
6 Virginia creditors want this case in West Virginia, it's not  
7 what happened. But here, too, Your Honor, I don't want you to  
8 take my word for anything and not even just the declarations.  
9 Here, too, I ask the team to go back and look at every single  
10 thing that's happened in this case since the day they were  
11 filed to tell you who actually was involved and who came from  
12 where. Because two months in a mega case in a pretty long time  
13 and I think the past is probably a pretty good prologue --

14 THE COURT: Well, I don't know about that. I mean, I  
15 don't think that in terms of a case of this size, I've had a --  
16 this Court's had a lot of cases in which a lot more has  
17 happened in the first two months and we do have the pending  
18 venue motion which may be affecting the timing of certain  
19 things. So I'm happy to hear the data, but I don't know that  
20 it's --

21 MR. HUEBNER: Okay, Your Honor --

22 THE COURT: -- necessarily predictive.

23 MR. HUEBNER: Understood, but in part I think when I  
24 tell you what the data is because it relates, again, as actual  
25 evidence on things they've said --



**PATRIOT COAL CORPORATION, et al.**

193

1 THE COURT: Okay.

2 MR. HUEBNER: -- you may find it a little bit,  
3 slightly maybe, weightier than your initial thoughts --

4 THE COURT: Okay.

5 MR. HUEBNER: -- to this accounting might be. So we  
6 heard people say leases, et cetera. Let's talk about that. So  
7 far, Your Honor, as of last week we've moved to reject leases  
8 and executory contracts with twenty counterparties. One of the  
9 twenty was from West Virginia. Nineteen -- and that's JMAC  
10 Leasing for the record. The rest were not. Rather they were  
11 from ten different states all across the country: California,  
12 Connecticut, Illinois, Indiana, Maryland, Missouri, New Jersey,  
13 Ohio, Virginia and New York.

14 Two, don't forget adversary proceedings. Who have we  
15 started going after in the first weeks of this case? We have  
16 four adversary proceedings currently on file. Massey, Tampa  
17 Electric, STB Ventures and Royaltyco. Three of the four are  
18 against non-West Virginia entities and while I'm generously  
19 counting Massey as West Virginia, their parent company, which  
20 I'm guessing is probably kind of focused on this, is actually  
21 not in West Virginia.

22 Then let's look at our coal supply stipulations. The  
23 critical revenue contracts that save this company. We've done  
24 three of them so far in this case, Your Honor. Vitol, EDF and  
25 RWE. This is all right there on the docket. Guess how many

**PATRIOT COAL CORPORATION, et al.**

194

1 are from West Virginia? Zero. Vitol and EDF have their  
2 headquarters in Houston and RWE is right here in New York City.  
3 So when you look at the shareholder group -- let's talk about  
4 them. We have an equity committee motion now pending. We  
5 already went around with them at the U.S. Trustee and happily  
6 we and the committee convinced the U.S. Trustee that committee  
7 is not appropriate. Where are our shareholders from? It's  
8 their own 2019, Your Honor, which I think the ECF number  
9 before. Darien, Connecticut, Old Saybrook, Connecticut and  
10 Virginia.

11 THE COURT: But those shareholders? Right?

12 MR. HUEBNER: The ones who have --

13 THE COURT: The moving shareholders?

14 MR. HUEBNER: Absolutely, the moving shareholders who  
15 have stepped up to say I want to get involved in this case,  
16 number from West Virginia, zero. So Your Honor, again, I --  
17 it's not for me to urge the Court how to weight it, but I think  
18 that when you look at the record evidence in the declarations  
19 about the incredible national/international scope and creditor  
20 body and concentration of Patriot, you look at -- I mean, it's  
21 the debtors. You look at what actually has happened in this  
22 case so far with several dozen counterparties on operational  
23 contracts --

24 THE COURT: All right, but nothing -- by my  
25 recollection, there hasn't been anything that's been

**PATRIOT COAL CORPORATION, et al.**

195

1 significantly contested of all the things you listed. Right?

2 MR. HUEBNER: Well, some of those matters, Your Honor,  
3 resolved what could have been substantial disputes. Others of  
4 them are still --

5 THE COURT: The adversaries have just begun. That  
6 much I understand.

7 MR. HUEBNER: Right. But they're not West Virginia  
8 parties. And the lease rejections are, as they said to you,  
9 all their mineral -- they're telling you stuff without support.  
10 I'm giving you the actual support. We went after twenty  
11 lessors so far. They're from ten states including New York and  
12 one is from West Virginia. That's got to count for something  
13 in a world where they're telling you everyone's from West  
14 Virginia and they ran far away.

15 THE COURT: Well, I don't want to sound cynical but  
16 it's early in the case. As any good debtor does, you're trying  
17 to get things done. These were not contested so you got them  
18 done. So it -- you didn't have to -- they didn't have to go to  
19 West Virginia. Nobody had to come here. You just were able to  
20 get them done.

21 MR. HUEBNER: But these were the first twenty leases  
22 that we needed to --

23 THE COURT: Understood.

24 MR. HUEBNER: And I -- look, I don't want to say it  
25 for more than that because, again, the Schroeder declaration is

**PATRIOT COAL CORPORATION, et al.**

196

1 the evidence we really need. In fact, we don't really need any  
2 evidence, but we have it.

3 THE COURT: Okay.

4 MR. HUEBNER: Then the next factor under the Second  
5 Circuit cases is convenience of the witnesses. So what do we  
6 have? We have the debtors' proof that for them New York is  
7 better. We have the union saying if there is ever an 1113,  
8 1114 against us, we will bring some witnesses from West  
9 Virginia. And we have nothing from anybody else. So what do  
10 we have in the record that proves that the actual factor called  
11 convenience of the witnesses is better for West Virginia for  
12 the whole estate with 3.x billion dollars and thousands of  
13 creditors? We have one party saying they like it more. It  
14 doesn't help.

15 Then there's location of assets. Your Honor, I hereby  
16 concede irrevocably, plainly and unqualifiedly the location of  
17 the assets overall of the Patriot debtors is primarily located  
18 in West Virginia. We get it. We said it from the beginning.  
19 It was never contested. We didn't need experts to help prove  
20 it. The problem for the movants, and it's a very serious  
21 problem is what does the law have to say about the location of  
22 assets? And what the law says is in a Chapter 11 case the  
23 location of assets matters almost not at all. Once again let's  
24 look at corporate --

25 THE COURT: But Judge Gonzalez, in one of the Enron

**PATRIOT COAL CORPORATION, et al.**

197

1 decisions, did draw a distinction between a case such as Enron,  
2 which was a more or less a purely financial situation in which  
3 there was no ongoing business, and one like this where there  
4 very much is an ongoing business and the very purpose of the  
5 filing is to attempt to preserve the ongoing business. And  
6 it's all driven by the coal.

7 MR. HUEBNER: Yeah. And Your Honor, I owe you an  
8 apology because I should have said Enron-II, and let me  
9 explain.

10 THE COURT: Okay.

11 MR. HUEBNER: This case is a fortiori --

12 THE COURT: Mr. Huebner, I've got to give you a two-  
13 minute warning as they do in football, because we have to  
14 change court reporters. Hold on, I might be being overruled.  
15 All right, two-minute warning stands.

16 MR. HUEBNER: So Your Honor, what did CORCO say?  
17 Because again, I think it's so important, especially given the  
18 line-up here, that you get quotes and pin cites for everything.  
19 In CORCO the Court said that the location of assets is "of  
20 little importance in Chapter XI proceedings where the goal is  
21 financial rehabilitation, not liquidation." CORCO, by the way,  
22 Your Honor, when you look at the facts, and I desperately hope  
23 people will read CORCO, involved a Puerto Rican company  
24 headquartered pretty much exclusively in Puerto Rico with  
25 virtually all of its customers in Puerto Rico and all of its

**PATRIOT COAL CORPORATION, et al.**

198

1 physical assets in Puerto Rico and many of its functional  
2 departments in Puerto Rico and the Court said even so it's  
3 staying in Houston.

4           Enron-II, Your Honor -- I don't know why people are  
5 picking on Puerto Rico, it's just a weird coincidence -- what  
6 did Enron-II involve? Enron-II involved San Juan Gas Company,  
7 the local gas company that had a monopoly under Puerto Rican  
8 law to supply natural gas to the citizens of San Juan. It  
9 conducted its operations exclusively in Puerto Rico. It had a  
10 monopoly of San Juan gas distribution. It had not one single  
11 share of public stock. Not one single public debenture. Not  
12 one single other public security. Nineteen of its top twenty  
13 unsecured creditors were located in Puerto Rico and there was a  
14 363 sale pending. And despite all of that, that that entity  
15 was a hundred percent in Puerto Rico in a way that bears no  
16 fair analogy to the sprawled ninety-nine Patriot debtors with  
17 customers in four continents and fifteen countries and very few  
18 of their top fifty creditors by dollar amount in West Virginia,  
19 the Court said, I place little to no emphasis on the location  
20 of the assets or the books and records. What matters to me is  
21 other stuff like what's the most likely to facilitate the  
22 reorganization of these debtors.

23           So at the end of the day it's not hard to concede  
24 location of assets, A, because it's true and we never don't  
25 concede anything that's not true, but B, because when you go

**PATRIOT COAL CORPORATION, et al.**

199

1 and look at the cases and, by the way, there're also a bunch of  
2 cases in our papers where the sole assets were in the  
3 jurisdiction to which venue was attempted to be moved, the  
4 argument was Your Honor, they're only there. They're nowhere  
5 else. How can you keep this proceeding? And the Court said,  
6 if I think the reorganization has a better chance of succeeding  
7 here because of what is here, that's what guides me. I'm not  
8 going to give you pin cites unless you want them, but there are  
9 a bunch of cases in our brief that say that.

10 THE COURT: All right, let's --

11 MR. HUEBNER: I'm ready for interest of justice, Your  
12 Honor, so this may be a good time --

13 THE COURT: Okay, I think this is a good time to take  
14 a break. We'll come back at twenty minutes to 4. All right?

15 MR. HUEBNER: Thank you very much, Your Honor.

16 THE COURT: Thank you. And you are welcome to bring  
17 coffee in.

18 MR. HUEBNER: I don't drink coffee, Your Honor.

19 THE COURT: Or tea.

20 MR. HUEBNER: Ah, thank you.

21 THE COURT: Or a Coke.

22 (Recess from 2:17 p.m. until 3:49 p.m.)

23 THE COURT: Please have a seat. Okay. Go ahead, Mr.  
24 Huebner.

25 MR. HUEBNER: Your Honor, before I proceed, I am sure

**PATRIOT COAL CORPORATION, et al.**

200

1 that the record will ultimately show that I've said several  
2 things that were wrong. One was brought to my attention which  
3 I would like to correct.

4 THE COURT: Okay.

5 MR. HUEBNER: And hopefully, it's actually a good  
6 thing although I don't know. Davis Polk did not, in fact,  
7 represent Patriot in 2007 in connection with the spinoff from  
8 Peabody. That was Simpson Thacher & Bartlett. Davis Polk  
9 began to represent Patriot in 2008.

10 THE COURT: Okay. Thank you.

11 MR. HUEBNER: So, Your Honor, as I think I presaged  
12 before the break, I'm now up to interest of justice.

13 Your Honor, among the many things we said yesterday  
14 that I did not have to gut in the wee hours last night was that  
15 the touchstone and the prime directive of every Chapter 11 case  
16 is saving companies and maximizing their value for their  
17 stakeholders.

18 THE COURT: All right. Just so I'm following along  
19 with what you said when you started. Are we on your number 2  
20 or number 3 now? You said number 2 was why were these cases  
21 filed here.

22 MR. HUEBNER: I'm going to be hitting those in tandem.

23 THE COURT: 2 and 3.

24 MR. HUEBNER: What is the interest of justice  
25 standard --



**PATRIOT COAL CORPORATION, et al.**

201

1 THE COURT: Right.

2 MR. HUEBNER: -- and why were these cases filed in New  
3 York.

4 THE COURT: Okay. Go ahead.

5 MR. HUEBNER: Because I think they're twins. And, in  
6 fact, 4, which is do the financial problems of Patriot fit in  
7 this equation, those three things together, frankly, form a  
8 three-ply cord.

9 THE COURT: Okay.

10 MR. HUEBNER: Your Honor, I wholeheartedly believe  
11 that both the debtors' motivation in seeking venue in a  
12 specific jurisdiction and the consequences of its ejection from  
13 that jurisdiction are relevant to the consideration under 1412.  
14 But the fact that I believe it is of rather limited utility,  
15 the question is what does the Second Circuit hold and what have  
16 your fellow judges ruled when construing 1412 motions.

17 As the Second Circuit said in Manville, and I quote,  
18 "The interest of justice component of Section 1412 is a broad  
19 and flexible standard that must be applied on a case-by-case  
20 basis. It contemplates a consideration of whether transferring  
21 venue would promote the efficient administration of the  
22 bankruptcy estate, judicial economy, timeliness and fairness."  
23 That's Manville, 896 F.2d 1384 at 1391. That's what the Second  
24 Circuit said interest of justice is. So Your Honor, let's look  
25 at how Southern District judges have applied it.

**PATRIOT COAL CORPORATION, et al.**

202

1 My contention to you this morning, and I'm going to  
2 give you a bunch of law on it, is that judges in this district  
3 have repeatedly said that the touchstone of the 1412 interest-  
4 of-justice standard includes the economic administration of the  
5 bankruptcy estate with the goal of preserving value for all of  
6 its stakeholders.

7 THE COURT: Okay. But I'm going to stop you because  
8 the threshold question that's been presented here is what  
9 everybody's been talking about a lot, the fact that was  
10 stipulated to by the parties, which is that the debtors formed  
11 PCX and Patriot Beaver Dam to ensure that the provisions of  
12 Section 1408 were satisfied and for no other purpose. So  
13 before you get to what you've just described, which I think is  
14 an accurate presentation as far as it goes, it skips over in my  
15 mind this very critical first question because I think that the  
16 U.S. Trustee, and to a lesser extent the others but perhaps the  
17 others as well, are, in essence, arguing that you don't get out  
18 of the starting blocks because you created those entities in  
19 order to be able to file these cases here and for no other  
20 purpose and that, therefore, all of that other stuff doesn't  
21 come into play.

22 MR. HUEBNER: Your Honor, here I would like to beg a  
23 little bit of indulgence.

24 THE COURT: Okay.

25 MR. HUEBNER: My order is to first explain for a

**PATRIOT COAL CORPORATION, et al.**

203

1 couple more minutes what I think the law is in other cases and  
2 then to tell you how the facts apply to legal standard. One of  
3 the things you said yesterday was: nobody is telling me what  
4 the interest of justice standard actually is. And when I think  
5 when I go through a bunch of Southern District cases and how  
6 they've articulated it, things you were not told yesterday but  
7 I think were very important, when I then give you the facts  
8 that you're looking for -- because what we're also going to  
9 hear in a few minutes is that there are a whole lot of other  
10 facts in the record about why we chose New York which nobody  
11 mentioned yesterday far beyond that one-liner from the  
12 stipulation -- I promise you I will get to that in less than  
13 five minutes, maybe less than three. But if I can --

14 THE COURT: Go ahead.

15 MR. HUEBNER: -- I had set it up to set the legal  
16 stage first --

17 THE COURT: Go ahead.

18 MR. HUEBNER: -- and then apply the facts.

19 Your Honor, in International Filter in 1983, Judge  
20 Buschman said that the interest of justice concerns "the  
21 interest of the debtor in rehabilitating itself. The interest  
22 of the creditor is in receiving a fair and equitable return.  
23 The interest of the public in whether the pendency of the  
24 proceeding in a wrongful district advances or retards those  
25 interests."

**PATRIOT COAL CORPORATION, et al.**

204

1 He went on to say that, first and foremost, the  
2 question is what is good for the reorganization of these  
3 companies. I understand and I'm going to hit it very hard that  
4 the U.S. Trustee is saying she disagrees --

5 THE COURT: What case -- is that in your brief, that  
6 case?

7 MR. HUEBNER: It sure is, Your Honor.

8 THE COURT: What -- give me the --

9 MR. HUEBNER: And it's also in --

10 THE COURT: Give me the page citation.

11 MR. HUEBNER: Your Honor, can I give those to you in a  
12 few minutes? Those are not in the typed version --

13 THE COURT: That's In re International Filter?

14 MR. HUEBNER: Oh, I'm sorry. I apologize, Your Honor.

15 THE COURT: In re International Filter?

16 MR. HUEBNER: It is, Your Honor.

17 THE COURT: Okay.

18 MR. HUEBNER: 33 B.R. --

19 THE COURT: 30, 31 and --

20 MR. HUEBNER: -- 952.

21 THE COURT: -- 36. Okay.

22 MR. HUEBNER: Exactly.

23 THE COURT: All right. Keep going.

24 MR. HUEBNER: As he said, Your Honor, "In almost every  
25 operating Chapter 11 case, a principal concern whether the test

**PATRIOT COAL CORPORATION, et al.**

205

1 be phrased in the terms of the interest of justice or  
2 convenience is the economic administration of the estate. In  
3 practical terms, that concern translates into inquiry of the  
4 need for post-petition financing pursuant to Section 364 of the  
5 Code, the need to obtaining financing to fund the plan of  
6 arrangement, and the location of the sources of that financing  
7 and the management and personnel in charge of obtaining it.  
8 Such facts are critical in that they bear on the rehabilitation  
9 generally contemplated by Chapter 11."

10 Your Honor, other recent decisions as well -- in fact,  
11 pretty much all of them, including especially the ones relied  
12 on by the movants are to the same effect. They're looking at  
13 interest of justice; efficient administration of the estate is  
14 at the core of the inquiry. And that's why, when I talk about  
15 in a few minutes, what we considered and how we weighed it,  
16 you're going to see how the facts match the law.

17 They love Dunmore Homes. And, by the way, I'll talk  
18 about Dunmore Homes all day long because I love it, too. Even  
19 though they were transferred in that case, I think it's a great  
20 example of a case that should be transferred. But what did  
21 Judge Glenn say about the standard --

22 THE COURT: I'm very familiar with Dunmore Homes and I  
23 think it's completely inapposite to the situation we have here.

24 MR. HUEBNER: I agree, Your Honor.

25 THE COURT: I've read it. I know it. I'm happy to

**PATRIOT COAL CORPORATION, et al.**

206

1 have you talk about it. But I don't think that it is at all  
2 persuasive or informative on the facts that we have here.

3 MR. HUEBNER: The only thing I'm going to say about  
4 it, Your Honor, is what does Judge Glenn say the legal standard  
5 is for interest of justice? That the interest of justice prong  
6 contemplates "the economic and efficient administration of the  
7 estate" including "the need to obtain post-petition financing  
8 and the need to obtain financing to fund the reorganization".

9 In EB Capital Management, Your Honor -- also on our  
10 papers, and more importantly in their papers because it came  
11 out the wrong way -- or the right way -- these are all right; I  
12 agree with all of them -- they transferred the case out.

13 There, too, he said, "Interest of justice includes promoting  
14 economic administration of the estate." Okay? Chief Judge  
15 Bernstein in Grumman Olson Industries in 2005, also in the  
16 papers, same thing. And, of course, the Enron decisions, which  
17 everybody's been citing. What did Judge Gonzalez say? And I  
18 quote, "The considerations involved with the interest of  
19 justice are intertwined with the economic and efficient  
20 administration of the estate," e.g., "the need to obtain post-  
21 petition financing and the need to obtain financing to fund the  
22 reorganization."

23 So what Judge Gonzalez said, along with his brethren  
24 and sistren, was that among the things you have to look at,  
25 even on an interest of justice or maybe especially on an

**PATRIOT COAL CORPORATION, et al.**

207

1 interest of justice, is would it best serve the debtors'  
2 reorganization efforts. I understand what they want you to do.  
3 They want you to say it doesn't matter what the consequences  
4 are. It doesn't even matter if it kills the company. I don't  
5 even care what the facts are. If you did this, you must be  
6 thrown out. And what I'm arguing to Your Honor is that's not  
7 what the law is. The law, in case after case after case in the  
8 Southern District, is that even looking at interest of  
9 justice --

10 THE COURT: No. I disagree with you. I don't think  
11 that that's an accurate statement because in none of those  
12 cases do you have a fact pattern that you have here. In some  
13 of the cases, and I got into this a little bit with Ms. Jennik  
14 yesterday, I drew a distinction between forum shopping versus  
15 forum selection, running away from something as opposed to  
16 running to --

17 MR. HUEBNER: To something.

18 THE COURT: -- something which I think is an important  
19 distinction in my mind. And I don't think that -- for example,  
20 in Dunmar Homes, I think that's one of the reasons why that's  
21 not applicable.

22 So, of course, I think that those general statements  
23 of the law are noncontroversial. So you asked for three to  
24 five minutes. I think we're there.

25 MR. HUEBNER: Yeah. I'm actually done with the law,

**PATRIOT COAL CORPORATION, et al.**

208

1 Your Honor. I'm ready to move to the facts, absolutely. My  
2 only point is I think that those issues about what's best for  
3 the rehabilitation of the debtors, whether they did it, as I  
4 think you said yesterday, for the right reasons or the wrong  
5 reasons and whether they ran to or from are all about to be  
6 very important on the facts. And I'm, frankly, I guess we're  
7 delighted, I agree. I don't think the legal standard is  
8 controversial. I think what's being asked for at least by one  
9 of the movants is, and I'll talk about that in a minute. But  
10 for now, let's get right to the facts because you've been  
11 waiting for that and you've been very generous with me but let  
12 me hit the why we are in New York.

13 Mr. Schroeder's first day declaration, Your Honor,  
14 addresses the question that we're here to talk about today. I  
15 will now read paragraph 43 of the accepted, unrebutted relevant  
16 documentary evidence on why the debtors chose to file their  
17 bankruptcy cases in this jurisdiction.

18 "The Debtors determined that the Southern District of  
19 New York (the "SDNY") is the optimal venue for the Debtors'  
20 chapter 11 cases and [is] in the best interests of the Debtors,  
21 their creditors and other stakeholders and these estates. The  
22 Debtors' legal and financial advisors are all located in New  
23 York, and the Debtors' significant financial creditors, along  
24 with their professional advisors, are also located in New York.  
25 Moreover, along with their advisors, the agent under the



**PATRIOT COAL CORPORATION, et al.**

209

1 proposed 'first out' DIP financing facility and two of the  
2 three arrangers under the proposed DIP financing facilities are  
3 New York-based institutions, and the DIP financing contemplates  
4 that the Debtors' cases be venued in the SDNY. I believe that  
5 had we filed in one of the other jurisdictions that were also  
6 available to us (i) most of our domestic and foreign creditors  
7 would have been inconvenienced and (ii) the costs and  
8 inefficiency of [the] administration of the estates would have  
9 materially increased."

10 Now, Your Honor, if you accept that the law is did you  
11 do it for convenience of creditors, did you do it in the best  
12 interest of creditors, did you do it for the efficiency and  
13 economic administration of the estate, and then you match the  
14 facts to the declaration that says all those things, on a  
15 hearing where, again, we have no burden.

16 THE COURT: Well, this is why I raised my eyebrows, so  
17 to speak, about the stipulation because I did read this and,  
18 frankly, I was -- maybe "expecting" is too strong a word but it  
19 certainly seemed possible that Mr. Schroeder would have been  
20 cross-examined on that conclusion. And I did spend a lot of  
21 time with the movants asking them what's your evidence. And I  
22 think quite to their credit, they said, we don't know. They  
23 said we don't know. These proceedings could be longer; it  
24 could be shorter. There might be local counsel who are  
25 employed but New York counsel may still be retained.

**PATRIOT COAL CORPORATION, et al.**

210

1 So I think that what we have is record evidence of Mr.  
2 Schroeder un rebutted that it was his view that the cost of  
3 inefficiency of administration would have materially increased.

4 MR. HUEBNER: Correct. And --

5 THE COURT: That's what it is.

6 MR. HUEBNER: And this is what I think is so  
7 important -- and you pointed this out, I think, to several  
8 people, and certainly to Mr. Goodchild -- this is a contested  
9 matter in the court.

10 THE COURT: Right.

11 MR. HUEBNER: And the movants had a burden to show X.  
12 They decided not to serve discovery. They could have said we  
13 think you did this for the wrong reasons; we want discovery.  
14 We think you did this to run from something; we want discovery.  
15 We think you did this to disadvantage a specific creditor; we  
16 want discovery. We think you did this to get a forum that's  
17 going to be unduly, sleazily in your favor. They could have  
18 asked us a million things. What they did instead was they  
19 agreed that the facts are we did it in the best interest of the  
20 estate, in the best interest of creditors, with cost and  
21 efficiency, and to make it convenient for creditors.

22 And you know what, Your Honor? Honestly, what I  
23 actually think is that the reason they didn't take discovery is  
24 because they know it's true.

25 THE COURT: Okay. But the U.S. Trustee doesn't care

**PATRIOT COAL CORPORATION, et al.**

211

1 about this.

2 MR. HUEBNER: And that's -- I'm going to get to that.

3 THE COURT: Okay? The U.S. Trustee and Ms. Jennik  
4 both told me that they don't care. Right? And you're going to  
5 tell me that that's inconsistent with the law that tells me  
6 that I should look at the economic administration of the case.

7 MR. HUEBNER: And that, Your Honor, is why I  
8 appreciate the favor you did me to tell you the law first  
9 because I think that the 1412 interest of justice law,  
10 including the Second Circuit case as well as the other  
11 decisions, say what Courts are supposed to weigh to include --

12 THE COURT: All right. But I'm going to --

13 MR. HUEBNER: -- DIP financing --

14 THE COURT: I'm going to stop you. I want to go back  
15 to 1408. Okay? Which this is not a motion, as was the case in  
16 Houghton Mifflin challenging the what I'll call literal  
17 compliance with the statute.

18 MR. HUEBNER: Yes, Your Honor.

19 THE COURT: Right? Parties conceded that. All the  
20 parties said --

21 MR. HUEBNER: Yep.

22 THE COURT: -- there's a domicile here.

23 MR. HUEBNER: Venue is proper under 1408.

24 THE COURT: Well, the word "proper" is a loaded word.

25 MR. HUEBNER: 1408 has been satisfied.

**PATRIOT COAL CORPORATION, et al.**

212

1 THE COURT: 1408 has been satisfied. Okay. And what  
2 I think you're telling me is that that's the end of the inquiry  
3 vis-a-vis that issue, and that the fact that the entities were  
4 formed for no other purpose -- it doesn't matter. We're here.  
5 We literally complied. Courts don't close loopholes; Congress  
6 does. Right? That's the argument.

7 MR. HUEBNER: You know, Your Honor --

8 THE COURT: If it's a loophole, it's a loophole. And  
9 you don't get to close it; Congress gets to close it. Don't be  
10 an activist judge. Right?

11 MR. HUEBNER: But, Your Honor, what I would prefer is  
12 to agree in part because if I told you at the beginning --

13 THE COURT: You can agree with nothing.

14 MR. HUEBNER: -- I have eleven reasons why -- that's  
15 number 7 but there are many others as well.

16 THE COURT: You said you had eleven reasons why --

17 MR. HUEBNER: Why Winn-Dixie --

18 THE COURT: -- Winn-Dixie --

19 MR. HUEBNER: In other words, their reading of --

20 THE COURT: Okay.

21 MR. HUEBNER: As I read their --

22 THE COURT: But -- stay with me.

23 MR. HUEBNER: Yes, Your Honor.

24 THE COURT: Okay? The words of the statute are  
25 satisfied. There are entities that are domiciled here in New

**PATRIOT COAL CORPORATION, et al.**

213

1 York.

2 MR. HUEBNER: Yes, Your Honor.

3 THE COURT: Okay? And you've stipulated that they  
4 were formed for no other purpose.

5 MR. HUEBNER: Yes, Your Honor.

6 THE COURT: Well, if you had put Mr. Schroeder on the  
7 stand, I might have asked him -- when you formed those entities  
8 in the state of New York, you had to pay a fee, right?

9 MR. HUEBNER: Yes, Your Honor.

10 THE COURT: Okay. And you had to fill out a form, I'm  
11 guessing. Governments love forms.

12 MR. HUEBNER: I believe that's correct.

13 THE COURT: I know that the people that I work for  
14 love forms.

15 MR. HUEBNER: I believe the forms are in the record as  
16 evidence.

17 THE COURT: Okay. No. I think the certificates of  
18 incorporation --

19 MR. HUEBNER: I apologize.

20 THE COURT: -- are in the record as evidence.

21 MR. HUEBNER: Yes.

22 THE COURT: But you had to apply to have a corporation  
23 in New York, right?

24 MR. HUEBNER: Yes, Your Honor.

25 THE COURT: And I'm guessing that it probably asked

**PATRIOT COAL CORPORATION, et al.**

214

1 for a corporate purpose. And I would have asked Mr. Schroeder  
2 what was put down on that form.

3 MR. HUEBNER: Your Honor, I'm not a general corporate  
4 lawyer. But I'm going to --

5 THE COURT: That much I know, Mr. Huebner.

6 MR. HUEBNER: I'm clearly not much of a litigator  
7 either. But I'm going to take a flyer on this one which is  
8 that just like in many, many, many documents that I have done,  
9 the answers to that are for general corporate purposes. I  
10 don't think you fill in to start a small fracking business in  
11 upstate New York and see if it does well.

12 THE COURT: It may not be specific --

13 MR. HUEBNER: I'm guessing --

14 THE COURT: -- but I'm guessing that it didn't say to  
15 establish -- to ensure that the provisions of Section 1408 were  
16 satisfied. I'm taking a --

17 MR. HUEBNER: Your Honor --

18 THE COURT: -- flyer on that one.

19 MR. HUEBNER: You know what, Your Honor? And that's  
20 right. But let me tell you what --

21 THE COURT: And look, let me just be clear. People  
22 who do this for a living know, from time to time, if there's a  
23 little humor that enters the proceeding, it's only to buoy  
24 everyone's spirits. It's not intended or should it be  
25 interpreted to diminish the seriousness of what's going on.

**PATRIOT COAL CORPORATION, et al.**

215

1 MR. HUEBNER: Thank you, Your Honor.

2 THE COURT: Okay? So -- but we don't have Mr.

3 Schroeder. So I don't get to ask that question.

4 MR. HUEBNER: Right. But what do we do have? What we  
5 do have is that we've been upfront with everybody. We're not  
6 defensive and we're not embarrassed. I don't think -- when  
7 anybody said how did you get into New York and what are these  
8 two entities, there was no serpentine anything. We said, we'll  
9 tell you what we did. We created these two entities because we  
10 believed that it was in the best interest of these estates to  
11 get the financing we need and save these companies to get into  
12 New York where we believe we are allowed to do it. Why is  
13 setting up a tiny fracking business a legitimate business  
14 purpose but securing an 802 million dollar DIP financing -- and  
15 we believe substantially --

16 THE COURT: Well, nobody --

17 MR. HUEBNER: -- increasing --

18 THE COURT: Nobody would bite on the hypothetical,  
19 okay, which is fine. But let me give you -- what I'm  
20 struggling with is -- because I do believe that judges  
21 shouldn't close loopholes, but I'm not sure that I see this as  
22 a loophole. There has been facial compliance. There are New  
23 York domiciliaries here. But I'm not sure that that  
24 automatically gets us to -- so now we go to 1412 and now I'm  
25 into the interest of justice analysis. And the question, I

**PATRIOT COAL CORPORATION, et al.**

216

1 think, is whether or not because the parties concede that venue  
2 is "proper" under 1408, whether I take into account the fact  
3 that these entities were formed for no purpose other than to  
4 establish venue in the interest of justice analysis. And  
5 moreover, second set of questions is I think there are other  
6 instances in the Bankruptcy Code and the bankruptcy law where  
7 just because you can look at the Bankruptcy Code and look at  
8 what the debtor did and say there's a match, that you don't get  
9 to look behind it.

10 MR. HUEBNER: Right.

11 THE COURT: And every time you do that, it's not a  
12 loophole. Judges are supposed to be analytical.

13 MR. HUEBNER: Your Honor, I completely agree. And the  
14 point is, they were invited to go behind it and we submitted  
15 record evidence which is unrebutted on what is behind it. And  
16 that's paragraph 43.

17 THE COURT: Okay. But I'm making --

18 MR. HUEBNER: We did in the best --

19 THE COURT: I'm sorry.

20 MR. HUEBNER: -- interest for economic administration  
21 and --

22 THE COURT: Okay.

23 MR. HUEBNER: -- the interest of creditors.

24 THE COURT: But I'm making a slightly different point.

25 MR. HUEBNER: Yes, Your Honor.



**PATRIOT COAL CORPORATION, et al.**

217

1 THE COURT: Okay? Let me give you an example and I  
2 don't think this was in anybody's papers. But there's a body  
3 of case law that has to do with artificial impairment. Are you  
4 familiar with that, generally?

5 MR. HUEBNER: Not as familiar as I'm guessing I wish I  
6 were in a few moments.

7 THE COURT: Well --

8 MR. HUEBNER: Yes, I am --

9 THE COURT: -- just to be --

10 MR. HUEBNER: -- Your Honor.

11 THE COURT: In broad outline, right, artificial  
12 impairment means that in order to get to cramdown, you have to  
13 have an accepting impaired class. And there are cases out  
14 there -- I can give you citations -- where the debtor finds a  
15 creditor and gives them --

16 MR. HUEBNER: 103 cents.

17 THE COURT: -- four dollars less than what they're  
18 owed and --

19 MR. HUEBNER: Or four dollars more.

20 THE COURT: Right. And says, oh look. They're an  
21 impaired class. We can get to cramdown. We're doing it in the  
22 best interest of creditors. Life is good.

23 MR. HUEBNER: Yes.

24 THE COURT: And the courts say not so fast. Right?  
25 The courts say not so fast. Yes, I can see that impaired class

**PATRIOT COAL CORPORATION, et al.**

218

1 right there in your plan but that's not the way it should work.  
2 You don't get to apply the provisions of the Bankruptcy Code in  
3 that way. The ends don't always justify the means.

4 MR. HUEBNER: Right.

5 THE COURT: And that gets to a very important issue  
6 about the meaning of justice that I still maintain, at ten  
7 minutes after 4 on the second day of this hearing, I haven't  
8 heard enough about.

9 MR. HUEBNER: So, Your Honor, I actually happily, Your  
10 Honor -- happily have a bunch more to say some of which I think  
11 will hit hopefully to at least some of your concerns partly --

12 THE COURT: Okay. There's --

13 MR. HUEBNER: -- because --

14 THE COURT: There was most recently a case out of the  
15 Eastern District of North Carolina called Swartville in which  
16 the very issue of artificial impairment --

17 MR. HUEBNER: Right.

18 THE COURT: -- was dealt with. So go ahead. I said a  
19 lot --

20 MR. HUEBNER: Your Honor --

21 THE COURT: I said a lot of things. You can answer  
22 them in any order that you like.

23 MR. HUEBNER: Your Honor, in terms of the record  
24 evidence, again, I'm not going to repeat it. We think that  
25 paragraph 43 -- which, again, you're right -- were we delighted

**PATRIOT COAL CORPORATION, et al.**

219

1 when they said we accept this as the governing facts on why the  
2 debtors did this and we don't need to cross-examine anybody; we  
3 have all we need? Only partially, because we would have been  
4 equally happy to have somebody answer further questions. They  
5 wouldn't have gotten anything in discovery because we did our  
6 fiduciary duty and we did what we thought was best.

7           So let's talk about what they didn't do. What they  
8 didn't do is present not only any evidence but not even an  
9 allegation. In fact, they were very courteous, as you pointed  
10 out a minute ago, when actually you pressed them. You said  
11 this in your brief. Did you really mean they did this at the  
12 expense of creditors? Well, okay, maybe we didn't really mean  
13 that. The surety lawyer, which I was very happy to hear, went  
14 as far as to say, actually, they probably balanced stuff as a  
15 fiduciary, et cetera.

16           There's no evidence in this record nor, frankly --  
17 I'll take a flyer -- could there be that we did this for any of  
18 the negative reasons. Not to get away from bad press coverage  
19 like in Winn-Dixie. Not to be a serial filer like in EB. Not  
20 to get an improper advantage. We did it in the best interest  
21 of creditors. Artificial impairment, by the way, if I can  
22 mention your analogy for a minute, is found to be against the  
23 best interest of creditors because you're allowed to jam  
24 something down on them through an artifice. What we're trying  
25 to jam down on them is our best shot at survival. And that's

**PATRIOT COAL CORPORATION, et al.**

220

1 what the record evidence shows. Artificial impairment is when  
2 you take rights away by saying I get to do this to you because  
3 I have an impaired class. The only evidence and it happens to  
4 be the truth about why we're here is because we genuinely  
5 believe it's more convenient, more economical and likely to  
6 best maximize the value of these estates. And we have nothing  
7 to hide. We think that that is our fiduciary obligation and we  
8 think we fulfilled it.

9 But let me go on because the next part matters a lot,  
10 too. And I want to address Ms. Schwartz' hypothetical dead-on.

11 What if we said, you know, we actually think Alaska is  
12 best. We actually think that this is getting real far away  
13 from anything and anybody connected to Patriot is in its best  
14 interest, so we'll spend the five dollars, we'll spend the 175  
15 on the filing fee and we'll file in Alaska. And I'll come up  
16 and say to the Alaska judge -- you know, the great news is that  
17 has nothing to do with this case. And let me explain why.

18 That would be a great 1412 motion. In fact, Your Honor -- I  
19 won't summarize it because you say you know it so perfectly --  
20 that's Dunmore Homes. Everybody is in California. The lender,  
21 the DIP lender, the management, the top creditors, the owners,  
22 the legal advisors. You can't say, you know what, I'm going to  
23 go shop for New York because the facts don't fit the case. In  
24 Winn-Dixie, they were running from Jacksonville. But our ties  
25 to New York are massive. And let's talk about the record

**PATRIOT COAL CORPORATION, et al.**

221

1 evidence.

2 THE COURT: But you're getting away from the point  
3 that I want to talk about at the moment which is -- I don't  
4 think we need to talk about Alaska anymore. Okay? But let's  
5 talk about New York. Because what you're not telling me --  
6 you're telling me that the law says that 1412 requires that we  
7 look at the economic administration of the case. It's my  
8 experience that in a lot of the large cases, parties hire New  
9 York lawyers. They hire Chicago lawyers. They hire lawyers  
10 from large urban areas where there are large concentrations of  
11 financial and other businesses.

12 So if I go with your formulation, the economic  
13 administration of the case, what is the limiting principle?  
14 This Court will be selected in any number of cases. And  
15 anybody who has the 175 dollars can go to the New York  
16 secretary of state, name a corporation, have a certificate of  
17 corporation and we're good to go. And then every party can  
18 come in and say, but, Judge, economic administration of the  
19 case. Look, I've got all these advisors. I've got all these  
20 lawyers. We can get here on the subway. Why make us go  
21 somewhere else? This Court has a track record. This Court has  
22 guidelines, all of that other stuff that everybody agrees is  
23 the case. But what's the limiting principle? Doesn't it make  
24 a complete -- doesn't it render the substantial portion of the  
25 venue statute meaningless?

**PATRIOT COAL CORPORATION, et al.**

222

1 MR. HUEBNER: Your Honor, let me -- I'm going to --  
2 I'll give you my best answers and there are several of them.

3 THE COURT: Okay.

4 MR. HUEBNER: Number one is 1408, as it currently  
5 exists, in fact, does not require any meaningful nexus to the  
6 jurisdiction of filing. So it's not like the law currently  
7 says you need to go where your principal assets are and we're  
8 having a big fight about where that is and we created an entity  
9 with its principal assets in New York and said, ha ha, we have  
10 won. 1408 in Patriot's a great example. We have venue in  
11 eleven places. The statute just doesn't require that you be in  
12 a specific place. And I'm guessing that most large corporate  
13 families could probably file in ten or twenty or thirty  
14 jurisdictions with no possible attack of the types we're  
15 hearing today because they happen to have among their 100 subs  
16 or 200 subs or 500 subs -- subs that are incorporated in almost  
17 every state or subs that are their principal assets or subs  
18 that are headquarters. Congress didn't say go where you are.  
19 It said if you have any affiliate that meets any of the  
20 following tests which are very easy to satisfy, you can go to  
21 any of those places. That's why when you look at 1412, the  
22 Courts say I get it, that under 1408 you can probably figure  
23 out a way to file almost anywhere, especially if you're a big  
24 company. But then the question is what's good for the  
25 creditors. What's convenient for the creditors? What's cost

**PATRIOT COAL CORPORATION, et al.**

223

1 effective for the creditors? Did you do it for the right  
2 reasons to save the estate or did you do it because you had a  
3 prior pending case somewhere else and you wanted to get away.  
4 You had counterparties you thought you could disenfranchise and  
5 you were running away to make it expensive for them. That's  
6 exactly the kind of stuff that has no relevance here, is not in  
7 the record and never could be. And that's why our ties New  
8 York, which we're about to get to, I think are also quite  
9 relevant because it's not just unrebutted evidence about a pure  
10 heart to make this case good for creditors and save these  
11 estates and raise incredible amounts of complicated financing.  
12 It's not just that the official committee of unsecured  
13 creditors supports us. It's that the fact of this case -- and  
14 Manville says look at the facts and circumstances of every case  
15 individually -- and there is huge record evidence; I'm going to  
16 read you pin cite after pin cite -- is that Patriot has huge  
17 pre-existing ties to New York that from a policy perspective  
18 are infinitely greater than the fact that we happen to have the  
19 teeny fracking sub that we put 60,000 dollars into that didn't  
20 work out --

21 THE COURT: All right. But that --

22 MR. HUEBNER: -- a year ago.

23 THE COURT: -- hypothetical is not here. And there is  
24 one fact, though, that you, I think, will agree with. If  
25 there -- without coal there's no Patriot.

**PATRIOT COAL CORPORATION, et al.**

224

1 MR. HUEBNER: I certainly agree, Your Honor.

2 THE COURT: Without coalminers, there is no Patriot.

3 MR. HUEBNER: I agree with that, too, Your Honor,  
4 obviously.

5 THE COURT: Doesn't that deserve substantial weight?

6 MR. HUEBNER: Without a --

7 THE COURT: The financial creditors of this estate,  
8 the unsecured creditors of this estate will recover or not,  
9 depending on whether men and women still go down into the mines  
10 and mine the coal.

11 MR. HUEBNER: Yes, Your Honor. And we --

12 THE COURT: Those are facts.

13 MR. HUEBNER: And we -- I could not --

14 THE COURT: Or --

15 MR. HUEBNER: -- possibly agree with --

16 THE COURT: I'm sure -- I don't intend to give short  
17 shrift to other mining techniques such as MTR that don't  
18 require that. But that raises a whole host of different  
19 issues.

20 But I hear you about the financial creditors. But I  
21 also heard what Ms. Jennik had to say about the workers.

22 MR. HUEBNER: Your Honor --

23 THE COURT: And I know the company took that into  
24 consideration.

25 MR. HUEBNER: So heavily. And that's the point.



**PATRIOT COAL CORPORATION, et al.**

225

1 We're saving this company -- and we will work day and night  
2 until it's done to do so for, among other people, the workers  
3 and the unionized workers in particular, UMWA. And that's why,  
4 Your Honor, I read you the quote from their brief because they  
5 don't see that this is a plan of reorganization. They don't  
6 see that we need financing. They think that -- and I read you  
7 their brief verbatim. They think this is just a fight between  
8 us and them. It's not at all. Not even a tiny bit.

9 THE COURT: Well, I don't see it that way. It's  
10 not --

11 MR. HUEBNER: The question is where we can we save --

12 THE COURT: I don't like --

13 MR. HUEBNER: -- the company.

14 THE COURT: -- to see it as a fight between and among  
15 any constituency. And I certainly see it as not involving the  
16 financial aspects of it. And if my memory serves correctly, I  
17 told Ms. Jennik that. But -- and I'm going to give you all the  
18 time you want. I apologize for all the interruptions.

19 MR. HUEBNER: You're the judge.

20 THE COURT: I just have to ask the questions as they  
21 come to me; otherwise, I'll forget.

22 There's another factor here that I don't think enough  
23 attention has been paid to. And again, I'm torn because  
24 there's a burden of proof and I believe the parties have to  
25 satisfy the burden of proof. Okay? But the elephant in the

**PATRIOT COAL CORPORATION, et al.**

226

1 room maybe -- might be a baby elephant or a really big  
2 elephant -- is Peabody because folks have raised in footnotes  
3 and by innuendo and in sentences here and there and pointed to  
4 things in the record the circumstances of the creation of this  
5 company.

6 MR. HUEBNER: Yes, Your Honor.

7 THE COURT: And if this case is like any of the other  
8 cases that this Court presides over, the creditors' committee  
9 and the debtor are going to look into that.

10 MR. HUEBNER: That -- Your Honor, let me help with  
11 that.

12 THE COURT: If I'm putting you in a difficult  
13 position, I don't care.

14 MR. HUEBNER: Nope. You're putting me in an easy  
15 position. So let me just say it straight out. The  
16 circumstances surrounding Patriot's spinoff from Peabody will  
17 most assuredly be looked at with extraordinary seriousness by  
18 both the debtors and the creditors' committee. We're already  
19 on it, Your Honor, you won't be surprised to hear. And if we  
20 or they or both of us decide that there is a cause of action to  
21 be brought, it will be brought. And ironically, I think the  
22 union would like to hear what I'm about to say; it will be  
23 brought in the legal jurisdiction pursuant to acceptable law in  
24 the place that we think works the best for getting the best  
25 recovery for the creditors of these estates. That, I don't

**PATRIOT COAL CORPORATION, et al.**

227

1 think, had any role in our selection -- which I think I can say  
2 without any concerns about privilege -- of venue. Fraudulent  
3 transfer factors that this Court knows far better than I do of  
4 a bankruptcy debtor can be brought either under 544 channeling  
5 applicable state law or under 548 using applicable federal  
6 bankruptcy law. And there's also a two-year statute of  
7 limitations extension when you file so we have the times to do  
8 what we need to do.

9           Now to be clear, I don't mean to suggest that it  
10 wouldn't be right to do so, that we will soon be suing Peabody  
11 for a trillion dollars. We don't know yet. For the last X  
12 weeks, what we and the committee have been focused on is  
13 putting one foot in front of the other and getting the relief  
14 that we need. Will Peabody and possibly Arch be looked at very  
15 seriously? Absolutely. Does the union feel very strongly  
16 that -- and have they articulated in various fora that Peabody  
17 has a lot of implication in all of this and we're really in  
18 Peabody's retirees? Absolutely. Will they be part of the  
19 equation? Maybe they will as well. Maybe, as I said before in  
20 a different context, a three-ply cord is not easily broken.  
21 We'll be looking at all the ways we can, Your Honor, to  
22 maximize the value of the estate.

23           But the critical issue is that we made this decision  
24 with exactly that goal in mind. And our ties to New York --  
25 and, by the way, the Peabody spin, just to be clear, this is --

**PATRIOT COAL CORPORATION, et al.**

228

1 THE COURT: I don't know what the facts are.

2 MR. HUEBNER: Well --

3 THE COURT: I'm merely repeating to you --

4 MR. HUEBNER: Let me tell you what the record evidence  
5 is.

6 THE COURT: -- what -- the little snippets that I've  
7 picked up from the record --

8 MR. HUEBNER: Right.

9 THE COURT: -- that I have before me.

10 MR. HUEBNER: Right. And the record has very little  
11 on it because I don't think any of us thought it was that  
12 relevant particularly. Let me tell you what it does say.  
13 Peabody was in St. Louis -- were in St. Louis. The Peabody  
14 spin documents are governed by Delaware law. I think the  
15 fraudulent transfer action, if there is one, is going to have a  
16 lot to do with the governing law of the spin or the states of  
17 incorporation of the spinnor or the spinee or the physical  
18 location where the deal was done. If anything, I think Peabody  
19 cuts exactly -- again, I don't want to presume too much, Your  
20 Honor, because all you said was Peabody may be a big deal. So  
21 I don't want to guess what Your Honor may be thinking. But  
22 frankly, if you ask me, I would say on the fly New York has  
23 lots of multi-billion dollar fraudulent transfer actions. And  
24 this one, the documents are not governed by West Virginia law,  
25 and that is record evidence. I don't have the pin cite but I

**PATRIOT COAL CORPORATION, et al.**

229

1 will give you my word that that's somewhere in our documents.  
2 I would ask my team to find it for me so I can give you the pin  
3 cite. It's a Delaware law spin between two companies  
4 headquartered in St. Louis. I'm not sure why that would  
5 possibly suggest that the bankruptcy cases of Patriot should  
6 all go to West Virginia. It may be brought after emergence by  
7 a liquidation trustee or litigation trustee as it often is. It  
8 may be brought during the case. There may be STN standing  
9 discussions. There may be joint prosecution.

10 THE COURT: Right. I mean, there may be an STN  
11 motion. There may be discussions as part of a plan of  
12 reorganization.

13 MR. HUEBNER: Absolutely.

14 THE COURT: None of us has any way of knowing.

15 MR. HUEBNER: Correct. But will it be looked at? I  
16 imagine Mr. Mayer will speak just as emphatically as I have  
17 that this is --

18 THE COURT: I would expect so.

19 MR. HUEBNER: -- not in small font on our list. And  
20 frankly, I don't think Peabody should be surprised either.  
21 Obviously, lots of people have been saying it. It doesn't make  
22 it true but there's a lot involved and it has to be looked at.  
23 But the question is does that mean or does that suggest or does  
24 that provide any support for and, therefore, the entirety of  
25 these ninety-nine Chapter 11 cases should go take place in West

**PATRIOT COAL CORPORATION, et al.**

230

1 Virginia where Peabody executives were not, the senior Patriot  
2 executives are not, the governing law is not and the deal was  
3 not negotiated. So I'm just guessing but I think it cuts  
4 exactly the other way. I'm guessing --

5 THE COURT: Okay.

6 MR. HUEBNER: -- a lot of --

7 THE COURT: Why don't I let you keep going for a while  
8 and I'll attempt -- do my best to not interrupt you for a  
9 little while.

10 MR. HUEBNER: Oh, thank you, Your Honor --

11 THE COURT: All right?

12 MR. HUEBNER: -- although, again, my only function  
13 today is to answer your questions.

14 So, Your Honor, in terms of the record evidence, I was  
15 right, happily. It is record evidence and it is in paragraph 5  
16 and 6 of Mr. Schroeder's venue declaration setting forth,  
17 albeit in relatively skeletal form, the spinoff, more  
18 particularly, when the spin happened and the fact that there  
19 was a Delaware choice of law provision in the spin documents.

20 THE COURT: Okay. Thank you.

21 MR. HUEBNER: So Your Honor, fact and circumstances:  
22 we're in New York. Are we really, as the objectors say, here  
23 with no prior nexus to New York except for the two recently  
24 formed subsidiaries? Their words: "little to no ties to this  
25 district" except for these newly created companies. "West

**PATRIOT COAL CORPORATION, et al.**

231

1 Virginia law will control many of the issues relating to  
2 Debtors' operations and much of the litigation." Are those  
3 facts true because they're important. Their case sort of rests  
4 on we have no prior connection to New York until we created  
5 these two subs and it will all turn on West Virginia law. If  
6 those facts were true, for example, Your Honor, we'd be a lot  
7 closer to Dunmore Homes. The problem is those facts, which are  
8 not facts -- they're unsupported lawyer statements in their  
9 briefs -- are not remotely true.

10 Here are the facts with pin cites for every single one  
11 of them. One: New York law governs forty-one of the debtors'  
12 sixty-five, as of the petition date, sales contracts. Almost  
13 two-thirds. 1.95 billion dollars of revenue. By contrast,  
14 only two of the debtors' sixty-five sales contracts are  
15 governed by West Virginia law. So they tell you, "West  
16 Virginia law will govern" all this stuff. That's why we should  
17 be there. What are the actual facts? Our revenue stream is  
18 governed by New York law not West Virginia law.

19 Two: The debtors have entered into a master equipment  
20 lease with each of their twenty equipment lessors. This sounds  
21 very coal-y, right? Equipment lessors. What are the facts?  
22 The facts are that of the twenty master leases, four are  
23 governed by New York law. No other state has more than four,  
24 and West Virginia has zero. Zero of our top twenty leases are  
25 gov -- of our top twenty master equipment leases are governed

**PATRIOT COAL CORPORATION, et al.**

232

1 by West Virginia law. Pin cite: Schroeder, paragraph 19.

2 Three: Virtually all of the debtors' pre-petition  
3 debt instruments and both of their DIP agreements, over 1.25  
4 billion dollars, are governed by New York law or contain a New  
5 York forum selection clause. Schroeder, paragraph 23 to 24.  
6 This is almost every penny of the entire capital structure.

7 Four: Schroeder venue declaration, 48 to 64. The  
8 negotiations by the company's executives from St. Louis, by the  
9 way -- once again, West Virginia is nowhere to be found for the  
10 DIP -- took place largely in New York with New York  
11 professionals for all sides and DIP lenders based in New York.

12 Five: The debtors sell a lot of coal in New York.  
13 Not much less, frankly, than they sell in West Virginia.  
14 Schroeder venue declaration, paragraph 16. Unrebutted.

15 Six: The debtors have very, very material creditors  
16 in New York as set forth in the uncontested and admitted  
17 Schroeder declaration, paragraphs 30 to 31. We have over -- we  
18 have -- this alone, just this little slice of bonds we could  
19 figure out has 98.3 million dollars of New Yorkers and  
20 173,000 -- two-tenths of one percent -- in West Virginia.

21 So, Your Honor, the facts matter. Even though it's  
22 not my burden, they told you with no support that we had no  
23 prior ties and we came like a stranger. We wandered into New  
24 York because we thought it was good for us. Not only is it  
25 unsupported, it's just not true. The record evidence is



**PATRIOT COAL CORPORATION, et al.**

233

1 overwhelming. Our creditors, our debt, our leases, our revenue  
2 stream are very, very heavily centered right here where we  
3 filed in the best interest with a pure heart.

4 Your Honor, I'm now ready to turn to my last point,  
5 which is Winn-Dixie because it certainly --

6 THE COURT: But before you leave --

7 MR. HUEBNER: Other than the Court's preference.

8 THE COURT: Okay. So in our discussion about Peabody  
9 and before we talked about other venues --

10 MR. HUEBNER: Yes, Your Honor.

11 THE COURT: Again, not your burden; their burden. All  
12 of that still pertains. But a lot of large cases also get  
13 filed in Delaware.

14 MR. HUEBNER: Yes, Your Honor.

15 THE COURT: This one didn't.

16 MR. HUEBNER: Yes, Your Honor.

17 THE COURT: Was there a reason why not that you can  
18 share --

19 MR. HUEBNER: The answer --

20 THE COURT: -- or that you are willing to share?

21 MR. HUEBNER: The answer is in between, Your Honor.

22 And if I may, I'll obviously explain.

23 One of the things that we do, and it's no surprise  
24 that every debtor does do and should do as part of their  
25 fiduciary duty, is look at the primary drivers that they think

**PATRIOT COAL CORPORATION, et al.**

234

1 are likely to obtain in the case and to analyze where they  
2 think they have the best shot of surviving and maximizing  
3 value. Those range from things like protecting the revenue  
4 stream, intellectual property concerns, securing DIP financing,  
5 integration issues under contracts, lease rejection standards.  
6 There are many things that go into that analysis. There are  
7 very serious issues of attorney-client privilege here because  
8 many of the issues, as Your Honor noted before, softly chiding  
9 me for getting excited about what the two months to date has  
10 proven, is that that's the tip of the iceberg and most of the  
11 case is still in front of us. So I think that it would be not  
12 inappropriate exercise of fiduciary duty and would run a very  
13 serious risk of risking privilege if I told you, you know,  
14 please advise the world why you did not file in Delaware where  
15 you had dozens of incorporated entities. And while the union  
16 still may have certainly said, this is convenient for no one.  
17 How dare you? You're not there. We're not there. The  
18 creditors aren't there. The assets aren't there.

19 THE COURT: Well, I think the union -- I think Ms.  
20 Jennik made it clear that she didn't have an actual answer to  
21 the question. But I think what she said was that it's very  
22 likely that if this case had filed anywhere but West Virginia,  
23 the union would have made the same motion.

24 MR. HUEBNER: Right. And that's sort of a part of my  
25 answer.

**PATRIOT COAL CORPORATION, et al.**

235

1 THE COURT: And not to put words in her mouth, but I  
2 think that was more or less the tenor of what her response to  
3 me was.

4 MR. HUEBNER: Right. And Mr. Goodchild gave you a  
5 variant to that which is -- or, no, I'm sorry -- it was not Mr.  
6 Goodchild; it was the sureties, I apologize -- who said well,  
7 we would have had a thousand-to-one odds had they actually  
8 filed in one of the places where technically, because of some  
9 pre-existing sub of which there are ninety-nine, they have, but  
10 we may have tried anyway, we're not sure. This is sort of the  
11 point, Your Honor, which is could we have filed in Delaware?  
12 Sure. Did we look at it in the exercise of our fiduciary duty?  
13 And as Mr. Schroeder's evidence tells you, we looked at the  
14 best interest of creditors, convenience and cost. And among  
15 other things -- there were lots of other reasons, Your Honor,  
16 but what he tells you in his declaration is lots and lots and  
17 lots and lots of people and things were already in New York, so  
18 as between New York and Delaware, there were lots of reasons  
19 why that was not remotely a hard call. She would have had a  
20 very good opening fact statement to say tell me who's in  
21 Delaware. You guys in Delaware? Is your management in  
22 Delaware? Your lawyer's in Delaware? Your banker's in  
23 Delaware? Your financing source is in Delaware? Your  
24 creditors in Delaware? Your contract's in Delaware? Anything?  
25 And that we wouldn't have had the incredibly powerful detailed

**PATRIOT COAL CORPORATION, et al.**

236

1 answer to, at least on some of the points, as I believe we have  
2 about New York, which is, again, Your Honor, why it's facts and  
3 circumstances of each case. The ties here are legion and are  
4 unrebutted. And they go to things like who are the creditors;  
5 what law governs; where are the creditors. And as I said  
6 before, it's not evidence but I think it's okay for me to say,  
7 many of the parties, the biggest parties, have pre-existing New  
8 York counsel. Weil Gotshal was on the scene for Citibank way  
9 before we said you got to go for New York because we think we  
10 may be in New York.

11 THE COURT: But Citibank is in a lot of places, a  
12 large number of places.

13 MR. HUEBNER: Yes, Your Honor.

14 THE COURT: And if it costs more for Citibank to  
15 represent its interest, then, if you believe in the free  
16 market, then Citibank next time will charge more. In other  
17 words, somebody could say if you don't keep the case here in  
18 New York, it's going to make the ability to get financing go up  
19 because then there's a risk that Citibank has to go collect in  
20 another place.

21 MR. HUEBNER: Yes, Your Honor.

22 THE COURT: And that's not this case. That's not my  
23 problem. If the cost of --

24 MR. HUEBNER: Fair enough.

25 THE COURT: -- capital goes up, the cost of capital

**PATRIOT COAL CORPORATION, et al.**

237

1 goes up. And Citibank -- I think it was in -- it was either in  
2 the -- one of the -- I think it was in the first-out DIP  
3 agent's pleadings make the point that it's not free. If Citi  
4 incurs expenses in going to another jurisdiction --

5 MR. HUEBNER: We pay that.

6 THE COURT: -- the estate pays for it. So everybody  
7 pays for it. And that's absolutely true.

8 MR. HUEBNER: It's more drag on the estate and their  
9 survival.

10 THE COURT: Right. So if that went into the debtors'  
11 analysis, as I'm sure it did, then that fact is --

12 MR. HUEBNER: Yes.

13 THE COURT: -- what it is. But let me --

14 MR. HUEBNER: And it's in the declaration.

15 THE COURT: Before you go to the Winn-Dixie point --

16 MR. HUEBNER: Yes, Your Honor.

17 THE COURT: -- let me ask you just a couple of random  
18 questions. On page 4 of your memorandum, your objection -- and  
19 again, not evidence; lawyer's argument but I pay attention to  
20 every word -- you say where the cost to transfer the cases  
21 will -- let me start at the beginning. "But it cannot be in  
22 the 'interest of justice' to transfer these cases where all  
23 parties concede that venue was properly laid, where the costs  
24 to the estates and the creditor community would be enormous,  
25 and where the U.S. Trustee does not...argue that another forum

**PATRIOT COAL CORPORATION, et al.**

238

1 would be more convenient."

2 So it's not your burden but can you put a number  
3 around "enormous"?

4 MR. HUEBNER: Your Honor, the record evidence -- and I  
5 want to first talk about that and then --

6 THE COURT: Okay.

7 MR. HUEBNER: -- answer your question as if I was  
8 allowed to just answer you with my thoughts.

9 THE COURT: Right.

10 MR. HUEBNER: Right? The evidence is that we thought  
11 it would be more expensive because so many people --

12 THE COURT: Okay.

13 MR. HUEBNER: -- we knew were going to be in New York.

14 THE COURT: But I don't know. I don't know if it's  
15 enormous --

16 MR. HUEBNER: But we --

17 THE COURT: -- or I don't know if it's ten dollars.

18 MR. HUEBNER: What we do know -- and as I was saying  
19 before, and maybe it's a little bit more relevant right now --  
20 we've already confirmed what Your Honor intuited yesterday  
21 which is all the big parties I checked with, their clients all  
22 said New York counsel is still heading this. It's going to be  
23 an additional layer of expense. And we get charged for all  
24 that. It goes -- hits our cash directly.

25 I also note, as I may have mentioned before, that one

**PATRIOT COAL CORPORATION, et al.**

239

1 of the professionals told me last night that he was a key  
2 person in Winn-Dixie and that's what actually happened in Winn-  
3 Dixie. Every single New York professional stayed on the case  
4 and then they all had to hire Jacksonville people and reorient  
5 and do the whole thing.

6 THE COURT: Okay.

7 MR. HUEBNER: Okay. So the question is what would it  
8 cost. So I think it's a combination of two things, Your Honor.  
9 One, which is maybe the greater one, is what are the potential  
10 risks and harms to the estate of going to West Virginia. And  
11 here again, Your Honor -- and I can't possibly say it more  
12 strongly than there is not the teeniest angstrom unit of insult  
13 or lack of respect for West Virginia. The fact is the law in  
14 the Fourth Circuit on several topics that are very important to  
15 us and have nothing to do with, for example, organized labor  
16 but about protecting our revenue stream and keeping our assets  
17 from being at risk by counterparties, is not as good for us.  
18 And in some cases, it's much worse for us.

19 And so I think that the bigger issue than that dollar  
20 cost of many people we have to pay for sending us much, much  
21 bigger bills is the unquantifiably -- and frankly, partially,  
22 maybe largely, dangerous privilege issue laws, we might lose  
23 the ability to do X in Circuit Y or we might be faced with a  
24 counterparty who can rip Z out of our hands because of a stray  
25 case in Y Circuit. What I can tell you is that underlying Mr.

**PATRIOT COAL CORPORATION, et al.**

240

1 Schroeder's sworn testimony that New York is in the best  
2 interest of these estates and we think it maximizes value is  
3 ultimate calculation that was done on various legal issues and  
4 discussed primarily not with Mr. Schroeder because he's not a  
5 lawyer --

6 THE COURT: Right.

7 MR. HUEBNER: -- he's the CFO, but it was certainly --

8 THE COURT: But the --

9 MR. HUEBNER: -- discussed with the general counsel.

10 THE COURT: You're talking about a comparison of the  
11 law in the Second Circuit and the law in the Fourth Circuit.  
12 I'd imagine that two of the things that are very important to  
13 the union movants are the Coal Act and the Black Lung Act and  
14 how those intercept with the bankruptcy laws, right?

15 MR. HUEBNER: Yes. Your Honor, let me --

16 THE COURT: And I think that --

17 MR. HUEBNER: -- help with that.

18 THE COURT: I think that the Second Circuit and the  
19 Fourth Circuit are pretty aligned on those issues.

20 MR. HUEBNER: Extraordinarily close. And let me  
21 assure you, Coal Act and Black Lung Act, both of which are  
22 things that the learning curve has been very intense for all of  
23 us at Davis Polk on coal issues -- I think we now know a  
24 reasonable amount, as nonexperts, about the Coal Act and the  
25 Black Lung Act. Those are both statutory obligations that are



**PATRIOT COAL CORPORATION, et al.**

241

1 very different and have specified interactions with the  
2 Bankruptcy Code that are not the same as other types of  
3 obligations. Again, I'm very wary of representing our legal  
4 positions on issues.

5 THE COURT: I understand.

6 MR. HUEBNER: But, for example, if I can somehow say  
7 this can't be used against me, yes. I have no basis to  
8 disagree, Your Honor --

9 THE COURT: Okay.

10 MR. HUEBNER: -- that on Coal Act and Black Lung Act,  
11 which miners and the union should care a lot about, as does  
12 Patriot, I'm not sure there's much of a circuit split anywhere.

13 But on things that do matter to us and are in the best  
14 interest of the estate including all of our workers, there are  
15 some issues where the changes -- where the differences are, in  
16 fact, rather material. And we did what I would think even in  
17 their hearts the union would want us to be doing, to be  
18 figuring out where can we not have our revenue stream a risk.  
19 Where could we not have certain -- and I'm not going to say the  
20 words -- X, Y, Z at risk, things with third parties that have  
21 no --

22 THE COURT: Okay.

23 MR. HUEBNER: -- connection to labor. Where can we  
24 get our DIP approved with the greatest certainty so that we're  
25 here to have the luxury of a venue fight.

**PATRIOT COAL CORPORATION, et al.**

242

1 Your Honor, if this DIP had not been approved, we'd be  
2 out of money. We'd be shut. I mean, I don't mean to be overly  
3 dramatic but it's just the simple truth. And as I said before,  
4 I'm not remotely saying another judge would not have approved  
5 it. Of course I would never say that. But in my judgment and  
6 the company's judgment, New York had the greatest certainty or  
7 likelihood of approval because they've done a lot of big  
8 complex rollups, enough that they publish guidelines on them  
9 that we could follow and know what we thought would fly.  
10 That's different -- you know, Mr. Stark has a fact in his  
11 pleading that says -- and I'm not going to attest to it; I  
12 don't know if it's true but I think it's in a footnote in his  
13 pleading -- that there's a mega case history chart or something  
14 like that. West Virginia has only -- had one mega case since  
15 1979. Is that part of the calculus? On something like the  
16 DIP, it is. If a client says to me there's a Court that's seen  
17 twenty of these in the last five years and a Court that's never  
18 seen one, where do we think it's more likely, I don't think one  
19 can argue that it may be more likely in Courts that have seen  
20 it before. And there was a lot of analysis of exactly that  
21 fiduciary bent as part of our calculus.

22 Your Honor, I apologize. I interrupted you. You  
23 were --

24 THE COURT: No. That's okay.

25 MR. HUEBNER: -- asking me to walk through our brief.

**PATRIOT COAL CORPORATION, et al.**

243

1 THE COURT: On page 7 of your brief, you say, "it is  
2 not expected that more than a handful of employees or retirees  
3 would even (sic) need to be present in this Court". Isn't part  
4 of the argument that the union is making is that it's not a  
5 question that needs to be present, that justice in this case is  
6 related to the numbers of employees and retirees who want to be  
7 present?

8 MR. HUEBNER: Your Honor, that is their argument. And  
9 I guess my view is I think the case law is on my side on this  
10 one which is that the law says that what matters is who  
11 actually has to come to court and be a witness and be an  
12 advocate. As I said before and I'll say it again, all other  
13 things being equal if the prospects for reorganization are the  
14 same and the costs are the same and the convenience to  
15 creditors are the same and the location of creditors is the  
16 same, then there may be a lot of value to saying but in one  
17 case you can have an extra forty spectators watching justice  
18 being done; I don't disagree with that. The problem is --

19 THE COURT: What about the --

20 MR. HUEBNER: -- here --

21 THE COURT: What about the issue that the workers  
22 can't afford the time and money to go to a far-flung  
23 jurisdiction?

24 MR. HUEBNER: But, Your Honor, the answer there is  
25 that, one, the union is the only creditor and the official

**PATRIOT COAL CORPORATION, et al.**

244

1 representative.

2 THE COURT: Oh, I understand that.

3 MR. HUEBNER: So --

4 THE COURT: I'm talking about --

5 MR. HUEBNER: -- this is if they want --

6 THE COURT: I'm talking about the actual employees --

7 MR. HUEBNER: Right.

8 THE COURT: -- who somebody told me and if we can keep  
9 at it, I'm going to get to it. Somebody told me that somebody  
10 has the greatest economic stake in this case. But the way I'm  
11 looking at it, at least on this issue, is that no one has a  
12 greater economic stake than any particular person because it's  
13 up or down for them. It's up or down. They're -- this is what  
14 they do. They're not going to go get a job working at a local  
15 community college or another manufacturing facility. This is  
16 what they do. It's all or nothing for them.

17 MR. HUEBNER: Yes, Your Honor.

18 THE COURT: And if the economic creditors sustain a  
19 loss or less than a full recovery, they'll be okay. I mean,  
20 JPMorgan Chase -- you can read about it in the paper. Right?  
21 Couple months ago. They lost nine billion dollars because of  
22 the London Whale.

23 MR. HUEBNER: Yes, Your Honor.

24 THE COURT: They're okay. Is it good? No. It's bad.

25 MR. HUEBNER: Right.

**PATRIOT COAL CORPORATION, et al.**

245

1 THE COURT: Should that ever happen again? No. But  
2 we're not going to have a far-ranging debate now about economic  
3 regulation.

4 MR. HUEBNER: Right.

5 THE COURT: But my point is in terms of the stake that  
6 that particular stakeholder has, it's pretty big.

7 MR. HUEBNER: And, Your Honor, that's exactly the  
8 point. And that's so critical to me. We believe that we have  
9 the best chance of saving these companies to pay the maximum  
10 amount of wages and benefits and employ the most people by  
11 being here. That's what we swore in the declaration. That's  
12 what you have to weigh against somebody who wants to watch a  
13 hearing or two or three or five. If I could look a worker or  
14 retiree in the eye and say, what do you prefer, that we file in  
15 West Virginia and take the risk that our DIP isn't approved and  
16 we liquidate and you're all unemployed in a week or two and we  
17 can pay nothing further, or we file in New York where after  
18 careful fiduciary analysis, we think we have the best chance of  
19 paying the most for the most people, I'm trying to save your  
20 jobs and pay as much of your benefits as we can, who would  
21 answer for door one? Nobody. And that's why the test, Your  
22 Honor -- and that's why I begged you to let me start with the  
23 law. That's why interest of justice in this district is about  
24 where can you save the company, where can you get DIP  
25 financing, where can you most efficiently administer the estate,

**PATRIOT COAL CORPORATION, et al.**

246

1 because way at the end where it really matters, the touchstone  
2 is saving the company not having more people being able to  
3 watch the process at a greater risk to all. That's my answer.

4 THE COURT: I asked Ms. Jennik about the cost of the  
5 employees attending hearings. Is it, in fact, correct that the  
6 company has declined to offer to provide financial support for  
7 the workers to travel to hearings in the event that the case  
8 were to stay here or to go somewhere else?

9 MR. HUEBNER: It is definitely not correct. And I  
10 have decided not to even mention it at all, but since Your  
11 Honor asks, what Ms. Jennik actually asked us was we want you  
12 to pay the legal fees and pay for a financial advisor for the  
13 negotiations between the two sides. Pay our lawyers' fees and  
14 pay our bankers' fees. Nothing about witnesses and  
15 convenience. And Your Honor --

16 THE COURT: Well, isn't it -- I'm just thinking about  
17 all the labor and negotiations that have taken place in and  
18 around cases in this district just in the last couple of  
19 months.

20 MR. HUEBNER: Even a week.

21 THE COURT: Okay. And I think I saw that in the  
22 American case --

23 MR. HUEBNER: Five million and two million.

24 THE COURT: -- that the -- part of the agreed  
25 transactions with certain of American's unions involved the

**PATRIOT COAL CORPORATION, et al.**

247

1 payment of fees.

2 MR. HUEBNER: And that's what we told them, Your  
3 Honor. So I'm so --

4 THE COURT: And I think I read that the Office of the  
5 United States Trustee objected.

6 MR. HUEBNER: That's also correct, Your Honor.

7 THE COURT: But I don't mean to put Ms. Schwartz on  
8 the --

9 MR. HUEBNER: Your Honor --

10 THE COURT: -- on the spot.

11 MR. HUEBNER: -- hopefully --

12 THE COURT: So it might be the case that, if you get  
13 to that point, that a similar structure would pertain.

14 MR. HUEBNER: Your Honor, that's --

15 THE COURT: As part of the deal, they get their fees  
16 paid, right?

17 MR. HUEBNER: Our answer was as part of the deal, it's  
18 not for now. This is exactly, exactly right. In every  
19 negotiation, one of the issues that is usually at the end when  
20 you're moving towards a deal is we've got to talk about who's  
21 bearing the cost of the whole process. And, Your Honor, again,  
22 I don't want to testify but there's some document, which I  
23 think is called an LM-2 which is the annual filing that unions  
24 have to make. They have 171 million dollars of assets. It's a  
25 sort of ironic fact -- and I don't want to overspeak; I'm sure

**PATRIOT COAL CORPORATION, et al.**

248

1 I'm going to get attacked for the fact that it's really all  
2 timberland not cash -- they may be much more liquid than we  
3 are. But at the end of the day --

4 THE COURT: You should have asked them to provide the  
5 DIP.

6 MR. HUEBNER: You know what? It's not a bad idea.  
7 They can certainly buy into the DIP. Can you guys -- I hereby  
8 ask Citibank and BofA to syndicate it to them.

9 But here's the point, Your Honor. Both points are  
10 right. One, don't think for a minute this is a small local  
11 union that doesn't have any money and we need to be the good  
12 guys here. We are fighting for our lives.

13 THE COURT: All right. Let's try to keep it away from  
14 that kind of nomenclature. You are trying to be the good guys  
15 here because that's your job under the law. You're trying to  
16 be good fiduciaries.

17 MR. HUEBNER: No. I agree.

18 THE COURT: Okay.

19 MR. HUEBNER: I'm sorry. Let me --

20 THE COURT: So --

21 MR. HUEBNER: -- rephrase that. The way Your Honor  
22 said it is unsurprisingly better than the way I said it. They  
23 asked us to pay their legal fees and their bankers' fees. Our  
24 response was this is not the right juncture for that. We hope  
25 to reach a deal with you. If and when we're moving towards



**PATRIOT COAL CORPORATION, et al.**

249

1 that, we can talk about that. Nobody ever asked us -- and I  
2 don't think Ms. Jennik was quite accurate --

3 THE COURT: Okay.

4 MR. HUEBNER: -- yesterday to pay witness expenses.

5 THE COURT: All right. All right. I just wanted to  
6 make the parties here in the courtroom aware that we've been  
7 advised that, in fact, the video feed is going to continue  
8 until we're done.

9 MR. HUEBNER: Okay.

10 THE COURT: So my appreciation to the office of the  
11 clerk in West Virginia for making those arrangements. And in  
12 St. Louis, they're going to be with us as well until we're  
13 done. And it's going to be a while yet.

14 MR. HUEBNER: Okay, Your Honor.

15 THE COURT: Yes. Mr. Mayer is standing.

16 MR. MAYER: Yes. So I can cancel the arrangements  
17 that have been made for supplemental lines? We'll be --

18 THE COURT: Well --

19 MR. MAYER: -- relying --

20 THE COURT: -- I don't know that that's necessarily  
21 the case because I don't have any way of knowing how many  
22 parties may want to leave the two courtrooms and go home and  
23 continue to listen from home because they have family  
24 obligations. So I would ask that you keep those arrangements  
25 in place.

**PATRIOT COAL CORPORATION, et al.**

250

1 MR. MAYER: In that case, Your Honor, if I may just  
2 interject, we have a supplemental line open in case the first  
3 one overloads. And I have --

4 THE COURT: Okay.

5 MR. MAYER: -- numbers for that.

6 THE COURT: Why don't you put that on the record  
7 because folks might be spreading that word to those who are not  
8 even in the courtroom. So let's -- if you have it, let's do  
9 it. Go ahead, Mr. Mayer.

10 MR. MAYER: This is an operator-operated line. I  
11 think it has capacity for --

12 THE COURT: Mr. Mayer, come up to the podium because  
13 the camera then can see you.

14 MR. MAYER: A mixed blessing. Excuse me. The dial-in  
15 for the second line, which should include -- should have  
16 capacity for a greater number of calls, is 800-896-8445. And  
17 the passcode is 327609. I think there's a # after that. 800-  
18 896-8445; passcode, 327609. Thanks.

19 THE COURT: Thank you, Mr. Mayer.

20 MR. HUEBNER: Your Honor, where I think we were  
21 procedurally was that you were walking through our brief asking  
22 questions.

23 THE COURT: Oh, yes. Thank you.

24 MR. HUEBNER: And then I have Winn-Dixie and the wrap-  
25 up to do after that.

**PATRIOT COAL CORPORATION, et al.**

251

1 THE COURT: Okay. All right. All right. On page 8  
2 of your objection, you cite to me a number of large companies  
3 who reorganized in New York even when their headquarters and  
4 assets are primarily located outside the jurisdiction. But in  
5 any of those cases, were the lead debtors, if you will,  
6 incorporated a month before the filings?

7 MR. HUEBNER: Your Honor, I don't know the answer to  
8 that. The point we were trying to make there was from a policy  
9 perspective the idea of very large companies from elsewhere  
10 coming to New York is --

11 THE COURT: We can stipulate to that.

12 MR. HUEBNER: Exactly.

13 THE COURT: Happens all the time.

14 MR. HUEBNER: And I don't think we said anything  
15 different. And the answer to your question is I don't know.

16 THE COURT: Okay. On page 9, in the second paragraph,  
17 you talk about -- you say "Ironically, it is the Union -- which  
18 is itself located outside of Washington, D.C. -- and the  
19 sureties -- not one of which is located in West Virginia --  
20 that have acted 'strategically' by seeking to transfer these  
21 cases to West Virginia, notwithstanding the extraordinary  
22 inconvenience, burden, and costs that would result." What do  
23 you mean by the word "strategically"? To what end do you  
24 believe is that strategy?

25 MR. HUEBNER: Your Honor, this refers to the Enron

**PATRIOT COAL CORPORATION, et al.**

252

1 citation and the DBSI Inc. citation that I gave Your Honor a  
2 while ago which is what courts have said in the past is when  
3 you're trying to move venue to a place where you're not but  
4 because you'd rather be there, that's not permissible. And the  
5 words -- I mean, this is a much more gentle adjective than the  
6 one that were hurled at us. They said we manufactured, we  
7 manipulated, we violated. And what I'm saying is these are not  
8 West Virginia people. They like the law there for themselves  
9 for their own, I should note, unstated, largely, purposes.  
10 Don't accuse me. I'm the fiduciary. And I put evidence in the  
11 record about why I chose New York. You're trying to go to a  
12 place where you're not incorporated and you're not  
13 headquartered. You're the one that's trying to pick your law.

14 (Pause)

15 THE COURT: On page 34, Mr. Huebner, you note that  
16 "Indeed, it is notable that only two regulators -- the West  
17 Virginia Attorney General and the Kentucky DNR -- have  
18 expressed support for the motions, while the other regulators  
19 on whose behalf the sureties purport to speak elected to remain  
20 silent." Who are the other regulators, if you know?

21 MR. HUEBNER: So Your Honor, the sureties' motion,  
22 especially its initial motion, basically is a quite  
23 informative -- and I actually appreciate it because I learned a  
24 lot about environmental regulation by reading it -- is  
25 essentially a thirty-odd page description of all the different

**PATRIOT COAL CORPORATION, et al.**

253

1 regulate coal companies. And I would only embarrass myself if  
2 I rattled off the twenty-three acronyms that they use about all  
3 the different federal mining regulators, state mining  
4 regulators, health and safety regulators, land regulators and  
5 the like. One of the things that was most striking to me about  
6 their motion is it spoke entirely for someone else. And that's  
7 the problem with a lot of the movants. They said all these  
8 other people -- right? But when you get to actually them, the  
9 movants, it's much thinner. So the answer is, they gave us --  
10 and I'll just assume that it's true -- a list of, I think, a  
11 couple of dozen regulators and they're not here. We think  
12 that's important. And even West Virginia, by the way, Your  
13 Honor, there are many other West Virginia separate legal folks  
14 that, I believe, could have spoken had they chose to, and we  
15 only have the attorney general.

16 THE COURT: Well, they're also -- everywhere there is  
17 coal there is a regulator --

18 MR. HUEBNER: Correct.

19 THE COURT: -- or ten, right?

20 MR. HUEBNER: Yes. And we have assets as -- again, I  
21 don't have the pin cite; I apologize -- we have assets in about  
22 five states, six states, seven states.

23 THE COURT: Right.

24 MR. HUEBNER: Again, let me be very clear so nobody  
25 whacks me on reply. The majority of our assets --

**PATRIOT COAL CORPORATION, et al.**

254

1 THE COURT: Are in West Virginia.

2 MR. HUEBNER: -- by a wide margin are in West  
3 Virginia.

4 THE COURT: Okay.

5 MR. HUEBNER: I'm not suggesting to the contrary.

6 THE COURT: All right. All right. I think that  
7 brings us to Winn-Dixie.

8 MR. HUEBNER: So, Your Honor, I think Winn-Dixie is  
9 worth a few minutes because, in part, we're going to touch  
10 on -- and frankly, in some cases in a new guise with the new  
11 case law, several of the -- maybe many of the things we touched  
12 on to date. And partially, because at least as to the U.S.  
13 Trustee, which is really the main interest of justice movant,  
14 that's really their case. Right? They basically -- I mean, I  
15 don't know remember, I think it is about eight pages and maybe  
16 six of them are Winn-Dixie. Like, Judge Drain already ruled on  
17 this. It's kind of done and the implicit message is this is  
18 the Southern District way; the same result should obtain. I  
19 very, very strongly disagree for, as I said before and I'm  
20 going to give the numbers, for eleven different reasons.

21 One, the debtor consented to transfer in Winn-Dixie.  
22 As the fiduciary for all creditors, the debtor said given what  
23 has developed; I want to go back to Jacksonville because the  
24 cost and damage to me of staying here is greater. The debtor  
25 won. The result that should obtain here is that the debtor

**PATRIOT COAL CORPORATION, et al.**

255

1 should win because the debtor's fiduciary determination -- and  
2 again, I've got eleven different reasons, I made a lot of  
3 different points -- is that we strenuously objected to  
4 Charleston for many reasons great and small and do not at all  
5 believe it's in the best interest of these estates.

6 THE COURT: Okay. Two?

7 MR. HUEBNER: Two, the only reason given in Winn-Dixie  
8 for New York filing, the record evidence, was to escape bad  
9 press coverage. To use Your Honor's language, they were  
10 running from not running to. You know what our record evidence  
11 is. I'm not going to hit it again and again and again. Best  
12 interest of creditors, maximize value, convenient for our  
13 national/international creditors, cost and efficiency of the  
14 administration. That's a peppercorn versus a twenty-five pound  
15 weight. Those are totally different motives. One is exactly  
16 in line with the prime directive of all reorganizations and one  
17 is a small factor that got easily flipped around when the press  
18 looked the other way. We don't operate based on what the press  
19 is saying. We operate on what we think is best for the  
20 estates.

21 Three, in Winn-Dixie -- and I think we all read the  
22 transcript pretty closely -- there does not appear to have been  
23 any evidence that the debtors had any ties to New York other  
24 than their twelve-day-old sub. And indeed, they stipulated, at  
25 pages 47 to 48 of the transcript is where it's mentioned, that

**PATRIOT COAL CORPORATION, et al.**

256

1 the sub didn't even have any New York debt.

2           What the movants wish was true here, Your Honor, what  
3 they told you in their brief was true but it's absolutely not  
4 true, that we have no ties to New York, no nexus to New York,  
5 no connection to New York, it actually looks like it was true  
6 in Winn-Dixie. It is emphatically not true here. And, Your  
7 Honor, I walked through before through all the pin cites of the  
8 billion dollars of debt, Schroeder, 23 to 24; majority of our  
9 revenues under New York law, Schroeder 18; more mega equipment  
10 leases under New York law than anywhere else, Schroeder, 19;  
11 more creditors in New York than, as far as we know, any other  
12 state. The facts are just so different. It's unbelievable.  
13 And, you know, they didn't hit it as much in their oral  
14 argument, but they made a really big deal in their papers about  
15 the fact that PCX and Beaver Dam don't have employees or  
16 operations. Well, let me tell you what the record evidence is  
17 on that point, as well.

18           Schroeder, 37. More than seventy-five of the ninety-  
19 nine debtors are corporate or reserve holding companies without  
20 employees. And dozens of them have no operations. That's  
21 corporate America, Your Honor. In every corporate structure,  
22 most companies probably don't have employees or operations.  
23 And to say, well, it's a parent company. The parent company  
24 has almost no employees and does no operations. It can't serve  
25 as a venue basis because it's the parent of the whole thing?



**PATRIOT COAL CORPORATION, et al.**

257

1 THE COURT: No, but the focus there was that it was  
2 formed when it was formed and for whatever peculiar reason, it  
3 now has 97,000 dollars in a bank account.

4 MR. HUEBNER: And, Your Honor, we used domicile as the  
5 basis for venue. We didn't have to put any money there. And  
6 you know what? I actually think the integrity point is  
7 important here because I think it cuts so strongly the other  
8 way. Yeah. Maybe somebody else would have done it  
9 differently. Maybe somebody else would have ginned up a sub  
10 and tried to give it some little corporate purpose thirty-eight  
11 days before the filing when they realized things were not going  
12 well at all. Maybe they would have said let's put it in a dah-  
13 dah-dah and --

14 THE COURT: What's a dah-dah-dah, Mr. Huebner?

15 MR. HUEBNER: Well, I'm a dum-dum, right? You know,  
16 in other words, your fracking example. Let's say that we  
17 wanted to consolidate the fracking business under a new New  
18 York holding company and see if we wanted to sell it later.  
19 You know, lawyers can think of a lot of clever things, right?  
20 We didn't do that. We just didn't do it. We said we need to  
21 save these companies. We have massive ties to New York. We  
22 think New York is best. In a crazy coincidence, because this  
23 is a very rare fact pattern, out of ninety-nine companies,  
24 there's not one that happens to have been headquartered in New  
25 York or happens to have had a two-page piece of paper, a

**PATRIOT COAL CORPORATION, et al.**

258

1 certificate of incorporation in New York or happens to have a  
2 principal asset. You know, there are all sorts of cash  
3 concentration companies, SPD. We just didn't have it. I can't  
4 change that. My job was to figure out what was best for all  
5 these companies and all their creditors. And we were very  
6 upfront. If we had to file, we wanted to in the best place  
7 possible; we created these entities. I'm not going to hide  
8 from that. I didn't try to hide behind the veil of a business  
9 purpose. This was to satisfy the statute to save these  
10 companies and I'm not sure why that's not a good business  
11 purpose.

12 Reason number 5. Oh, sorry, 4; I skipped one. Reason  
13 number 4. The Winn-Dixie's debtor connection to Jacksonville,  
14 Florida were very different and much greater than these  
15 debtors' connection to West Virginia. The Winn-Dixie's  
16 debtors' operations were located entirely in the United States  
17 and they were headquartered in Jacksonville. I've only  
18 mentioned it once before but it's really important. We're not  
19 headquartered in West Virginia. All the key departments are  
20 not in West Virginia. All the witnesses are not in West  
21 Virginia. The senior executives are not in West Virginia.  
22 That was not the case in Winn-Dixie.

23 Here, as Schroeder says at 4 and 15, we supply  
24 customers in sixteen states and fifteen countries on four  
25 continents. This is not a southeast regional grocery chain

**PATRIOT COAL CORPORATION, et al.**

259

1 that's headquartered in the place they're trying to send venue  
2 and that's where all the assets and creditors and everybody is.  
3 It's just not. It's a much bigger company; way more  
4 international company. It's just different.

5 Reason number 5. This one is sort of hard for me  
6 because I kind of think Judge Drain is just the greatest and to  
7 say that I just -- I'm not quite sure he got something right is  
8 not so easy for me to say. But I'm going to say it.

9 He got Capital Motors wrong. And let me tell you why.  
10 Because the circuit court said the district court did such a  
11 good job describing the facts, we're not going to do it. Turns  
12 out the district court opinion is almost impossible to get.  
13 It's not published. It's not on LEXIS. It's not on Westlaw.  
14 It took us a dickens of a time to find it. And I can represent  
15 almost to a certainty he didn't have it because nobody  
16 referenced it. It wasn't attached to any briefs. There wasn't  
17 a transcript. Nothing. From the circuit court opinion, the  
18 way he described the facts is entirely why I think I would have  
19 decided also. But those were not the facts. What actually  
20 happened was -- and the district court opinion lays this out --  
21 there was a Maryland corporation and a Louisiana corporation  
22 that both had the same name. He thought that there was a New  
23 York corporation created and that that was the bad venue fact.  
24 It wasn't. The day before Chapter 11 they moved the Louisiana  
25 LeBlanc under the Maryland one just to get it into New York for

**PATRIOT COAL CORPORATION, et al.**

260

1 bankruptcy purposes even though moving it violated a pledge  
2 agreement that said we will never move the Louisiana stock  
3 company except to close the transaction.

4 Now I don't want to defend Capital Motor and say this  
5 proves that the day before a filing, the Second Circuit, 1953,  
6 said you can manipulate the venue statute because I don't need  
7 to prove any of that. I don't think it's true. I said to you  
8 before many, many, many cases should be transferred.  
9 International Filter, EB, Dunmore, lots of them. Get out of  
10 New York. You don't deserve to be here. You shouldn't be  
11 here. Get out. But the reality is Judge Drain's Winn-Dixie  
12 opinion rested on a reading of Capital Motor that, very  
13 respectfully and hesitantly, I suggest simply is not what the  
14 facts of the case were.

15 THE COURT: Well, I think it -- his ruling didn't rise  
16 or fall on that issue. I think his ruling, which I've now read  
17 many, many times was -- took into account many factors having  
18 to do with the unique facts in that case which you've already,  
19 frankly, pointed out. Not surprisingly, you've identified many  
20 of the same factors that I did. So --

21 MR. HUEBNER: Right. And --

22 THE COURT: -- without agreeing or disagreeing --

23 MR. HUEBNER: -- I'm ready to move on. Ready to move  
24 on from Capital Motors.

25 THE COURT: -- I don't think that that's -- I don't

**PATRIOT COAL CORPORATION, et al.**

261

1 think that that would have changed Judge Drain's ruling, but  
2 that's pure speculation.

3 MR. HUEBNER: Right. And I'm right there with you,  
4 Your Honor. But I felt obliged to mention it because it was  
5 addressed in the briefs and he clearly did say Capital Motors  
6 says X.

7 THE COURT: Right.

8 MR. HUEBNER: And none of the movants had anything in  
9 response. And we said here's the actual case, here's what  
10 actually happened. There wasn't even a New York corporation  
11 issued. They just said, no, Judge Drain got it right and  
12 that's not really -- I think we deserve more of a response.

13 Reason number 6. The U.S. Trustee is urging this  
14 Court to overrule the Second Circuit's nuanced facts and  
15 circumstances, look at what is best for each estate standard.  
16 They told you this morning they're not asking for a per se  
17 rule. With all due respect, I disagree. What they're asking  
18 for is exactly a per se rule.

19 Your Honor, we only needed one fact and we got it.  
20 That paragraph of the stipulation that says any time the venue-  
21 generating companies were created for the purpose of venue, any  
22 and every time, we're done. That case must leave. That's what  
23 they want. They've been very upfront. I call that a per se  
24 rule. They don't want to --

25 THE COURT: But I don't necessarily, and I had this

**PATRIOT COAL CORPORATION, et al.**

262

1 conversation, I think, with Mr. Goodchild several hours ago --  
2 that they may want that per se rule but I don't have to give  
3 them that per se rule.

4 MR. HUEBNER: And --

5 THE COURT: It's fact and circumstances. These facts.  
6 These circumstances.

7 MR. HUEBNER: I agree. And my point is when I argued  
8 the interest of justice case law, the point is the actual cases  
9 look at lots of facts and circumstances, including what's best  
10 for the estate --

11 THE COURT: So let's put a fine point on this one. In  
12 your view, when there's an analysis that was done similar to  
13 the analysis that you say is reflected in the Schroeder  
14 declaration was done here, there's nothing wrong, it's not  
15 inconsistent with the interest of justice, for the day before  
16 the Chapter 11 filing of a huge corporate family involving  
17 billions of dollars of debt for you to incorporate the day  
18 before and then attach that to your petition and come down here  
19 to Bowling Green and we're done; we shouldn't have to talk  
20 about it anymore. Does that feel right to you?

21 MR. HUEBNER: No. It's wrong. It doesn't feel right  
22 at all. And that's what I was trying to say before. That's  
23 why the facts about our massive pre-existing New York ties and  
24 our massive pre-existing New York creditors and the fact that  
25 unlike the movants saying West Virginia law, the fact that New

**PATRIOT COAL CORPORATION, et al.**

263

1 York law actually governs most of our revenue stream --

2 THE COURT: But the venue statute doesn't say that.

3 MR. HUEBNER: Correct.

4 THE COURT: It doesn't say when you have all this  
5 other stuff, right, contracts --

6 MR. HUEBNER: Right.

7 THE COURT: -- lenders, funded debt, right, it doesn't  
8 say that then it's okay.

9 MR. HUEBNER: Right.

10 THE COURT: It doesn't say that.

11 MR. HUEBNER: And that's where 1412 comes in. And  
12 that's exactly the point. 1408 is very technical and, frankly,  
13 very easy to satisfy. And as I'm going to talk about when I  
14 get to reasons 9 and 10, lots of people talk about changing  
15 that because they think that any company can already file  
16 basically anywhere in the country by the coincidental  
17 happenstance where one of their hundred subs happens to have,  
18 frankly, from a policy perspective, an irrelevant and trivial  
19 connection.

20 THE COURT: But it's more than that. It's where their  
21 attorneys decide to file. It's totally the debtors' attorneys'  
22 call. The debtors' call. Totally. Under your formulation,  
23 right, you decide, gee, the weather's nice in southern  
24 California this time of year.

25 MR. HUEBNER: Right.

**PATRIOT COAL CORPORATION, et al.**

264

1 THE COURT: Going to hire a bunch of lawyers in Los  
2 Angeles and I'm going to come up with an analysis. And if the  
3 analysis comes out the right way and it's not inconsistent with  
4 fiduciary duties, let's go have a case in Los Angeles. Right?  
5 And that can't be right.

6 MR. HUEBNER: I agree, Your Honor, and which is why,  
7 if I were on the other side of that, I would take International  
8 Filter, Dunmore Homes, EB Capital, I would take discovery. I  
9 would figure out what the actual facts were, where are your  
10 creditors located, what is your debt governed by, do you have  
11 prior ties, did you negotiate substantial things here, do you  
12 have massive major parties already in California? And if those  
13 things were not true, this would be Dunmore Homes and you would  
14 throw us out. But the issue is that in this case which is, I  
15 think, ultimately, a very narrow holding, which is where a  
16 massive company has huge, monstrous uncontested pre-existing  
17 ties to New York in many ways and has record evidence that it  
18 filed for all the right reasons exactly as contemplated by the  
19 statute, the mere fact that they had to take the final step in  
20 ensuring venue --

21 THE COURT: Let me focus on that. We all agree,  
22 broken record, you don't have the burden, not your burden. But  
23 given all the citations that you've made to Mr. Schroeder's  
24 declarations -- and again, not breaching attorney-client  
25 privilege -- but you nonetheless decided to stipulate and not



**PATRIOT COAL CORPORATION, et al.**

265

1 put him on the witness stand.

2 MR. HUEBNER: Sure. I mean, I guess I'll have to  
3 explain it the way a litigator would. We didn't have any  
4 burden. Unlike most movants who just said I don't have the  
5 burden, we have dozens and dozens of facts and they have none.  
6 They took no discovery. They didn't examine our guy. They  
7 didn't take a deposition. They didn't ask for one document.  
8 So why should I possibly say, when I'm able to give you dozens  
9 of record evidence cites as the nonmovant on a discretionary  
10 matter, just to nail the fiftieth nail in the coffin but expose  
11 the risk of everybody in this courtroom including probably some  
12 pretty clever folks can now have at it as a witness, my  
13 obligation is to do what's best for the client. And I have no  
14 reason in the world to do that when everything the Court needs  
15 in spades is there and when the only evidence on the other side  
16 came in in reply briefs, and all that says is we, the union,  
17 are in West Virginia and we, the sureties, think that the  
18 debtors have a lot of mining permits. I just think the  
19 asymmetry on this is just -- I've almost never seen a  
20 proceeding like this where people allege such weighty matters  
21 are at issue and they're so passionately focused but they don't  
22 want any discovery and they don't want to cross-examine the  
23 witness and they don't want any documents? Maybe they really  
24 want us to win, Your Honor. And maybe --

25 THE COURT: I don't know.

**PATRIOT COAL CORPORATION, et al.**

266

1 MR. HUEBNER: -- this is a political statement. I  
2 have no idea. And I've done, I think, a pretty disciplined job  
3 about not speculating about the "real reasons". I'm not going  
4 to start now. I can just tell you the facts. Those are the  
5 facts.

6 THE COURT: All right. Let's keep going because  
7 it's --

8 MR. HUEBNER: I'm almost done.

9 THE COURT: It's fifteen after 5 and we've got a lot  
10 more folks to hear from.

11 MR. HUEBNER: Almost done. Reason number 7. The  
12 United States Trustee is asking you to violate governing  
13 Supreme Court precedent.

14 THE COURT: That's a big one.

15 MR. HUEBNER: It is. And it's a new one. So here it  
16 is.

17 THE COURT: Supreme Court's -- they're big.

18 MR. HUEBNER: Yeah, they're big. They're big. Why am  
19 I saying this? What's the basis for this contention?

20 In two cases in 1996, Your Honor, United States v.  
21 Noland, 517 U.S. 535, and United States v. Reorganized CF&I  
22 Fabricators of Utah, 518 U.S. 213, what the lower court did  
23 was, they said there's one statute in the Code that says X.  
24 But X works a result we think is unjust. So we're going to say  
25 that using a different provision of the Code, which is an

**PATRIOT COAL CORPORATION, et al.**

267

1 equitable provision, every time we see X, we're going to say  
2 that the equitable provision overrides the actual provision.  
3 And in that case, there was a priority provision and what the  
4 case is centered on was the lower court saying, you know, it's  
5 not fair that tax penalties have priority. The government's  
6 being overpaid at the expense of innocent creditors. So every  
7 time we see a tax penalty, we're going to take away the 503  
8 priority under Section 510(c). We're going to say it's just --  
9 it's inequitable, it's wrong, in order to do that. The Supreme  
10 Court said absolutely not. If you want a categorical rule that  
11 any time X, the result is Y, and now we're staying the primary  
12 statute, you go to Congress. Courts are not allowed to take  
13 equitable provisions of the Code and use them to say here's a  
14 category of conduct under a different part of the Code that any  
15 time I see it, equitably, I'm going to reverse the Code section  
16 that's been satisfied.

17 THE COURT: I'll remind you of this when you make a  
18 105 argument to me sometime.

19 MR. HUEBNER: With all due respect, Your Honor, I  
20 don't make a lot of 105 arguments.

21 THE COURT: That's good.

22 MR. HUEBNER: And there may come a day in this case,  
23 and maybe I'll rue this, but this is, I think, such a great  
24 analogy. 1408 --

25 THE COURT: Let me give you a different one, because I

**PATRIOT COAL CORPORATION, et al.**

268

1 totally agree with what you just said, and I don't know that  
2 the U.S. Trustee would disagree with that, okay? But let me  
3 give you a different one. There's a principle. I'm probably  
4 not going to state it very eloquently, but there's a principle  
5 that says that Courts should not interpret clear -- even clear  
6 statutory provisions that lead to absurd results.

7 MR. HUEBNER: Yes, Your Honor.

8 THE COURT: Okay? So what you and I have been talking  
9 about for the last forty minutes or so involves reading 1408 in  
10 a way that allows, under certain circumstances, a debtor to go  
11 out and form a corporation in a venue, and base venue on that,  
12 and thereby -- thereby rendering the venue statute virtually  
13 meaningless.

14 MR. HUEBNER: Yes, Your Honor.

15 THE COURT: Isn't that an absurd result that the  
16 Supreme Court would say that I need to avoid?

17 MR. HUEBNER: Your Honor, I think my answer is that a  
18 facts and circumstances ruling on all issues that went into  
19 that case is exactly what 1412 says you should do. What the  
20 U.S. Trustee is saying is anytime that one fact exists,  
21 irrespective of all other facts, you must transfer. And that's  
22 the point.

23 And let's go to Winn-Dixie for a second. That's my  
24 whole point. Winn-Dixie was totally different on the facts and  
25 on the record evidence and on the motivations and on the from

**PATRIOT COAL CORPORATION, et al.**

269

1 versus to and on the New York nexus and on the creditors, so in  
2 that case the -- and I'll use her word just once -- the  
3 manufacture venue, and then I'm not going to use it ever again,  
4 should have resulted in transfer. And the debtor consented,  
5 because they realized it wasn't good for us. That's the point.  
6 That's different than a categorical rule that says any time I  
7 see --

8 THE COURT: Okay, well, go to Judge Drain's narrow  
9 ruling. And by the way, this is the same Judge Drain who did  
10 not allow the Hostess Company to reject the Teamsters'  
11 agreement.

12 MR. HUEBNER: That's correct, Your Honor.

13 THE COURT: Okay. We're talking about the same Judge  
14 Drain. All right. So we're going to find out soon whether we  
15 have Twinkies, okay, which I'm not going to say anything more  
16 about but --

17 MR. HUEBNER: But to be clear, Your Honor, I'm going  
18 to represent to you that they will not be eaten in this room.

19 THE COURT: That's fair.

20 MR. HUEBNER: Period.

21 THE COURT: That's good news. All right. But I think  
22 to the extent that you can identify a narrow ruling in Judge  
23 Drain -- in the transcript of Winn-Dixie. I think it's at page  
24 170 starting at line 12: "On the other hand, I think" --

25 MR. HUEBNER: This goes up to 164. Go ahead, Your

PATRIOT COAL CORPORATION, et al.

270

1 Honor.

2 THE COURT: No, no, no. Let's wait until you get it.

3 MR. HUEBNER: Oh, wait. It's an ex -- I'm sorry.

4 It's an exhibit to People's pleadings.

5 THE COURT: It is. It's an exhibit to Ms. Schwartz's  
6 pleading.

7 MR. HUEBNER: Your Honor, I have it. I apologize for  
8 the delay.

9 THE COURT: Okay. No problem.

10 You there?

11 MR. HUEBNER: Page 170.

12 THE COURT: Page 170 of the transcript that I have. I  
13 think it was the one that was attached to --

14 MR. HUEBNER: Yeah. There's -- I believe it's --

15 THE COURT: Yeah, okay.

16 MR. HUEBNER: -- unpublished, Your Honor, so there's  
17 just this one transcript.

18 THE COURT: Okay. "On the other hand, I think that  
19 the interests of justice require transfer of venue where,  
20 again, the facts were created to fit the statute. In that  
21 sense, you are building the shop that you choose to act in as  
22 opposed to going to it." I don't know if "shop" is the exact  
23 word, but that's what the transcript says.

24 So isn't that -- that's the narrow ruling, right?

25 Were you going to address that?

**PATRIOT COAL CORPORATION, et al.**

271

1 MR. HUEBNER: Well, Your Honor, that's sort of what  
2 numbers 1 through 11, I'm hopefully trying to do which is that  
3 ruling was based on the facts of that case, which point number  
4 1 was the debtor consented and says to fiduciary, please send  
5 me home. Number 2, as you pointed out yesterday, and I think  
6 we have the pin cite for it, the only evidence about why they  
7 filed in New York was to run from Jacksonville, from press,  
8 right? 3 was a stipulation that the filing debtors had no debt  
9 and no debt and --

10 THE COURT: Well, I started the citation too late.  
11 Let's back up to page 169 at line 19: "The forum shopping that  
12 is properly decried in cases like Eclair Bakery and Abacus  
13 Broadcasting and In Re: Miroku (ph.) USA involve efforts by  
14 debtors who were already in trouble in one forum trying to  
15 evade that forum to get a better result somewhere else." So  
16 that's the running to -- running away from issue. In my mind,  
17 that is improper forum shopping. And I think, Mr. Huebner, you  
18 don't disagree.

19 MR. HUEBNER: No, I don't disagree at all.

20 THE COURT: But that's not this case, right? That's  
21 what you said.

22 MR. HUEBNER: I don't disagree on either count.

23 THE COURT: Okay.

24 MR. HUEBNER: One, that's what should happen, and two,  
25 that is emphatically not this case.

**PATRIOT COAL CORPORATION, et al.**

272

1 THE COURT: Okay. All right. And then Judge Drain  
2 goes on to say, "I do not believe it is otherwise improper to  
3 file within a district that Congress has expressly created for  
4 one. In fact, it may well be a duty to do so based on one's  
5 analysis of all the facts at hand." Still good, right?

6 MR. HUEBNER: Yeah.

7 THE COURT: Yeah. And then he says, "On the other  
8 hand."

9 MR. HUEBNER: Yep.

10 THE COURT: So then we're down to the kernel of it,  
11 right?

12 MR. HUEBNER: Yes, Your Honor.

13 THE COURT: Okay.

14 MR. HUEBNER: And again, that's why I'm saying that  
15 this is not Winn-Dixie and I'm not going to get up here and say  
16 Judge Drain would have ruled for Patriot if he were sitting  
17 there right now and this were his case, because I don't know  
18 that. What I do know is that this case is radically different  
19 than Winn-Dixie, and with all due respect, arguments like CF&I  
20 and Noland, and another thing I'm about to get to in about ten  
21 seconds, which was a subsequent development since Winn-Dixie, I  
22 think leave no question that a different result should obtain  
23 in this case on these facts and circumstances including the  
24 massive New York creditors and the massive New York ties.  
25 Remember, and just let me say this, too, which I haven't said



**PATRIOT COAL CORPORATION, et al.**

273

1 before, the committee has only one function here which is --

2 THE COURT: Well, I'm going to -- I'm anxiously

3 looking forward to talking to the committee so --

4 MR. HUEBNER: -- which is to be the fiduciary for all  
5 creditors. They have no other goal on them but to do what's  
6 best. Their on our side; that matters a lot because even if  
7 you say, you know, complex, debtors this and -- they came and  
8 took a fresh look and said what's best for unsecured creditors,  
9 and they're on our side.

10 So Your Honor, that's number 7 which is CF&I and  
11 Noland. And again, the facts of our case versus Winn-Dixie  
12 show you as a policy matter -- there are two parts of 7. One  
13 is the legal argument which is the "one fact, you die rule", is  
14 the exact tax --

15 THE COURT: The "one fact, you die" rule?

16 MR. HUEBNER: In other words, if I can prove that  
17 subsidiaries were done for venue, you need to leave  
18 irrespective of all other facts. That, to me, is just like if  
19 you're a tax penalty claim, you must be subordinated  
20 irrespective of all other facts, but from a policy perspective,  
21 the difference in facts for the facts that I think matter  
22 between us and Winn-Dixie show the wisdom of the Supreme Court  
23 thing that you can't make a categorical rule; you've got to  
24 look at every single case with its own facts and circumstances  
25 which, again, no surprise, the governing Second Circuit

**PATRIOT COAL CORPORATION, et al.**

274

1 standard from Manville says it verbatim on a venue transfer.

2 It's not just a precedent from somewhere else; it's grandmother  
3 and mother. All the law says the same thing.

4           Number 8, this is the loophole point, Your Honor, and  
5 again, you may not agree at all; you may agree only in part. I  
6 have no illusions to the contrary. But here is my view and  
7 here's the argument. Judge Drain was actually explicit that he  
8 was closing a loophole that he perceived in 1408. Again, with  
9 all due respect to Judge Drain, as the cases in our brief  
10 make -- as the case -- as we believe the cases in our brief  
11 support, both the Supreme Court and the Second Circuit have  
12 expressly said if a judge finds what they believe is a loophole  
13 in a statute, that's not for judges to fix. That's separate  
14 from the CF&I and Noland where they said specifically  
15 bankruptcy judges can use equitable provisions of the  
16 Bankruptcy Code to fix rules in the Bankruptcy Code they don't  
17 like. This is a more generic statement that is good law both  
18 in the Supreme Court and the Second Circuit. There's a lot of  
19 policy debate about 1408, but everyone admits we satisfied it.  
20 If the U.S. Trustee or the union or the sureties want to see a  
21 different 1408 that says you have to have a separate business  
22 purpose, you have to have been in business for a year, you have  
23 to be more than five percent of the assets, you have to, you  
24 have to, not only could they and should they, but many people  
25 have tried to get the law changed, and Congress hasn't changed

**PATRIOT COAL CORPORATION, et al.**

275

1 it.

2 THE COURT: All right. Well, we could have -- we  
3 could be here for a long time discussing why.

4 MR. HUEBNER: Yep.

5 THE COURT: So we're not going to do that.

6 MR. HUEBNER: We're not. And I want to move on to  
7 number 9.

8 THE COURT: Okay.

9 MR. HUEBNER: So number 8 is closing a loophole, just  
10 the law says you can't do it.

11 THE COURT: Okay.

12 MR. HUEBNER: Number 9 is the new fact which is since  
13 Winn-Dixie, which was decided in 2005, Congress, in fact,  
14 considered amending 1408.

15 THE COURT: All right. But, again, that's my point is  
16 that I don't think we should go into why or why not Congress  
17 did or did not do certain things.

18 MR. HUEBNER: No, I agree with that.

19 THE COURT: Right.

20 MR. HUEBNER: I wasn't going to.

21 THE COURT: It's --

22 MR. HUEBNER: I'm merely noting --

23 THE COURT: It's a tremendously complex political set  
24 of facts, so I don't think that you can put that forth as an  
25 evidence that there was a chance to do it and Congress

PATRIOT COAL CORPORATION, et al.

276

1 rejected.

2 MR. HUEBNER: Oh, no.

3 THE COURT: It hasn't been changed.

4 MR. HUEBNER: Yes. My --

5 THE COURT: It's still the law.

6 MR. HUEBNER: Right. My point is the much narrower  
7 one, much smaller one, which is just Congress is thinking about  
8 this. That's a fact. It's on their agenda now and again, and  
9 that's where it belongs.

10 THE COURT: Well, certain members of Congress are.

11 MR. HUEBNER: Fair enough, Your Honor. Fair enough,  
12 Your Honor.

13 Okay. Reason number 10. So another fascinating  
14 history lesson that I learned from Capital Motor, which I just  
15 did not know before, was that the predecessor to 1408 until  
16 1938 specifically required that an entity be in existence for  
17 three months prior to serving as the basis for venue. That was  
18 changed in 1938 when the Bankruptcy Act was passed.

19 What the U.S. Trustee is basically saying is I kind of  
20 want to change it back myself under the guise of equitable  
21 rulings and, essentially, add a clause to 1408 that says unless  
22 the affiliate use for venue is X, it's just legislation. I  
23 know it's legislation, but it's what 1408 or its predecessor  
24 used to say. The law was changed to not require that, which I  
25 genuinely did not know until I read Capital Motor. But here's

**PATRIOT COAL CORPORATION, et al.**

277

1 what even worse, Your Honor. You asked the U.S. Trustee  
2 yesterday what are the contours of this new ruling you want me  
3 to pass? How far back? What are the facts? Hypotheticals?  
4 And she basically said well, I'm not going to tell you, because  
5 I don't know, right? I'll know it when I see it.

6 And you want to talk about justice and the rule of  
7 law? Justice and the rule of law are that laws are written and  
8 clear and have text and can be interpreted. They're passed by  
9 Congress and signed by the president. Not I'm just the U.S.  
10 Trustee; I'll know it when I see it, and I can't even answer  
11 the Court's questions. How is any company supposed to deal  
12 with the next case when they're told you may get attacked, you  
13 may not. Fracking may be enough, may be too big, may be too  
14 small, maybe six months. I mean, that's why you need laws.  
15 One way or the other, a statutory text is there and it's  
16 interpretable. What they're saying is we'll let you know next  
17 time when we do or don't attack venue, and that's not how  
18 legislation gets passed.

19 And then there's reason number 11, Your Honor. The  
20 policy now being advocated by the U.S. Trustee and their  
21 categorical per se reading of Winn-Dixie is, as Your Honor  
22 noted yesterday, the opposite of the position that they took in  
23 Winn-Dixie. And I'm not saying they're estopped; they can't  
24 speak, just like I certainly didn't say they were late, and  
25 their pleading was untimely, and they shouldn't be allowed to.

**PATRIOT COAL CORPORATION, et al.**

278

1 Of course not. They're the U.S. Trustee. They juggle an  
2 impossible workload with incredible attentiveness, and we're  
3 not going to call foul on that. But there is a policy issue at  
4 stake here, which is in the very case that's basically their  
5 only case the actual U.S. Trustee for the Region 2 at the time  
6 came and said even though the debtors want to leave, and as a  
7 fiduciary matter say we think it's in the best interest of the  
8 estates to go back to Jacksonville, the U.S. Trustee said no.  
9 Listen to the stakeholders. There's over 600 million dollars  
10 of economic creditors, and that's -- you need to consider what  
11 the stakeholders are telling you.

12 Your Honor, that's a pretty radical shift in position  
13 on the only case they have that they say governs and should be  
14 what governs today. And you know, Your Honor, what they're  
15 really, sort of, saying is that even if for every reason in the  
16 world this case should stay in New York -- it saves jobs, it  
17 saves benefits, it saves the company, it gets financing, it has  
18 huge New York ties, nothing else matters -- well, it mattered a  
19 lot in Winn-Dixie, where they had none of those facts and the  
20 debtor wanted to leave, but the creditors alone wanting them to  
21 say was enough. I'm not sure, and they certainly haven't told  
22 us, why they've had such a radical, radical, radical change of  
23 position.

24 And from a policy perspective, Your Honor, look at  
25 Enron. It was .5 percent of the assets. Again, they're not

**PATRIOT COAL CORPORATION, et al.**

279

1 saying to you -- in fact, they were very careful, emphatically,  
2 not to say companies need to have massive subsidiaries with  
3 massive assets or massive debts. They basically said anything  
4 is enough. I just don't see the policy there compared to what  
5 they argued in Winn-Dixie.

6 Your Honor, I'm ready to wrap up. As everybody has  
7 said many times --

8 THE COURT: Well --

9 MR. HUEBNER: I apologize.

10 THE COURT: I keep -- no, no, no. That's fine. You  
11 can wrap up, and then I want to hear who else wants to be heard  
12 so we can estimate how much more time we need.

13 I keep asking everyone to talk to me about what  
14 justice means, the interests of justice means in this case  
15 beyond I win. Everyone who stands up says justice means I  
16 should win. My position is right. And I think what you're  
17 trying to tell me, what you have been telling me, is that you  
18 believe that justice here, putting the convenience issues to  
19 one side, that justice here requires that, notwithstanding the  
20 issues surrounding the formation of the subsidiaries, that  
21 because the debtor did its homework and came to a conclusion in  
22 good faith that it would be best for -- fill in the blank --  
23 its stakeholders, that that's why justice would be served. The  
24 most good for the most stakeholders.

25 MR. HUEBNER: Your Honor --

**PATRIOT COAL CORPORATION, et al.**

280

1 THE COURT: Can you give me a formulation --

2 MR. HUEBNER: Your Honor, there --

3 THE COURT: -- of or, stated differently, to the U.S.

4 Trustee's point, why it's not inconsistent with notions of  
5 justice to allow this to stand.

6 MR. HUEBNER: Sure. Your Honor, I have a multifaceted  
7 answer, and it's --

8 THE COURT: Please.

9 MR. HUEBNER: -- going to take a minute or two. From  
10 a policy perspective, to argue that it would have been just for  
11 these cases to be here if, coincidentally, subsidiary number 88  
12 happened to have been a New York corporation but that it is  
13 unjust for the companies to be here because of the happenstance  
14 of that entirely trivial fact that has no weight in terms of  
15 where the company is located, its workers are located, its  
16 people are located, its creditors are located, its assets are  
17 located, I don't think that justice should turn on a 175-dollar  
18 coincidental certificate of incorporation. I don't think that  
19 if you happen to find a small company out of hundreds of  
20 subsidiaries that that's just; but if with the exact same goal  
21 you realize you're one step away from something that's  
22 critically important to saving a multibillion dollar company,  
23 that's unjust. I think when you look at our New York ties and  
24 our New York creditors and our New York law issues, and you  
25 say -- because this is really important, and with all due



**PATRIOT COAL CORPORATION, et al.**

281

1 respect it was not in the formulation you gave, if we had no  
2 prior connection to New York and didn't have New York creditors  
3 and didn't have New York debt and didn't have a New York law  
4 based revenue stream, and we merely said we think Second  
5 Circuit --

6 THE COURT: But, Mr. Huebner, you have a coal-based  
7 revenue stream.

8 MR. HUEBNER: Yes.

9 THE COURT: It's coal-based.

10 MR. HUEBNER: But, Your Honor, the revenues all  
11 come -- seventy-eight percent of our coal, and this is in the  
12 record evidence as well, is sold pursuant to committed  
13 contracts with third-party purchasers on four continents.  
14 Those purchasers, especially with market prices fluctuating a  
15 lot, right, have a lot of thoughts about their contracts. More  
16 than half of our revenues, the money we get from our worldwide,  
17 I mean, who -- we had Bosnia and Herzegovina in our first day  
18 pleading. I mean, we are all over. The revenue stream and our  
19 fiduciary obligation to protect the revenue stream is largely  
20 under New York contracts. I'm not saying the coal isn't in New  
21 York, but we're getting back to why does the location of the  
22 assets drive where a bankruptcy legal case should be venued.  
23 And, again, very respectfully, if you look at CORCO and Enron  
24 and lots and lots of cases in our brief, I don't think they  
25 disagree. It's black letter law in the Second Circuit that the

**PATRIOT COAL CORPORATION, et al.**

282

1 location of the assets is given almost no weight in a  
2 reorganization case.

3 I know the coal is in West Virginia. But when you  
4 choose bankruptcy you don't say where are our assets. You say  
5 where can we save these companies and save jobs and benefits  
6 and recoveries for innocent creditors. And that's what we did.

7 I think when you choose New York with a pure heart,  
8 where you have massive existing prior connections, with no  
9 evidence of anything negative, and the only evidence is that  
10 you match the statutory goals that are the Second Circuit's  
11 articulated standard of 1412 perfectly -- efficient  
12 administration, convenient to creditors -- it's not just that  
13 you can shop for the law you like. You have to have a material  
14 presence in New York, which is why, again, Dunmore Homes should  
15 have been thrown out. Even if Dunmore Homes came and said we  
16 chose New York because we -- this is a one-issue case. It's  
17 about whether two leases are integrated with one another for  
18 rejection purposes, and New York law is better than California  
19 law on the integration question, so we think we can maximize  
20 value.

21 All right? And then the judge rules the same way. In  
22 other words, your fact pattern. New York is better. And the  
23 judge says no. Your only office is in California. Your  
24 management's in California. Your assets are all in California.  
25 Your employees are all in California. Your owners are in

**PATRIOT COAL CORPORATION, et al.**

283

1 California. Your legal advisors are in California. Your DIP  
2 lender is in California. Get out. You're not allowed to do  
3 that. And if that was what we did, Your Honor, I would be in a  
4 very different place. But none of those facts are true here.  
5 The record evidence is that our ties, our creditors,  
6 convenience, expense, DIP lending, fiduciary duty, there's only  
7 one -- I mean, it's a weird thing, because I have all the  
8 evidence and none of the burden. But the evidence, I believe,  
9 is way, way more than sufficient. I tentatively and  
10 respectfully suggest to satisfy the interest of justice  
11 standard as interpreted in the Second Circuit and elsewhere,  
12 which is that you do consider survival of the companies.

13 I mean, one of my, sort of, things I'm kind of  
14 frustrated about is that in Houghton Mifflin they said we have  
15 no choice. We have no choice. You didn't satisfy the statute.  
16 This is not that case. This is a discretionary --  
17 extraordinary relief, discretionary transfer to rip a debtor  
18 out of its legally sufficient choice of forum.

19 THE COURT: Right. But we would have a different  
20 case, and I totally agree with you. I think everybody agrees  
21 Houghton Mifflin was a different case. It was a by lack of --  
22 a lack of venue under 1408.

23 MR. HUEBNER: No, I agree.

24 THE COURT: And one of the questions that I -- we  
25 would have had -- we would have a different case if, similar to

**PATRIOT COAL CORPORATION, et al.**

284

1 Houghton Mifflin, there were no other movant here, right? If  
2 there were just the United States Trustee saying 1412, I might  
3 say that's nice. Sit down. But that's not what we have. We  
4 have --

5 MR. HUEBNER: Right.

6 THE COURT: We have, in the lead position, the union  
7 joined, and we have the pension fund, who, for reasons that are  
8 still not entirely clear to me, joined the U.S. Trustee instead  
9 of the union, but be that as it may. So we've got different --  
10 this is different. This is new.

11 MR. HUEBNER: Right. And I agree. But which way does  
12 it cut? We have the Washington, D.C. pension funds --

13 THE COURT: Okay.

14 MR. HUEBNER: -- in a company -- let me say one new  
15 thing I haven't said yet -- where the record evidence is that  
16 the majority of their retirees are not in West Virginia.

17 THE COURT: Yes. No. The record evidence --

18 MR. HUEBNER: That's the record evidence.

19 THE COURT: -- is clear that the majority --

20 MR. HUEBNER: So for a Washington --

21 THE COURT: -- of their retirees are not in West  
22 Virginia.

23 MR. HUEBNER: -- guy to come in and say my --

24 THE COURT: But they're not in New York.

25 MR. HUEBNER: I agree with that. But it's not my

**PATRIOT COAL CORPORATION, et al.**

285

1 burden to show that West Virginia --

2 THE COURT: I agree.

3 MR. HUEBNER: -- is where we need to go.

4 THE COURT: We're in radical disagree -- agreement  
5 here.

6 So anything else? I think you've been up there for  
7 quite a long time.

8 MR. HUEBNER: I have, Your Honor. I think that --

9 THE COURT: Not a criticism, just an observation.

10 MR. HUEBNER: I'm trying to basically skip the  
11 whole --

12 THE COURT: No, that's fine.

13 MR. HUEBNER: -- wrap-up, so --

14 THE COURT: Okay.

15 MR. HUEBNER: -- forgive me if I --

16 THE COURT: Sure. Go ahead.

17 MR. HUEBNER: Thirty seconds may save us all more of  
18 me, which is always a good thing.

19 Yes. I'm just going to say a very small part of, Your  
20 Honor, what would have been my closing, which is the thing that  
21 I think is most troubling to me about the U.S. Trustee's  
22 discretionary request here is that they've said they're not  
23 interested in what the impact is on the estates. They're not  
24 interested in what's best for creditors. If we put a witness  
25 up and said we will liquidate if you transfer us to X, they've

**PATRIOT COAL CORPORATION, et al.**

286

1 told you their view is the same. This is it. If you -- you've  
2 already admitted the one fact we need. Because this is  
3 discretionary, for the U.S. Trustee to say we have no interest  
4 in the consequences of transfer, we don't care where you go,  
5 just get out, that is not an appropriate request for a  
6 discretionary transfer, especially where the law in the circuit  
7 says that the judge is supposed to care very much about the  
8 interests of creditors, innocent and all, and the maximization  
9 of value.

10 We and the committee, Your Honor, are fiduciaries. We  
11 do care what it costs. We do care what it risks. We did our  
12 work, and we think we filed for all the right reasons. And you  
13 know, the last thing you said, which is, I think, the last  
14 thing I'm going to jump to for the very last sentence, is it's  
15 not just the U.S. Trustee. It's the U.S. Trustee plus. But  
16 that's where you get into, sort of, who's on what side. And  
17 I'm going to take a monster discount on the joinders that use  
18 the form that we sent all these, in my view, big law firms who  
19 advise their clients. I get -- I'll accept that for argument's  
20 purposes, but I would ask that you think about my arguments as  
21 you're weighing it. Yes, we have the U.S. Trustee plus. But  
22 who's the plus? The plus is one party, a very important one, a  
23 very big one, that has its own reasons, has its own thoughts,  
24 and is one party.

25 We have four sureties, none of whom is from West

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**PATRIOT COAL CORPORATION, et al.**

287

1 Virginia, none of whom have contracts governed by West Virginia  
2 law. Of the top fifty unsecured creditors one, a utility, is  
3 on the U.S. Trustee's side. The fact is that on our side, Your  
4 Honor, we have both fiduciaries, the one that took the original  
5 look and the one that took the new look, and lots of 1412  
6 cases, as one of the movants said yesterday, says in all the  
7 cases the committee's views get a whole bunch of weight, and I  
8 think they should.

9 We have 100 million dollars of bonds. We have 802  
10 million dollars of DIP, albeit better protected unsecured  
11 creditors. But again, we have the top, we have the bottom, we  
12 have the middle, Your Honor. We have lots of creditors. And  
13 by the way, let there be no mistake. There were a bunch of  
14 joinders filed. Caterpillar, top five secured creditor, a huge  
15 party. I've been general, because I didn't want to speak for  
16 that long, right, but there are plenty of big creditors filing  
17 joinders who care a lot, and there's no possible claim that  
18 they just, you know, filed our form under who knows what  
19 circumstances, although my representations to the Court are to  
20 the best of my ability. Almost everybody is on our side. And  
21 that matters a lot, because that's who we're actually supposed  
22 to care about.

23 The prime directive of Chapter 11 is maximizing the  
24 value of estates and keeping companies from liquidating. All  
25 the evidence is that that's what guided us and that's what we

**PATRIOT COAL CORPORATION, et al.**

288

1 believe is the best. There is no evidence that we will do any  
2 better anywhere else and a lot of reasons why we will do worse.  
3 But at the end of the day, and it's weird to end on a technical  
4 point instead of with a dramatic flourish, but I'm going to do  
5 it.

6 This is a contested matter. I had no burden of proof.

7 THE COURT: I understand.

8 MR. HUEBNER: They had it.

9 THE COURT: I said that --

10 MR. HUEBNER: And there's just --

11 THE COURT: -- within the first five minutes of this  
12 hearing yesterday.

13 MR. HUEBNER: The one piece of evidence, because it's,  
14 ultimately, kind of all they got, is that paragraph in the  
15 stipulation, which we freely admit. We think the eighty pieces  
16 of evidence that go around it, that explain why, far more than  
17 carry the day.

18 THE COURT: All right. Thank you.

19 All right. It's almost ten minutes to 6. So by my  
20 count I've yet to hear from the unsecured creditors committee,  
21 the DIP agents, Wilmington Trust and the ad hoc consortium. Do  
22 each of you want time to speak?

23 Mr. Mayer, I'll start with you?

24 MR. HUEBNER: I apologize, Your Honor. I'm hurrying.

25 THE COURT: I'll start with you by -- not with you



**PATRIOT COAL CORPORATION, et al.**

289

1 speaking but by asking you how much time you want to speak.

2 MR. MAYER: Yes, Your Honor. I don't think it's more  
3 than twenty minutes.

4 THE COURT: Okay.

5 MR. MAYER: It depends on how many questions you have  
6 for me.

7 THE COURT: Okay. Fair enough. I'm running out of  
8 steam too.

9 All right. Let me ask Ms. Schonholtz.

10 MS. SCHONHOLTZ: Good afternoon, Your Honor. I'd say  
11 about the same. Twenty minutes.

12 THE COURT: Twenty minutes. And --

13 MS. SCHONHOLTZ: Subject to questions.

14 THE COURT: And you're speaking for both DIP agents?

15 MS. SCHONHOLTZ: No, I'm speaking for BofA and Ms.  
16 Goldstein will speak briefly on behalf of both of us on other  
17 points that I will not address.

18 THE COURT: All right. Ms. Goldstein, how much time  
19 do you think you need?

20 MS. GOLDSTEIN: I am hoping about ten minutes, Your  
21 Honor.

22 THE COURT: Okay. Twenty and twenty and ten is fifty.  
23 Who's going to speak on behalf of Wilmington Trust?

24 MR. RECKMEYER: That's me, Your Honor. Jeremy  
25 Reckmeyer from Andrews Kurth.

**PATRIOT COAL CORPORATION, et al.**

290

1 THE COURT: Okay. How much?

2 MR. RECKMEYER: Ten minutes, fifteen minutes.

3 THE COURT: Okay. We're up to an hour. Last but not  
4 least?

5 MR. STARK: Thank you, Your Honor. Robert Stark from  
6 Brown Rudnick. I crossed out broad swaths of my outline. I  
7 would have said a half an hour or a little more when we got  
8 started. Hopefully fifteen minutes, maybe even less.

9 THE COURT: Okay. All right. So since lawyers are  
10 always wrong about their time estimates -- someone's raising  
11 their hand in the back. Yes? You'll have to come forward so  
12 the microphone can pick you up.

13 MS. DAVIDSON: Yes. Kristi Davidson, Buchanan  
14 Ingersoll & Rooney, for the Caterpillar creditors. Just a  
15 couple of minutes. Very brief remarks.

16 THE COURT: Okay. All right. Thank you. All right.  
17 Now, what about rebuttal? We're going to do that too, aren't  
18 we? Ms. Jennik?

19 MS. JENNIK: Yes, Your Honor. I would also estimate  
20 twenty minutes. I will try to be brief.

21 THE COURT: Okay.

22 MR. EARLY: Blaine Early for the sureties, Your Honor.

23 THE COURT: Yes, Mr. Early.

24 MR. EARLY: Just a few minutes. Five at the most.

25 THE COURT: Okay. Ms. Schwartz?

**PATRIOT COAL CORPORATION, et al.**

291

1 MS. SCHWARTZ: I would estimate a half an hour.

2 THE COURT: Whoa. Okay. All right. Let's try to  
3 figure out what the smartest way to do this is.

4 (Pause)

5 THE COURT: All right. Let's do this. Let's take a  
6 comfort break for ten minutes for the benefit of everybody here  
7 and who are watching. We'll come back at 6 o'clock. We'll  
8 turn to the rest of the parties who join the debtors' position,  
9 and then at that point it may be best to take a very, very  
10 quick dinner break for twenty to twenty-five minutes, and then  
11 we'll wrap up, and with any amount of luck we'll get out of  
12 here by about 9 o'clock tonight. I apologize, but I think we  
13 need to keep going until we get this done. Does anybody have  
14 an issue with proceeding along those lines? I'm even willing  
15 to relax my no-food rule as long as you clean up after  
16 yourselves.

17 MR. HUEBNER: Your Honor, let me just make a  
18 suggestion that might be helpful.

19 THE COURT: I don't know if people have personal  
20 obligations, which I certainly can appreciate.

21 MR. HUEBNER: What we would be happy to investigate is  
22 if we could actually bring in dinner for everybody so that --

23 THE COURT: Sure.

24 MR. HUEBNER: -- the travail of getting down and up  
25 and security --

**PATRIOT COAL CORPORATION, et al.**

292

1 THE COURT: Excellent idea, Mr. Huebner.

2 MR. HUEBNER: We have a conference room. We'll try to  
3 see if we can order from someplace local and just bring in --

4 THE COURT: All right.

5 MR. HUEBNER: -- sandwiches --

6 THE COURT: You'll have to send somebody down to the  
7 front when the food arrives and have them bring it upstairs. I  
8 can't have the court officers bring the food upstairs.

9 MR. HUEBNER: We for sure will. But may we tell the  
10 court officers that Your Honor has permitted us --

11 THE COURT: Absolutely.

12 MR. HUEBNER: -- to bring in dinner for the courtroom?

13 THE COURT: That's an excellent idea.

14 MR. HUEBNER: And we'll try to serve it in the  
15 breakout room so that --

16 THE COURT: Please.

17 MR. HUEBNER: -- nobody is dripping in your courtroom.  
18 That would be a lot of expensive carpet repairs.

19 MS. SCHWARTZ: Your Honor, just for the record, as I  
20 know Your Honor knows --

21 MR. HUEBNER: Oh. No dinner.

22 MS. SCHWARTZ: -- as a government agency we will  
23 have --

24 THE COURT: You'll --

25 MS. SCHWARTZ: -- our own dinner. We --

**PATRIOT COAL CORPORATION, et al.**

293

1 THE COURT: Very good.

2 MS. SCHWARTZ: Okay. Thank you.

3 THE COURT: All right. As will the Court and members  
4 of the Court's staff.

5 MR. HUEBNER: Right. Your Honor, this isn't like  
6 Persephone and the three orange pits. Nobody has to eat our  
7 food, but they're welcome to if they can.

8 THE COURT: All right. Very good. Let's take that  
9 comfort break. We'll come back in ten minutes.

10 (Recess from 5:52 p.m. until 6:08 p.m.)

11 THE COURT: Okay. Mr. Mayer, good evening.

12 MR. MAYER: Good evening, Your Honor. And for the  
13 record, Thomas Moers Mayer; Kramer Levin Naftalis & Frankel for  
14 the official committee of unsecured creditors.

15 Your Honor, the committee supports the debtors'  
16 objection in full --

17 THE COURT: Mr. Mayer, step back a little bit from the  
18 microphone because the intelligence that we're getting is that  
19 when we get too close, it doesn't transmit well over the video  
20 system.

21 MR. MAYER: Oh, okay, Your Honor. The intelligence I  
22 was getting is that people were hard to hear so I was  
23 overcompensating but I'm happy to step back.

24 THE COURT: Okay. Let's just keep going.

25 MR. MAYER: The committee, as Your Honor knows, is the

**PATRIOT COAL CORPORATION, et al.**

294

1 statutory fiduciary for all unsecured creditors in this case  
2 and we do have only one goal which is to maximize recoveries  
3 for unsecured creditors generally. And we believe that  
4 creditors will do best if the case remains in New York.

5 Your Honor has repeatedly asked why that judgment is  
6 made and I presume if I wait, you will ask me why we made that  
7 judgment. We spent more time on the question of substantive  
8 law differences between the various jurisdictions than on  
9 anything else. I'm not going to get into privileged matters  
10 here, but I am authorized to state that we delivered a detailed  
11 memo to the committee analyzing the differences in substantive  
12 law, comparing applicable precedence in New York, Charleston  
13 and St. Louis relating to four major issues in the case. We  
14 didn't recommend; we just analyzed and drew conclusions from  
15 the cases. We gave it to our committee and we asked our  
16 committee where do you want to be. They read the memo, they  
17 deliberated, and on August 16th which was sometime after the  
18 original motions were filed -- I believe the union's original  
19 motion was filed the day the committee was formed -- on August  
20 16th, the committee approved, voted to support the debtors'  
21 position that venue should stay in New York. And the committee  
22 later approved, after extensive comments, the objection to the  
23 transfer that we filed on August 27th.

24 The record shows that three individual committee  
25 members had taken different positions and there is nothing

**PATRIOT COAL CORPORATION, et al.**

295

1 wrong with that. And individual committee member always has  
2 its own interests to protect and advance and service on a  
3 committee doesn't force a member to sacrifice its own rights  
4 and interests.

5 I have a couple of supplemental points and corrections  
6 with respect to the individual dissenting members who filed  
7 motions. I want to revisit one of Mr. Huebner's observation  
8 that the union has claims of nine of the ninety-nine debtors.  
9 Mr. Huebner argued that that goes to the weight of the union's  
10 argument and I submit it also raises standing issues. If you  
11 grant the union's motion to transfer all of the debtors, you  
12 basically have to hold that the union has standing to transfer  
13 venue of cases where it's not a party-in-interest. And if  
14 you're --

15 THE COURT: Whoa, whoa, whoa, whoa. Slow down.  
16 Unpack that a little bit for me.

17 MR. MAYER: The union has collectiv --

18 THE COURT: Because, by the way, you didn't make that  
19 argument in your brief.

20 MR. MAYER: We adverted to it in our brief, actually,  
21 Your Honor. Hold on.

22 THE COURT: Where's the adversion (sic)? The  
23 advertisement?

24 MR. MAYER: Wrong binders.

25 THE COURT: Your brief was largely about convenience,

PATRIOT COAL CORPORATION, et al.

296

1 Mr. Mayer.

2 MR. MAYER: That is correct.

3 (Pause)

4 MR. MAYER: You are correct, Your Honor, that we did  
5 not specifically mention standing. At the bottom of page 5, we  
6 say, "Nor is it clear that allowing one creditor with claims  
7 against a subset of debtors to compel a transfer of venue of  
8 all debtors in a jointly administered proceeding would serve  
9 the interest of justice."

10 THE COURT: Okay. But it's not a standing argument.  
11 It's an interest of justice argument.

12 MR. MAYER: That is correct.

13 THE COURT: Okay.

14 MR. MAYER: If you believe that this is -- I am  
15 untimely raising a new issue. I'm prepared to move on. I have  
16 a few --

17 THE COURT: I think that's a good idea.

18 MR. MAYER: Okay. In that case, in reference to the  
19 interests of justice, I want to address very briefly what I  
20 think may be an incorrect assumption in some of today's  
21 argument. The assumption that the union has a presence at  
22 every debtor with a producing mine, at a minimum I can say that  
23 that assumption has not been proved. And I think I can assert  
24 based on this record --

25 THE COURT: I think you're right. I don't think



**PATRIOT COAL CORPORATION, et al.**

297

1 that's a fact in evidence that the union has a presence at  
2 every producing mine. One of the questions that I asked at the  
3 very beginning that I think Ms. Jennik couldn't answer goes to  
4 exactly this point; the distribution, geographically and by  
5 mine and by numbers of workers, union versus nonunion, right,  
6 West Virginia versus non-West Virginia. Right? This is what  
7 you're talking about to some extent?

8 MR. MAYER: Yes. Yes, Your Honor.

9 THE COURT: Okay.

10 MR. MAYER: You made some comments today -- and the  
11 union is a critical player in this case and there's no question  
12 about that, and the union pension fund is a critical player in  
13 this case. But it's not, as the record shows, there's coal  
14 that comes out of the ground that's produced by union members  
15 and the record does not show that all coal that comes out of  
16 the ground --

17 THE COURT: All right --

18 MR. MAYER: -- is produced by union members.

19 THE COURT: Are the non -- so the union is one of the  
20 members of the committee?

21 MR. MAYER: Yes, it is.

22 THE COURT: Okay. And every member of the union,  
23 Patriot employee-wise, is one of your constituency?

24 MR. MAYER: Well, Your Honor, the union is the  
25 spokesperson for the employees and shortly for the retirees.

**PATRIOT COAL CORPORATION, et al.**

298

1 THE COURT: But as employees --

2 MR. MAYER: Um-hum.

3 THE COURT: -- right, wearing their employee hat as  
4 opposed to their union hat, they're part of your constituency?

5 MR. MAYER: Yes, Your Honor. I'm trying to be careful  
6 here --

7 THE COURT: No, I underst --

8 MR. MAYER: If I were to pick up the phone and call a  
9 union member, I think the union would kill me.

10 THE COURT: Well, let's not --

11 MR. MAYER: The union stands between me and each  
12 member.

13 THE COURT: Let's -- I think what you mean to say is  
14 that the union might object and be unhappy.

15 MR. MAYER: Okay.

16 THE COURT: This is -- I'm serious.

17 MR. MAYER: Okay.

18 THE COURT: All right?

19 MR. MAYER: Okay. I overspoke.

20 THE COURT: Okay. Of course you're not going to pick  
21 up the phone directly to somebody who's represented by other  
22 counsel. Of course you're not going to do that. That's not my  
23 point.

24 My point is that just as the union members, I think,  
25 are a part of your constituency so are the nonunion members,

**PATRIOT COAL CORPORATION, et al.**

299

1 employees. Right?

2 MR. MAYER: That is correct.

3 THE COURT: I mean, gener --

4 MR. MAYER: To the extent they have unsecured claims.

5 THE COURT: As a general matter, the employees of a  
6 debtor are part of the unsecured creditors' constituency.

7 MR. MAYER: Yes. Yes, Your Honor.

8 THE COURT: Okay. So do you have anything further?  
9 Putting to one side the issue of burden which we all agree is  
10 on the movants. We've said it twenty times now. Do you have  
11 any information on this point? Where are those employees?  
12 Where do they work? What debtors do they work -- what mines do  
13 they work for owned by which debtors? I still don't have an  
14 answer to that question.

15 MR. MAYER: Your Honor, that's a project that the  
16 committee has been undertaking with the debtors for about the  
17 last three weeks. And yes, we have substantial additional  
18 information but I am not prepared to introduce it into the  
19 record at this time. I am bound by a confidentiality  
20 agreement --

21 THE COURT: Okay.

22 MR. MAYER: -- and it's sensitive.

23 THE COURT: Okay.

24 MR. MAYER: Your Honor asked whether it's in the  
25 interest of justice that employees be able to attend the

**PATRIOT COAL CORPORATION, et al.**

300

1 hearing. I want to address that a little bit. I would call  
2 that public access as kind of an interest of justice concept.

3 THE COURT: Right.

4 MR. MAYER: And I understand why you raise it and I  
5 certainly understand why the union is interested in promoting  
6 it, and there's nothing wrong with that.

7 I want to go back to a case Mr. Huebner mentioned. I  
8 won't belabor it but there are, I think, two points about CORCO  
9 that are particularly relevant and I'm not sure Mr. Huebner  
10 stressed them; they're obvious. The first is that access to  
11 the public in CORCO involved employees and consumers in a  
12 Spanish-speaking venue. Now, of course, the proceedings would  
13 have been in English, but the difference of access between  
14 Puerto Rico and San Antonio was substantial. And second, the  
15 case was decided in 1979 at a time of much lesser  
16 telecommunication convenience. And as Your Honor knows, the  
17 Fifth Circuit found that that public access concept was not  
18 sufficient to move venue or to at least compel a transfer of  
19 venue from San Antonio to Puerto Rico. And I just wanted to  
20 make that point.

21 THE COURT: Okay.

22 MR. MAYER: As you've already observed, Judge Drain in  
23 Winn-Dixie questioned how many times employees actually attend  
24 hearings.

25 THE COURT: Right.

**PATRIOT COAL CORPORATION, et al.**

301

1 MR. MAYER: Now, I think that's going to be different  
2 in this case because we have a union. And that's fine,  
3 that's -- nothing wrong with that. That's why there are  
4 unions. But it's also why the union is the representative of  
5 the employees and retirees. And I note that not one of the  
6 thousands of nonunion employees, to my knowledge, has joined  
7 any motion to move venue from New York.

8 THE COURT: But that's unrealistic. I mean, early  
9 yesterday somebody made a reference to the Getty Petroleum case  
10 that's here where on any number of occasions we had a courtroom  
11 full of gasoline station operators, who by the way were  
12 represented by counsel. So I think it's a stretch to make the  
13 observation that look, no employees have come forward.

14 This is complicated and difficult enough when you're  
15 represented by someone like the union. But I don't think it's  
16 fair to suggest that the employees should have organized  
17 themselves and figured out how to pay for it.

18 MR. MAYER: No, I understand that, Your Honor. But I  
19 think we are also familiar with the phenomenon of letters  
20 written to the Court. I expect we're --

21 THE COURT: Oh, I'm very familiar with that.

22 MR. MAYER: -- that we're going to see some of that in  
23 this case. So in a sense, if you're looking at unionized  
24 employees versus nonunionized employees, you have a little bit  
25 of a cousin of the creditor-solicitation questions you asked

**PATRIOT COAL CORPORATION, et al.**

302

1 Mr. Huebner. The reason there is the interest in the case  
2 leading to the need for the televised proceedings in West  
3 Virginia and in St. Louis is because there is a union. And as  
4 I said, there's nothing wrong with that, but it's sort of a --  
5 it's a -- you might say it's a legitimately biased sample, but  
6 it is something of a biased sample.

7 Mr. Huebner has already noted that movants have failed  
8 to prove that Charleston is more convenient than New York for  
9 any of the movants themselves. And even though it's not our  
10 burden and I know Your Honor is not particularly interested in  
11 the declaration that we've provided, we do believe we proffered  
12 evidence that for the union, the pension fund and the sureties,  
13 Charleston appears to be less convenient than New York. And  
14 that's true for each of the other committee members as well,  
15 with -- I want to correct one problem with our papers and I  
16 believe this may address a point that counsel to AEP adverted  
17 to indirectly.

18 We do believe that New York is clearly more accessible  
19 than Charleston for the union and the union pension fund who  
20 are based in Washington, for our equipment vendor in Charlotte,  
21 North Carolina, our bondholder in Florida and our indenture  
22 trustees in Wilmington, Delaware and Boston. The seventh  
23 member is a utility, American Electric Power in Columbus.

24 THE COURT: But let's go -- let's flip it around,  
25 okay?

**PATRIOT COAL CORPORATION, et al.**

303

1 MR. MAYER: Okay.

2 THE COURT: We're talking about how often members of  
3 the debtors work force will attend. Members of the creditors'  
4 committee don't come to every hearing. You have meetings with  
5 them and I suspect that a lot of the time, those meetings are  
6 telephonic.

7 MR. MAYER: Yes, Your Honor, I would --

8 THE COURT: So then --

9 MR. MAYER: -- assume that almost all the meetings are  
10 telephonic.

11 THE COURT: Of course they are because that's the most  
12 efficient way to proceed. So that doesn't advance the ball.

13 MR. MAYER: Your Honor --

14 THE COURT: Maybe I cut you off --

15 MR. MAYER: -- I would take issue with that --

16 THE COURT: -- and you were going to make a different  
17 point.

18 MR. MAYER: -- in the sense that at least in the cases  
19 that I've been involved in it is by no means uncommon for  
20 business representatives of indenture trustees in particular to  
21 attend a hearing. It is by no means uncommon for a bondholder  
22 to send a businessperson to a hearing. I don't know our  
23 equipment vendor well enough to address that.

24 Technically, the business representative of the  
25 union -- and I can't really speak to the union pension fund

**PATRIOT COAL CORPORATION, et al.**

304

1 because I don't know whether Mr. Buckner would serve in both  
2 capacities in that situation -- it would be -- it's not  
3 uncommon for the business representative of the union to attend  
4 a hearing, at least in my experience. These are not  
5 necessarily just delegated to lawyers in part because decisions  
6 need to be made fairly quickly and certainly with respect to  
7 bondholders, it's been known to have people present in court.

8 I wanted to make a correction in our pleading because  
9 I think we overstated something and it was our fault. The  
10 seventh member, American Electric Power, is in Columbus, Ohio  
11 which is in fact 200 driving miles from Charleston. If it were  
12 our burden to prove that it was inconvenient for AEP, I don't  
13 know that we could meet it. It's their burden to prove the  
14 contrary, but I didn't want to overstate, and I think I owed it  
15 to AEP to correct that statement in our pleadings.

16 More important, most important, no movant has offered  
17 any evidence that Charleston is more convenient than New York  
18 for creditors, generally, or more likely to promote efficient  
19 or economical proceedings. The fight has mostly been about  
20 interest of justice which the U.S. Trustee argues precludes New  
21 York as a venue without itself specifying an alternative.  
22 There's been a lot of talk about interest of justice and I will  
23 skip most of my material on it. But I think it's worth  
24 stating, even if other have stated versions of it, that justice  
25 is not a concept divorced from reality or economic interest.



**PATRIOT COAL CORPORATION, et al.**

305

1 As Ms. Jennik admitted yesterday from the podium, at least one  
2 of the factors used in analyzing the interest of justice  
3 overlaps with the interest of creditors and that's the economic  
4 and efficient administration of the bankruptcy estate.

5 We don't think it promotes the economic and efficient  
6 administration of the bankruptcy estate to transfer the case to  
7 a venue that is manifestly less convenient --

8 THE COURT: But let's talk --

9 MR. MAYER: -- and beneficial.

10 THE COURT: So let's talk about that one because the  
11 statute doesn't say venue lies where the debtor in the exercise  
12 of its reasonable business judgment has determined will be the  
13 place where the estate will be most efficiently administered.  
14 It doesn't say that. It provides the bases for venue.

15 I'm not -- everyone's pointed out to me, I shouldn't  
16 be closing loopholes, I'm not Congress. I'm just supposed to  
17 read the statute, apply it to the facts and decide this  
18 dispute. That's the box that I'm in. Right?

19 MR. MAYER: Actually, Your Honor, since it's my job to  
20 argue, you're not in a box. You have discretion.

21 THE COURT: I do, right? So therefore, in the  
22 exercise of that discretion, I look to the convenience of the  
23 parties but Ms. Schwartz argued that convenience doesn't trump  
24 other considerations or it doesn't trump justice. And I look  
25 to -- you know, Mr. Huebner gave me kind of the headline

**PATRIOT COAL CORPORATION, et al.**

306

1 version of a granular analysis. He indicated -- but again,  
2 since it's not their -- we didn't hear from Mr. Schroeder --  
3 what that analysis was; spreadsheets -- I don't know what there  
4 was. Spreadsheets -- he told me there was an analysis and they  
5 acted on that and nobody's placed into contention their good  
6 faith.

7 But I'm looking at it from many different angles and  
8 one of them is very simple, very simple. Here's the  
9 formulation: Judge Friendly. He's a biggie, right?

10 MR. MAYER: Yes, Your Honor.

11 THE COURT: Okay. Judge Friendly in the Ira Haupt  
12 case in 1966 said, "Conduct of bankruptcy proceedings not only  
13 should be right but must seem right." Second Circuit.

14 MR. MAYER: I don't think anyone would have a quarrel  
15 with that, least of all me. Your Honor --

16 THE COURT: Tell me why -- tell me how I can satisfy  
17 the direction that Judge Friendly has given thirty-five years  
18 ago.

19 MR. MAYER: Because the statute gives you the power to  
20 go either way. It's up to you. I believe the statute is  
21 written such that even if you concluded, even if you  
22 concluded -- which we don't think is appropriate -- that the  
23 interests of justice standard was violated here by recent  
24 incorporation, statute gives you discretion to say it should  
25 stay in New York anyway. And if since we attended -- since

**PATRIOT COAL CORPORATION, et al.**

307

1 Your Honor had offered up cases on sort of comparable  
2 situations, I'm reminded of the PR Holdings decision by Jerome  
3 Frank in which he spent most of the case talking about how this  
4 was an outrageous plan in which the dissenters got bought off  
5 with X cents on the dollar in cash even though everybody else  
6 was getting X cents on the dollar in stock, and how this was an  
7 outrageous, unfair discrimination. At the very end of the  
8 decision he wrote, but, you know, it's still better for  
9 everybody than the alternative and, therefore, the plan is  
10 confirmed.

11 Now, that is obviously not precedent under Section  
12 1412, but 1412's literal language means that the choice is up  
13 to you and you are not --

14 THE COURT: Well, the literal language --

15 MR. MAYER: -- bound by either.

16 THE COURT: -- says, it's in the disjunctive,  
17 everybody agrees with that, the literal language says, "in the  
18 interest of justice". It doesn't say justice for any  
19 particular party --

20 MR. MAYER: Yes, Your Honor, but --

21 THE COURT: -- it says, "in the interest of justice".

22 MR. MAYER: But it also says, "the Court may".

23 THE COURT: yes, it does say, "the Court may".

24 MR. MAYER: So the discretion is yours. You can  
25 determine whether the convenience of the parties, you can

**PATRIOT COAL CORPORATION, et al.**

308

1 determine whether the cost to the estate trumps the interest of  
2 justice or vice versa. The choice is yours.

3 THE COURT: All right. I interrupted you. You can  
4 keep going.

5 MR. MAYER: Well, it sort of leads into my few words  
6 about Winn-Dixie. Mr. Huebner already talked about the  
7 distinctions between this case and Winn-Dixie. In Winn-Dixie,  
8 Judge Drain held that recent incorporation standing alone was  
9 sufficient to transfer venue. And I suspect --

10 THE COURT: In that case.

11 MR. MAYER: In that -- well, you took the words out of  
12 my mouth, Your Honor. Yes, that's exactly right.

13 THE COURT: Okay.

14 MR. MAYER: Because on rebuttal we're going to hear a  
15 lot about standing alone, standing alone, standing alone. And  
16 he did say that. But he said that in that case; he did not  
17 hold that recent incorporation standing alone was sufficient to  
18 transfer venue in all cases.

19 If I may make a commonsense observation, I don't think  
20 a holding in an unpublished transcript was intended to  
21 establish a rule for all cases. I'm not saying it's not  
22 precedent on its facts that people can ignore. Nobody would  
23 say that. I'm just saying that if you want to take the case  
24 and say it's a rule for all cases, it's a rather odd result.  
25 I'm not Judge Drain and I don't talk to him except from

**PATRIOT COAL CORPORATION, et al.**

309

1 podiums, maybe at a conference now and then. But I suspect  
2 he'd be surprised at the concept that an unpublished transcript  
3 is going to establish a rule for all cases.

4 I have a few clean-up items because Your Honor asked.  
5 Peabody; we've been working on a preliminary report to the  
6 committee about claims against Peabody. And the most recent  
7 settlement with Peabody contains language we negotiated to  
8 preserve claims against Peabody. We've been looking into  
9 fraudulent transfer and other actions very closely and we have  
10 a preliminary report on some threshold issues that I'm  
11 scheduled to discuss at our next meeting, which means to my  
12 colleagues who are listening on the phone, you had better get  
13 ready. We need some more information from the debtors which  
14 Mr. Huebner has promised to turn to right after this hearing  
15 concludes.

16 So far, we haven't found anything that makes New York  
17 a worse venue than the alternatives. Counsel to the movants  
18 have been looking at this issue, too; it's in their papers.

19 THE COURT: Vis-a-vis the issue of the propriety of  
20 the Peabody transactions?

21 MR. MAYER: No --

22 THE COURT: Or more generally?

23 MR. MAYER: -- the question for this hearing, Your  
24 Honor, is if you were looking at venue, one of the factors you  
25 might look at is, is it better, if you were going to sue

**PATRIOT COAL CORPORATION, et al.**

310

1 Peabody if there was an action, is it better in New York or is  
2 it better in Charleston or is better somewhere else.

3 THE COURT: Right.

4 MR. MAYER: We haven't found anything, I -- again,  
5 because the burden is on the movants, I only submit that their  
6 papers indicate they're aware of this issue and they've raised  
7 no reason why New York is an inferior venue for bringing action  
8 against Peabody, if warranted, than any other venue.

9 I have a last clean-up item. You asked about a  
10 concern that a West --

11 THE COURT: Let me --

12 MR. MAYER: Yeah.

13 THE COURT: Since you've gone there, let me follow  
14 you. Peabody is headquartered in St. Louis?

15 MR. MAYER: I understand that to be the case.

16 THE COURT: Okay. And I can't remember -- perhaps I'm  
17 getting tired, but where are Peabody's mining complexes?

18 MR. MAYER: Well, most of them are not in West  
19 Virginia anymore. I believe they're in the far west.

20 THE COURT: Okay. Go ahead.

21 MR. MAYER: One last clean-up. You asked about a  
22 concern that a West Virginia bankruptcy judge would undue  
23 existing orders. Meaning no disrespect to the noteholders whom  
24 we have, obviously, been in contact with under Section 1102 and  
25 who have their own very good arguments to follow, we don't

**PATRIOT COAL CORPORATION, et al.**

311

1 think that would happen, and we urge Your Honor not to base any  
2 part of your ruling on that basis because of the Vienna Park  
3 Properties case at 125 BR 84, 87 (1991), because we think  
4 that's an improper basis for maintaining venue.

5 And I think that's all I have unless the Court has  
6 questions.

7 THE COURT: That's all. Thank you.

8 MR. MAYER: Thank you.

9 MS. SCHONHOLTZ: Good evening, Your Honor --

10 THE COURT: Good evening, Ms. Schonholtz.

11 MS. SCHONHOLTZ: -- Margot Schonholtz of Willkie Farr  
12 & Gallagher on behalf of Bank of America as the second-out or  
13 rollup DIP agent, and as the issuer of LCs in favor of three of  
14 the four sureties that have moved to transfer venue.

15 BofA supports the debtors' opposition to transfer  
16 venue and wishes to briefly make a few important points from  
17 our own perspective. Let me first just supplement quickly Mr.  
18 Huebner's statements about the DIP financing. As Mr. Huffard  
19 testified, getting 802 million of financing on a very  
20 accelerated timetable was difficult and the key to it was  
21 getting the rollup approved of 302 million dollars in LCs.

22 THE COURT: Okay, but that's done. It's done and Mr.  
23 Mayer just told me don't worry about the argument that was made  
24 that someone's going to unroll or undo the DIP.

25 MS. SCHONHOLTZ: We agree a hundred percent that

**PATRIOT COAL CORPORATION, et al.**

312

1 nobody should do it --

2 THE COURT: Okay.

3 MS. SCHONHOLTZ: -- I'm trying to make a different  
4 point, two different points.

5 THE COURT: Go ahead.

6 MS. SCHONHOLTZ: First of all, in terms of the  
7 debtors' decision to actually choose this venue, it was  
8 critical. And when Your Honor's looking and you've asked  
9 several times, well, what was the reason to file here, when  
10 you're looking at the reason, this was a critical reason,  
11 because but for the guidelines and the precedent in this  
12 jurisdiction, I am doubtful we could have done a fully  
13 consensual 802 million dollar DIP, 302 of which rolled up. So  
14 that justifies --

15 THE COURT: Well, what do you mean? Let's stop with  
16 that. What do you mean "fully consensual"? Who was going to  
17 object? If the case started elsewhere in venue X, who was  
18 going to object to the DIP as it's been approved by this Court?

19 MS. SCHONHOLTZ: In the absence of guidelines and  
20 certainly in this jurisdiction before the guidelines --

21 THE COURT: Right.

22 MS. SCHONHOLTZ: -- rollups were huge targets. And  
23 because of the guidelines that require the look-see --

24 THE COURT: Right.

25 MS. SCHONHOLTZ: -- the look-back, the unrollup



**PATRIOT COAL CORPORATION, et al.**

313

1 possibility --

2 THE COURT: Right.

3 MS. SCHONHOLTZ: -- we have found, I think all of us  
4 have found, that the predictability of those rules, people know  
5 what's going to happen, people know they have an opportunity to  
6 take a look-see --

7 THE COURT: Right.

8 MS. SCHONHOLTZ: -- enable those deals to get done.

9 THE COURT: But you said "consensual", right?

10 MS. SCHONHOLTZ: Yes.

11 THE COURT: So it's the same parties, right? And you  
12 could say if you were in a different jurisdiction, you could  
13 take our guidelines, right, and use them as a guide and still  
14 get the parties around the table and agree to the financial  
15 wisdom of entering into the DIP. And then you would, arm-in-  
16 arm on that first day, go to that Court and say here we all are  
17 and we all agree. And, indeed, the union hasn't objected to  
18 the DIP. The DIP's in place, right?

19 MS. SCHONHOLTZ: The DIP is in place, Your Honor, but,  
20 but for those guidelines, I won't name names, but in  
21 negotiating the final DIP which was fully consensual after the  
22 committee was formed --

23 THE COURT: Right.

24 MS. SCHONHOLTZ: -- somebody made the comment that the  
25 reason we are able to do a consensual DIP is because those

**PATRIOT COAL CORPORATION, et al.**

314

1 guidelines are here and these judges enforce them. So we all  
2 know the rules of the road. We know how things are going to  
3 proceed and it enabled this company to settle into a bankruptcy  
4 smoothly, frankly, and to tell us a story, an appropriate  
5 story, that we have enough financing for the benefit of all  
6 constituencies to proceed to try and reorganize. But for  
7 the --

8 THE COURT: Okay, here's the problem I have with that,  
9 though, and I've gone through this with a number of parties, is  
10 that then there is no limiting principle. The large money  
11 center banks who provide DIP financing in this very, very  
12 difficult environment that everyone's operating in since 2008  
13 when, for a long period of time, as I'm sure you know, there  
14 was no DIP financing; it just didn't happen. There was no  
15 credit flowing at all. So now we have DIP financing again, a  
16 good thing. But all the large money center banks are going to  
17 hire firms such as yours and are going to have their principle  
18 offices in New York and are going to want to be here.

19 So I don't have a limiting principle because every  
20 debtor, in order to satisfy the requirements of incurring post-  
21 petition credit, has to make a showing that they can't do it  
22 any other way. So I'm in a -- I'm chasing my tail here and the  
23 tail's wagging the dog, and I'll stop with the bad metaphors,  
24 but that leads me to the conclusion that these cases without  
25 any limitation are going to come -- and I won't say here, but

**PATRIOT COAL CORPORATION, et al.**

315

1 where the lenders want them to go. And a lot of the time,  
2 that's going to be here. And I'm not saying that because  
3 there's any sense that I don't want to work hard. I think you  
4 can tell I like to work hard, okay. And so do my fellow judges  
5 elsewhere. But the point is I have no limiting principle to  
6 that proposition.

7 MS. SCHONHOLTZ: Your Honor, this is just one factor  
8 to support the debtors' selection of this jurisdiction on a DIP  
9 that, frankly, is unlike any DIP that I've ever worked on where  
10 part of it is a rollup and a large part of it is new money.  
11 And my only point is we're not suggesting that there's no  
12 limiting principle, but in a DIP that -- I've never seen a DIP  
13 like this; I've never done a DIP like this, and certainly I've  
14 never done one on, I think, four days' or five days' notice  
15 during a holiday week -- the ability to look at guidelines and  
16 get a consensual deal on this particular DIP in this case was  
17 critical to the company and justified, among other reasons --  
18 not the sole reason -- Patriot filing in this jurisdiction.

19 THE COURT: Okay. But that's supportive of the  
20 position that the debtors -- that this was a good faith filing  
21 and a good faith venue choice.

22 MS. SCHONHOLTZ: That is my only point, Your Honor.

23 THE COURT: Okay, all right.

24 MS. SCHONHOLTZ: Let me turn to the sureties' papers,  
25 and my main job here is just to briefly reply to the sureties'

**PATRIOT COAL CORPORATION, et al.**

316

1 motion.

2           They are most notable, the papers, for what they do  
3 not say. They're based on the faulty premise that critical  
4 West Virginia issues are being raised by West Virginia entities  
5 with real substantial economic risk. That's not the case. In  
6 40 pages of briefing and over 100 pages of exhibits, the  
7 sureties -- and today, actually -- the sureties offer virtually  
8 no evidence related to the bond issuances, the obligations they  
9 back or the collateral the sureties actually have for those  
10 obligations. They offered a very informative but essentially  
11 irrelevant affidavit by Mr. Doss, a hired expert with no  
12 apparent first-hand knowledge about the bonds at issue here.  
13 They have offered no competent evidence in support of their  
14 claim that they have seventy million dollars of exposure in  
15 West Virginia.

16           I'd like to offer a demonstrative which hopefully, at  
17 this late hour will be helpful, that demonstrates the total  
18 amount of the bonds issued at issue with these sureties, what  
19 portion of them -- a large portion of them are not West  
20 Virginia-related, and then how the LCs would work.

21           THE COURT: Okay. Do you have copies for folks?

22           MS. SCHONHOLTZ: We do.

23           THE COURT: Okay.

24           MS. SCHONHOLTZ: Let me just state before I approach,  
25 if I may, that the demonstratives are based on Schedule 5 to

**PATRIOT COAL CORPORATION, et al.**

317

1 Mr. Schroeder's first-day affidavit which sets forth the LCs  
2 and to Exhibit C to the sureties' motion. And you don't have  
3 to look, Your Honor; I have them all attached.

4 THE COURT: Okay. All right, Mr. Early wants a copy.

5 MS. SCHONHOLTZ: As we said in our joinder, BofA has  
6 issued LCs in favor of the sureties in the amount of 32.4  
7 million dollars and three of the four sureties enjoy the  
8 benefit of that collateral. And it's our understanding that  
9 the sureties can apply, can draw on the LCs, if appropriate, to  
10 back any of their bonds. But when you look behind and deeply  
11 into the exhibits, you can see from this chart that, not  
12 getting to the LC collateral, about thirty-four percent of the  
13 bonds are not West Virginia bonds at all; they back obligations  
14 in other communities and, indeed, Westchester Fire has  
15 virtually no West Virginia exposure and Indemnity National, the  
16 second of four, has zero West Virginia exposure.

17 What the chart purports to do, quickly, and this is  
18 only at issue in the Argonaut, the first one which has a split,  
19 essentially, of West Virginia and non-West Virginia exposure,  
20 it assumes best case for the sureties that you apply the LCs to  
21 their non-West Virginia obligations first. And if you look at  
22 the right, Your Honor, after all that gets done, essentially  
23 maximum worst-case exposure on West Virginia obligations here  
24 is twenty-five million dollars. Certainly substantial, but not  
25 the seventy million dollars set forth in the papers.

**PATRIOT COAL CORPORATION, et al.**

318

1 THE COURT: Well, it's consistent with the observation  
2 that somebody made earlier today that in large measure the  
3 sureties were making the arguments of other parties, of the  
4 regulators, which I have to say I find a little curious,  
5 particularly when you layer in the fact that there is no way  
6 that this Court or any other court is going to allow this  
7 debtor to violate Midlantic or going to allow this debtor to  
8 walk away from its environmental obligations as they may be  
9 determined in due course. We don't know. And that's why I've  
10 found the sureties' presentation a little curious.

11 MS. SCHONHOLTZ: Let me pick up on that, Your Honor,  
12 and just cut through the argument. Not only is their argument  
13 based on the assumption that you will permit them to violate  
14 the law and their obligations, it's also premised on the  
15 assumption that -- it ignores the fact that both DIP financing  
16 agreements contain broad covenants requiring -- underline  
17 requiring -- compliance with environmental laws and  
18 regulations. Section 613 is headed, in both agreements  
19 essentially, headed "Compliance with Environmental Laws". The  
20 execution version of the credit agreement is docket number 78;  
21 it's filed on July 15th, 2012 and that's Section 613.

22 And I won't take the time to run through it, but Your  
23 Honor will see, it is a very broad covenant. It requires  
24 compliance; it requires compliance with permits, with  
25 reclamation obligations. It's about as broadly as it can be

**PATRIOT COAL CORPORATION, et al.**

319

1 written.

2 It's important to note that the DIP agreements also  
3 provide that noncompliance -- noncompliance with that covenant  
4 is an event of default under 901(c) if the default is not cured  
5 within thirty days. So the protection is there, Your Honor,  
6 both in the DIP financing agreements and by this Court and as  
7 counsel for the sureties candidly said this morning, the bonds  
8 are there if the debtors fail to perform their environmental  
9 obligations. That's a big if. There's nothing in the record  
10 that suggests they ever have or --

11 THE COURT: Well, you know what else?

12 MS. SCHONHOLTZ: -- that they would be able to, either  
13 under the DIP credit agreement or by Your Honor's ruling.

14 THE COURT: Well, and another thing with respect to  
15 making the arguments that one would expect the local regulators  
16 to make, the Office of the United States Trustee, of course, is  
17 an arm of the Department of Justice. But the EPA is not here.  
18 Other arms of DOJ are not here. They're not urging that the  
19 case be moved. I can only assume, although I caution everyone  
20 not to assume, but I can only assume that if they had a concern  
21 about the environment from the standpoint of the United States  
22 government, they know how to get here --

23 MS. SCHONHOLTZ: And they're not shy --

24 THE COURT: -- they were in here in force in the Getty  
25 Petroleum case. And they're not here.

**PATRIOT COAL CORPORATION, et al.**

320

1 MS. SCHONHOLTZ: And they're not shy.

2 THE COURT: No, they're not shy.

3 MS. SCHONHOLTZ: And as Mr. Huebner pointed out in his  
4 argument, there is a whole litany of other local regulators who  
5 are not here, either.

6 THE COURT: And one could argue, as I did I think  
7 earlier with the sureties and perhaps some other parties,  
8 that -- and this might sound cynical but I don't mean it that  
9 way -- but the local interest is very complicated because  
10 everyone wants folks to stay employed. Everyone wants that,  
11 right? But everyone also wants the environment and the land  
12 and the forests and the rivers to not be impaired, right?  
13 There's a conflict there a little bit.

14 So one could hypothesize that there could be  
15 situations in which some local regulator, okay, perhaps takes  
16 an easier line on the environmental issues because they're  
17 cognizant of the fact that folks might lose their jobs. But  
18 the United States government, boy, they're going to come in and  
19 give you their own view about what's required. So it's an  
20 extremely complicated issue.

21 MS. SCHONHOLTZ: And, Your Honor, importantly, to add  
22 to that, they all have access.

23 THE COURT: They do.

24 MS. SCHONHOLTZ: They all have access here. The  
25 sureties themselves can't claim they're going to be



**PATRIOT COAL CORPORATION, et al.**

321

1 disadvantages or disenfranchised in any way if they have to  
2 appear before this Court. I won't repeat the arguments with  
3 respect to the facts in Mr. Schroeder's affidavit, but it's  
4 important to note that the sureties have appeared on many  
5 critical issues to them in this Court since the outset of the  
6 case. Their concerns were addressed including in connection  
7 with language they requested in the final DIP order. They  
8 filed a joinder, I believe, with respect to the contract  
9 rejection procedures motion. And every indication is -- we  
10 have no reason to doubt it -- that their concerns will continue  
11 to be addressed by the parties and by the Court. Indeed, the  
12 sureties' legal advisor is not located in West Virginia, in  
13 addition to the other statements that Mr. Huebner put on the  
14 record.

15 This is important, Your Honor. Although we are on  
16 opposite sides of this motion, we're actually on the same page  
17 as the sureties with respect to the substantive issues in this  
18 case. We all want a successful reorganization and we want the  
19 debtors to continue to observe and honor their actual  
20 environmental obligations. We all do not want a call on the  
21 surety bonds or on the LCs. Or worse, we don't want this  
22 company to liquidate.

23 We respectfully believe that the best prospects for a  
24 successful reorganization are in this forum. And just to  
25 briefly address Your Honor's quote from Judge Friendly which

**PATRIOT COAL CORPORATION, et al.**

322

1 was quoted to me within the last two weeks, I think, by Judge  
2 Glenn in a different but similar circumstance --

3 THE COURT: Purely coincidence --

4 MS. SCHONHOLTZ: Absolutely.

5 THE COURT: -- I've had no conversations with Judge  
6 Glenn on this issue.

7 MS. SCHONHOLTZ: It's an important point. Judge  
8 Friendly's words, and I've thought them in another context  
9 which is why they resonated with me, suggest to me that the  
10 case should actually stay here. It would not be right or just  
11 to transfer this case to a jurisdiction at the request of,  
12 essentially, a single stakeholder, albeit a very important  
13 stakeholder. When the debtor strongly believes and has put on  
14 evidence that its prospects for reorganization are best here,  
15 that would not be justice or frankly the appearance of justice.  
16 Particularly in this day and age, Your Honor, when there is  
17 more access than I ever remember in my entire career; by phone,  
18 by video and, obviously, by appearance.

19 So we would respectfully request that Your Honor deny  
20 the motions to transfer venue. Thank you.

21 THE COURT: All right. Now, if I have questions about  
22 the pleading that the Weil Gotshal firm filed, should I direct  
23 those to Ms. Goldstein?

24 MS. SCHONHOLTZ: Please do.

25 THE COURT: Okay, thank you.

**PATRIOT COAL CORPORATION, et al.**

323

1 MS. GOLDSTEIN: Your Honor, I think I can now say,  
2 officially, good evening.

3 THE COURT: I think so.

4 MS. GOLDSTEIN: Marcia Goldstein on behalf of Citibank  
5 as agent for the first-out new money DIP lenders. The facility  
6 provides for up to 500 million of new money financing for these  
7 debtors.

8 Much has already been said so I will try to be brief.  
9 Of course, I will answer any questions you have about the  
10 pleadings. Just one thing to put out of the way. I wasn't  
11 going to comment on it but it came up again. From the DIP  
12 lenders' point of view, we do not believe that there is any  
13 risk that the DIP order can be undone by any court. The loans  
14 were extended, 375 million of term debt was extended based on  
15 the order of this Court and we believe that we are fully  
16 protected by 364(e), so I just wanted to get that --

17 THE COURT: I do, too.

18 MS. GOLDSTEIN: -- off my chest, if you will.

19 THE COURT: Okay.

20 MS. GOLDSTEIN: Okay. Now, Your Honor, you have said  
21 that perhaps because the DIP lenders -- and I'll put the first-  
22 out and second-out DIP lenders in this category --

23 THE COURT: Okay.

24 MS. GOLDSTEIN: -- are at the top, the first-out being  
25 at the very top of the priority list that perhaps we do not

**PATRIOT COAL CORPORATION, et al.**

324

1 have a significant interest or stake in this case. We view the  
2 contrary to be true. We believe that our clients -- our  
3 clients believe that they have a very vital stake in both the  
4 outcome of this case and how it proceeds.

5 This is a loan that is basically made against asset  
6 values, not against cash flow. And so the success of this case  
7 and the manner in which it exits from Chapter 11, the type of  
8 reorganization that occurs and ultimately, the refinancing of  
9 this debt, those are all things that are critical to our  
10 client. And how well the company performs and how this case is  
11 handled and the success of this reorganization are vital to the  
12 first-out DIP lenders, the second-out DIP lenders and you can  
13 go down the line --

14 THE COURT: All right, but let's pick up on --

15 MS. GOLDSTEIN: -- the noteholders and everybody else.

16 THE COURT: -- what Ms. Schonholtz's approach which  
17 based on the demonstrative shows that worst-case scenario, end  
18 of the day, the sureties' maximum contingent exposure is  
19 twenty-five million dollars. All right? And help me out by  
20 worst-case scenario -- I'm not going to ask you about the  
21 sureties; I'm going to ask you about Citibank -- worst-case  
22 scenario not based on any facts, just my hypothetical, worst-  
23 case scenario Patriot decides they're done. Now, Mr. Early  
24 said that the reclamation obligations are quantified based on  
25 the assumption of continuing mining operations. But for the

**PATRIOT COAL CORPORATION, et al.**

325

1 purposes of my hypothetical, you just said it; it's an asset-  
2 based loan, right. We're done. Patriot is not going to remain  
3 in business; the mining complexes are shut down; the workers  
4 get sent home.

5 What is Citibank's exposure? And I'm not -- this is  
6 not -- I'm not trying to trick you into giving me a liquidation  
7 value. I'm not trying to trick you into estopping you from  
8 claiming a greater enterprise value later. I'm just trying to  
9 right-size what your -- you have a stake. Of course you have a  
10 stake. But what's your real exposure is, if you will, because  
11 what we've been doing here for so long is all of you have been  
12 trying to help me add weight to the different piles of paper  
13 that I have. How much do I weigh what the union believes? How  
14 much do I weigh what the creditors' committee believes? How  
15 much do I weigh what the DIP agents believe? Right? So sure,  
16 I see the big, big, big numbers on the page. But in terms of  
17 your real worst-case scenario, this ends up badly for lots of  
18 folks outcome, can you give me a ballpark?

19 MS. GOLDSTEIN: Your Honor, before --

20 THE COURT: And you can -- an option always is to say  
21 you decline to do that.

22 MS. GOLDSTEIN: Your Honor, I don't think I can give  
23 you a ballpark for a variety of reasons that I will get to. On  
24 the surety point, I know you asked me not to address it, but if  
25 I can go back to Mr. Huebner's statements, the four sureties

**PATRIOT COAL CORPORATION, et al.**

326

1 here that Ms. Schonholtz dealt with --

2 THE COURT: Right.

3 MS. GOLDSTEIN: -- who claimed seventy million of  
4 exposure who really only have twenty-five million of  
5 exposure --

6 THE COURT: Right.

7 MS. GOLDSTEIN: -- that's not all the sureties.

8 THE COURT: Right, okay.

9 MS. GOLDSTEIN: So there's a much larger potential  
10 exposure that hasn't been discussed here.

11 THE COURT: Right. But they're speaking for twenty-  
12 five million dollars -- or let me say it differently.

13 MS. GOLDSTEIN: So they're speaking for twenty-five  
14 million --

15 THE COURT: The way Ms. Schonholtz was presenting it,  
16 they're, in fact, only speaking for twenty-five million  
17 dollars.

18 MS. GOLDSTEIN: But let's go back to Mr. Early talking  
19 about the multitudes of liabilities we might see here come to  
20 fruition in a liquidation of this company, which is the  
21 hypothetical -- and I would say a hypothetical, we hope -- that  
22 you're putting forth.

23 I have to step back and go to Mr. Huffard's testimony  
24 at the DIP hearing about how difficult it was and how, in  
25 effect, I think he used the words "lucky" this debtor was --

**PATRIOT COAL CORPORATION, et al.**

327

1 THE COURT: He did use the word lucky.

2 MS. GOLDSTEIN: -- to get this DIP loan. Much work  
3 was done by the DIP lenders in terms of understanding all of  
4 the liabilities. And I'm not going to get into priorities and  
5 what might come behind us or what we might argue about later in  
6 the case, but you heard Mr. Early say that we're not going to  
7 let any assets be sold here. Assets that back up our loans and  
8 the first-out and the second-out, unless all environmental  
9 liabilities are paid. So that is a scenario in a potential  
10 liquidation. We hope that doesn't occur because, frankly, I  
11 can't ballpark either the exposure that we're going to have in  
12 that scenario, because I can't ballpark all the reclamation,  
13 all the legacy --

14 THE COURT: Right.

15 MS. GOLDSTEIN: -- and all the environmental claims  
16 that are going to be asserted that have to be paid.

17 THE COURT: Okay.

18 MS. GOLDSTEIN: We may argue no but that's a high risk  
19 potential in terms of litigation. Also, there will be great  
20 delay. This loan was priced based on a certain risk factor  
21 which, you know, frankly, Your Honor --

22 THE COURT: There's not a bump up in the pricing if  
23 the case gets transferred from this district, is there?

24 MS. GOLDSTEIN: No, but there is an extension fee if  
25 we go past fifteen months. And this DIP loan matures in

**PATRIOT COAL CORPORATION, et al.**

328

1 eighteenth months. So if we're in a doomsday scenario, we're  
2 going to have a mature, defaulted DIP for a variety of reasons  
3 and we're going to have the default probably before the  
4 maturity --

5 THE COURT: But you're not suggesting that necessarily  
6 follows that if the case is transferred from this district that  
7 you would hit that --

8 MS. GOLDSTEIN: No, what you asked me -- you didn't  
9 ask that.

10 THE COURT: Right, you would hit that wall, right?

11 MS. GOLDSTEIN: Your Honor, you're positing what's our  
12 downside risk --

13 THE COURT: Got it. I got it.

14 MS. GOLDSTEIN: -- not what happens if the case is  
15 transferred. I think there was a sense of greater comfort  
16 based upon the precedence in this court that there was a  
17 greater likelihood for the success of a true reorganization in  
18 this court. I'm not saying we wouldn't have the same result in  
19 West Virginia. We don't know. But that's the issue. We have  
20 some level of comfort that in this jurisdiction, and this is  
21 what Mr. Huebner argued was part of the debtors'  
22 considerations, that there would be a greater chance of a  
23 reorganization here, and therefore, less likelihood of the  
24 doomsday scenario.

25 THE COURT: Well, I think that he may have argued that



**PATRIOT COAL CORPORATION, et al.**

329

1 but I think a lot of what he said, he can certainly speak for  
2 himself, was that debtors feel comfortable because there are  
3 lots of data points.

4 MS. GOLDSTEIN: Um-hum.

5 THE COURT: There are lots of big cases that come  
6 through here. Lots of decisions, guidelines. So there's a  
7 feeling of comfort.

8 MS. GOLDSTEIN: Right.

9 THE COURT: People are comfortable with what they  
10 know, predictability of outcome, et cetera. That's completely  
11 understandable and, frankly, I think, not objectionable. But,  
12 once again, it's not necessarily what the statute says nor does  
13 it have anything to say about what the outcome would be in  
14 another jurisdiction. There are successful reorganizations  
15 everywhere in the country.

16 MS. GOLDSTEIN: There are, Your Honor. We  
17 participated in those.

18 THE COURT: I mean, if there were fewer here, I  
19 wouldn't have to be sitting here at seven o'clock at night with  
20 a full calendar tomorrow and Friday, but you know, that's fine.

21 MS. GOLDSTEIN: Your Honor, I think, you know, the  
22 ability to have the case -- it's been filed in New York. Well,  
23 let me step back for a minute.

24 THE COURT: Right.

25 MS. GOLDSTEIN: It's been filed here. Neither of the

**PATRIOT COAL CORPORATION, et al.**

330

1 movants, the U.S. Trustee nor the union, have, in effect,  
2 challenged the satisfaction of venue requirements under Section  
3 1408.

4 THE COURT: Right.

5 MS. GOLDSTEIN: Both motions are made under section  
6 1412 -- and we've talked about this and I don't want to repeat  
7 things said twenty times -- that give you discretion to  
8 consider either the interests of justice or the convenience of  
9 the parties as a basis to transfer venue. Both movants are  
10 looking to that section as the basis for their request to this  
11 Court. Everybody knows -- I know you said it was said twenty  
12 times -- that they have the burden to prove that. Both of  
13 those considerations, which are discretionary with this Court,  
14 require an analysis of the facts and circumstances of this  
15 case. So from that standpoint, Your Honor, I think the facts  
16 and circumstances have been discussed. What they failed to  
17 prove, in terms of the overall benefits from the standpoints of  
18 the interest of justice or the convenience of the parties by  
19 moving this case, you have the union who basically has said  
20 it's in their specific interest. They talk about a  
21 jurisdiction where they believe the judge is more familiar with  
22 their constituents. He grew up with them. He breaks bread  
23 with them. He worships with them. They have a specific  
24 interest in getting the case in front of that judge. But you  
25 have multitudes of other parties-in-interest who are happy to

**PATRIOT COAL CORPORATION, et al.**

331

1 have the case stay here, for whom it's more convenient to have  
2 the case stay here. And no one has a established that the --  
3 well, the mine workers haven't established, the sureties  
4 haven't established -- that they are going to be worse off here  
5 or receive a less sympathetic ear. I won't repeat again how  
6 much experience this Court has in dealing with those kinds of  
7 both environmental and union-related issues but I think that  
8 you have to take the motions for what they are, which are  
9 motions under 1412, and make a determination based on the facts  
10 and circumstances of this case.

11 THE COURT: Let me ask you a question. Because I  
12 think you're right that you can't do a simplistic analysis of a  
13 worst-case scenario and put a number on, frankly, anyone's  
14 exposure. But if the case were to stay here -- this is not a  
15 trick question about appeals, but if the case were to stay here  
16 I think it's fair to say that the union would be unhappy.

17 MS. GOLDSTEIN: Perhaps, yes.

18 THE COURT: Okay. If the case were to stay here, that  
19 would necessarily mean that I would -- the Court would deny the  
20 union's motion, right? That's how --

21 MS. GOLDSTEIN: Yes.

22 THE COURT: Okay. So it seems to me that that  
23 wouldn't bode well for the conduct of the rest of the case. In  
24 other words, you'd be -- you're getting off on the wrong foot  
25 with the folks on whom you are relying, you, Citibank are

**PATRIOT COAL CORPORATION, et al.**

332

1 relying to get your loans repaid. You're not -- it -- you're  
2 not just going to get off well. They're not going to be  
3 favorably inclined to sit down and work with you constructively  
4 when they are angry. And feel that there has been -- that  
5 justice has not been done. So while I hear you, and I talked  
6 to Ms. Jennik about this, that justice isn't about trading the  
7 home court advantage of one party for the perceived home court  
8 advantage of another party. In terms of the conduct of the  
9 case this is a problem that we need to think about. What's  
10 going to happen? How do we get over it? How do we make the  
11 case work well?

12 MS. GOLDSTEIN: No, Your Honor --

13 THE COURT: I mean, Ms. Jennik said -- so strongly do  
14 they feel about this that Ms. Jennik said in answer to my  
15 hypothetical if I have a crystal ball and I can see in the  
16 crystal ball that the outcome is the same here and in West  
17 Virginia but costs a lot more there, she said we still want it  
18 to go there.

19 MS. GOLDSTEIN: Yes, Your Honor, I heard that same  
20 thing. And I would be very disappointed in Ms. Jennik and the  
21 union if, having lost this motion, they suddenly became  
22 intransigent in negotiations with --

23 THE COURT: I'm not suggesting -- I'm not suggesting  
24 that they are going to be intransigent.

25 MS. GOLDSTEIN: I've lost motions and I still

**PATRIOT COAL CORPORATION, et al.**

333

1 negotiate with the other parties.

2 THE COURT: Of course. And I'm not -- I'm not --

3 MS. GOLDSTEIN: So I would not assume that to be the  
4 case.

5 THE COURT: Well, I didn't say intransigent. I just  
6 said disappointed, didn't get what they wanted in the first big  
7 round.

8 MS. GOLDSTEIN: I can posit a different result.

9 THE COURT: Go ahead.

10 MS. GOLDSTEIN: I think that -- one, I think, under  
11 Enron and the standards of other cases -- let me just step back  
12 and say --

13 THE COURT: Right, I mean, and by the way, I'm not  
14 advocating a concept of -- trying to think about how I can say  
15 this. Go on.

16 MS. GOLDSTEIN: I was just going to start with the  
17 premise that under Enron and other cases the wishes of a  
18 minority do not outweigh, when you're considering the  
19 convenience of the parties or frankly even the interest of  
20 justice, the considerations of the majority. And the union has  
21 made clear that they think they'll be favored, they'll have a  
22 more favorable forum in West Virginia. Now, there's one thing  
23 I do agree with them. I mean the workers are clearly a very  
24 critical part of this case. Their interests are critical to  
25 this reorganization. But so are the interests of other

**PATRIOT COAL CORPORATION, et al.**

334

1 stakeholders. So it doesn't mean that because the union would  
2 be happier and think they'll be more favored in one  
3 jurisdiction that we move the case. And I am sympathetic that  
4 members of the workforce might like to hear and actually  
5 observe what's going on. But they are not necessarily going to  
6 be advocating in court. They have very competent --

7 THE COURT: True.

8 MS. GOLDSTEIN: -- counsel --

9 THE COURT: Right.

10 MS. GOLDSTEIN: -- who appears all over the country  
11 for them.

12 THE COURT: Right.

13 MS. GOLDSTEIN: So on significant hearings where their  
14 rights and interests are critically at stake, we've  
15 demonstrated in this hearing that we can have video technology  
16 make an observation perfectly available to them and the lenders  
17 certainly would be supportive of that. And if the Court wanted  
18 to proceed in that way for those hearings that are critical to  
19 the interests of the workers -- and I would doubt the debtor  
20 would oppose that -- that that should occur so that the work  
21 force can get the observation rights. I mean that's all we're  
22 talking about. Counsel is going to represent their interests.  
23 So I don't see how the workers, whose interests are very  
24 important here and whose role in terms of this company is just  
25 critical, they are not going to be denied necessarily the

**PATRIOT COAL CORPORATION, et al.**

335

1 opportunity to observe or hear what occurs in this courtroom on  
2 matters critical to them.

3 THE COURT: All right, but let's pause on that because  
4 page 7 of your objection in paragraph 11 --

5 MS. GOLDSTEIN: Yes.

6 THE COURT: You say, "In the first instance those  
7 parties with the greatest economic interest in these cases are  
8 not seeking to transfer venue." And then the next sentence it  
9 seems clear that you mean that that's a reference, at least in  
10 part, to the first-out --

11 MS. GOLDSTEIN: Well, we think we're part of that.

12 THE COURT: -- third parties.

13 MS. GOLDSTEIN: I mean, if you add up --

14 THE COURT: Right.

15 MS. GOLDSTEIN: -- the first out, the second out, the  
16 note holders --

17 THE COURT: Sure, but that's the big --

18 MS. GOLDSTEIN: -- multitudes of trade creditors.

19 THE COURT: But that's the biggest number, right?

20 MS. GOLDSTEIN: That's a big number, yes.

21 THE COURT: And I said it to, I think, Mr. Mayer that  
22 that's one way to look at it. But another way to look at it is  
23 that in terms of the relative importance of what it means to  
24 each creditor, if Citi were to lose its entire -- if the  
25 exposure were to be the maximum number on the page of your

**PATRIOT COAL CORPORATION, et al.**

336

1 credit agreement, Citi would be just fine. It would be  
2 unhappy.

3 MS. GOLDSTEIN: Very.

4 THE COURT: Very unhappy, but there would still be a  
5 Citibank. Right? I mean, I don't think you're going to argue  
6 with me on this point. It's a big number. No one wants to --

7 MS. GOLDSTEIN: Your Honor, I can't argue with you on  
8 that point. I understand the impact on an individual employee  
9 of a failure of not just this company, any company.

10 THE COURT: It's their entire livelihood.

11 MS. GOLDSTEIN: But, Your Honor, there are many, many,  
12 many cases where the employees are not located in the same  
13 jurisdiction as the court hearing the case.

14 THE COURT: Of course.

15 MS. GOLDSTEIN: In fact, probably most of the cases in  
16 this jurisdiction where the manufacturing occurs somewhere  
17 else, but there's venue here.

18 THE COURT: Well look, there are lots of data points  
19 all over the place. You know, this Court presided for ten  
20 years over Adelphia Communications. There was an entire town  
21 called Coudersport, Pennsylvania. It was a company town in  
22 every sense of the word. The case stayed here. At last count  
23 I think the creditors were paid close to if not more than a  
24 hundred cents and the court presided over the creation of a  
25 victims' fund. Numerous large cases like --



**PATRIOT COAL CORPORATION, et al.**

337

1 MS. GOLDSTEIN: Absolutely.

2 THE COURT: -- that here, where there are victims'  
3 funds and very, very considerable recovery. So there are lots  
4 of different -- there are lots of different data points --

5 MS. GOLDSTEIN: There --

6 THE COURT: -- and, I think that it's been argued that  
7 the union's concerns with the case being adjudicated in this  
8 jurisdiction are unfounded. I've certainly made the arguments  
9 that --

10 MS. GOLDSTEIN: Yeah, I don't think they're founded  
11 either and, in fact, Your Honor, we got distracted and I didn't  
12 get back to answer -- I was about to posit a different  
13 scenario. If the union were to win, your hypothetical was  
14 they'd be happier and probably easier to deal with. I posit a  
15 different scenario. If the union were to win this, they'd feel  
16 empowered and perhaps be more difficult to deal with in terms  
17 of a negotiation with the debtors. So you can take that win or  
18 lose hypothetical and interpret it in either direction. Just  
19 another couple of comments --

20 THE COURT: Okay.

21 MS. GOLDSTEIN: -- on the economic stakes, and I --  
22 again, I appreciate and would not argue with the point of the  
23 great stake that the employees have here. And Mr. Huebner  
24 hopefully will correct me if I'm incorrect on this and I'm sure  
25 it's somewhere in the record that I understand that the company

**PATRIOT COAL CORPORATION, et al.**

338

1 is up-to-date on all of its union obligations. We haven't had  
2 any activity yet in terms of 1113, 1114. So their exposure is  
3 yet to be determined.

4 THE COURT: Right.

5 MS. GOLDSTEIN: We all hope -- it is in our interest  
6 as well as the workers and the union and the other creditors  
7 here -- that we have a successful reorganization. That's what  
8 we're all working towards. We support the debtors' concept  
9 that everything, if possible, should be consensual. I think  
10 we're all hoping that that is the case. Let me say that, I  
11 couldn't ballpark it but I do believe, if there's a failure  
12 here, a liquidation of this company is a disaster for all  
13 constituents.

14 THE COURT: I think that's probably right.

15 MS. GOLDSTEIN: And I don't think that the fact  
16 that -- and to an individual it's going to be more meaningful  
17 than to a Citibank. I think we don't look at it that way  
18 necessarily from a standpoint of this --

19 THE COURT: Well, no one likes to think of this --

20 MS. GOLDSTEIN: -- the questions before this Court.

21 THE COURT: -- no one likes to think about a  
22 liquidation.

23 MS. GOLDSTEIN: It's just not a scenario that is going  
24 to be desired.

25 THE COURT: It's going to be avoided at all costs.

**PATRIOT COAL CORPORATION, et al.**

339

1 MS. GOLDSTEIN: It should be avoided at all costs.

2 THE COURT: Let me ask you one more question and then  
3 I'm done with my questions. On page 11 of your pleading you  
4 state at the end of the carryover paragraph that "the first-out  
5 DIP agent submits that the concentration of the post-petition  
6 financing negotiations in New York City is indicative of the  
7 location in which all of these significant aspects of these  
8 cases including, for example, any plan of reorganization, are  
9 likely to be negotiated and resolved." But where the case may  
10 or may not be pending has nothing to do with that.

11 MS. GOLDSTEIN: Well --

12 THE COURT: If the case goes to another jurisdiction,  
13 you can still --

14 MS. GOLDSTEIN: We're still going to negotiate  
15 everything in New York --

16 THE COURT: You're still going to negotiate where you  
17 want to.

18 MS. GOLDSTEIN: But this point goes to the fact  
19 that -- of convenience to the parties. Parties are here, the  
20 advocates are here, the witness -- there's no -- and, again,  
21 let's go back to the burden of proof. There's no showing that  
22 West Virginia is convenient, really, for any of the parties.

23 THE COURT: But you don't have to go to West Virginia  
24 to negotiate --

25 MS. GOLDSTEIN: No, and I'm sure we wouldn't.

**PATRIOT COAL CORPORATION, et al.**

340

1 THE COURT: -- DIP extensions or -- you can do all of  
2 that wherever you like.

3 MS. GOLDSTEIN: Well, let me talk about the DIP  
4 extensions for a moment. This DIP loan matures in eighteen  
5 months. I think I indicated our view that this is not a simple  
6 case. Not an easy case. Lots of issues. And there's a good  
7 chance it will go beyond eighteen months. I think one of our  
8 client's concerns will be how do we get refinanced at that  
9 point in time. We talked a lot -- Ms. Schonholtz talked a lot  
10 about the fact that there are guidelines and precedents here  
11 about DIP financing. Whether our clients extend and on what  
12 terms remains to be seen. Or whether we can be refinanced with  
13 a new DIP lender is certainly going to be a big issue for the  
14 debtor. So I don't think we can just assume that the DIP  
15 lenders are not -- do not have a stake in where the case is  
16 being handled --

17 THE COURT: Okay.

18 MS. GOLDSTEIN: -- and how it proceeds.

19 THE COURT: Okay.

20 MS. GOLDSTEIN: Your Honor, we respectfully request  
21 that the motions of the United States Trustee and the United  
22 Mine Workers be denied.

23 THE COURT: All right. Thank you, Ms. Goldstein.

24 MR. HUEBNER: Your Honor, may I speak for one second?

25 THE COURT: Yes, Mr. Huebner.

**PATRIOT COAL CORPORATION, et al.**

341

1 MR. HUEBNER: Not as an advocate. I'm not arguing in  
2 any way. I just want to make one thing clear for the record,  
3 because probably many journalists, many people are listening.  
4 The conversations about potential liquidation --

5 THE COURT: They are --

6 MR. HUEBNER: -- in the case --

7 THE COURT: They are --

8 MR. HUEBNER: -- entirely hypothetical.

9 THE COURT: -- entirely hypothetical. And let me make  
10 a point --

11 MR. HUEBNER: Thank you, Your Honor.

12 THE COURT: -- that in this case, as in every other  
13 case, the press are, of course, welcome, but it is extremely  
14 important in this case, as in all other cases, that to the  
15 extent matters that are said in this courtroom are reported on  
16 that they be absolutely accurate.

17 I cannot, and should not, read the press accounts of  
18 what goes on here, but substantial damage can be done by  
19 inaccurate reporting, and I cannot emphasize enough how  
20 important that is, because folks who aren't watching and who  
21 aren't listen will read what's in the press reports and take it  
22 as an accurate and true fact. There is absolutely nothing  
23 that's been placed on this record that at all suggests that  
24 there is going to be or that anyone wants there to be a  
25 liquidation of this company. This is courtroom argument and

**PATRIOT COAL CORPORATION, et al.**

342

1 nothing more. This is what judges do to lawyers.

2 MR. HUEBNER: Thank you, Your Honor, very much. I  
3 very much appreciate the clarification --

4 THE COURT: All right. Now it's --

5 MR. HUEBNER: -- because we are worried that it will  
6 be misconstrued.

7 THE COURT: It's 7:20. We've got two more parties to  
8 go before we're going to take a break. I'm going to ask -- go  
9 ahead.

10 MR. HUEBNER: Your Honor, to the extent that it's  
11 helpful we were able to make good on our offer to get food in  
12 for everybody.

13 THE COURT: Okay. And do you have some -- the food is  
14 in?

15 MR. HUEBNER: The food is here.

16 THE COURT: Is here?

17 MR. HUEBNER: I've been advised that it's down the  
18 hall waiting in the conference room for everybody.

19 THE COURT: Okay. I'm being advised --

20 MR. HUEBNER: Except the U.S. Trustee, who may not  
21 have any.

22 THE COURT: She's --

23 MR. HUEBNER: Not even a cookie.

24 THE COURT: She looks like she's eating her pen at the  
25 moment, so --

**PATRIOT COAL CORPORATION, et al.**

343

1 All right.

2 MR. HUEBNER: Would you prefer that we wait until  
3 after, Your Honor?

4 THE COURT: Why don't we let folks take a break, and  
5 I'm going to ask you folks over here, it's getting quite warm  
6 in here, at least for me under these lights. If I could ask  
7 you to lift the blinds, throw open the windows; let's try to  
8 get some air in here. Go have dinner until -- I'm going to  
9 make you eat fast -- quarter to 8 we're back here, all right?

10 Folks in West Virginia and St. Louis, quarter to 8.  
11 All right? Thank you, everyone.

12 MR. HUEBNER: Thank you, Your Honor.

13 UNIDENTIFIED SPEAKER: Thank you.

14 (Recess from 7:21 p.m. until 7:56 p.m.)

15 THE COURT: All right. Good evening. Please have a  
16 seat.

17 MR. HUEBNER: Your Honor --

18 THE COURT: All right?

19 MR. HUEBNER: I'd like to begin with what is literally  
20 a housekeeping matter, and on behalf of everybody in the  
21 courtroom thank the Court's indulgence very much for allowing  
22 us to bring in dinner unlike --

23 THE COURT: Sure.

24 MR. HUEBNER: -- unlike what happened yesterday.

25 THE COURT: Hold on. There's an empty chair. We

**PATRIOT COAL CORPORATION, et al.**

344

1 don't have Ms. Schwartz yet. Hold on one second.

2 MR. HUEBNER: Well, she wasn't allowed to eat, so  
3 since I'm just thanking the Court -- Davis Polk will not be  
4 leaving tonight until we are comfortable that both the  
5 conference room and we feel --

6 THE COURT: Okay. Very good.

7 MR. HUEBNER: -- and this room is cleaned up.

8 THE COURT: Very good. Very good. Can you go to my  
9 house afterwards?

10 MR. HUEBNER: I have nothing to say, Your Honor.

11 THE COURT: Where during the break I had to give my  
12 eighty-five year old mother instructions on how to operate the  
13 stove so she could make her own dinner.

14 MR. HUEBNER: Your Honor, there is some food left in  
15 the conference room if that would help your mother.

16 THE COURT: In all seriousness, could somebody step  
17 out and try to find Ms. Schwartz?

18 MR. STARK: Your Honor, this is nonsubstantive.

19 THE COURT: Okay.

20 MR. STARK: But in preparation for my remarks, which  
21 I'm hoping will be brief, I may be referring to a couple of  
22 documents Your Honor had mentioned -- had questioned earlier  
23 whether or not I filed a 2019 statement.

24 THE COURT: Okay.

25 MR. STARK: If Your Honor doesn't have a copy I'd have



**PATRIOT COAL CORPORATION, et al.**

345

1 one to hand up to you.

2 THE COURT: Sure. That's fine. We can do that while  
3 we're waiting for the U.S. Trustee.

4 MR. STARK: Also, we may make reference to the DIP  
5 credit agreement, the first DIP credit agreement. I don't  
6 expect to spend a lot of time on it, but if it would help Your  
7 Honor I have another copy of that as well.

8 THE COURT: No. Well, I don't have it here, but why  
9 don't we wait and see.

10 MR. STARK: May I approach?

11 THE COURT: Sure. Yes. Okay.

12 All right. I think we can proceed now.

13 MR. STARK: Okay. Thank you, Your Honor.

14 Again, for the record, Robert Stark from Brown Rudnick  
15 appearing on behalf of the ad hoc consortium of senior  
16 noteholders.

17 Your Honor, it's late, and Your Honor has heard an  
18 awful lot, and I have, in fact, stricken out tremendous  
19 portions of my outline.

20 THE COURT: Okay.

21 MR. STARK: So if Your Honor will give me a little  
22 indulgence if I may stammer or pause from time to time as  
23 I'm --

24 THE COURT: Sure.

25 MR. STARK: -- trying to collect my handwritten notes,

**PATRIOT COAL CORPORATION, et al.**

346

1 trying to reflect answers to Your Honor's questions along the  
2 way. But what I do want to do is stay with outlined themes and  
3 deviate as Your Honor will have me just so I can follow my  
4 notes. And those themes are what I'll refer to as a thematic  
5 read of the case law, and it was mentioned in our papers.

6 The second is additional discussion about the impact  
7 on a venue transfer, some impact that we see, and we think it's  
8 important to consider.

9 Third, I'd like to mention certain other equitable  
10 factors that, again, we talked about in our papers but I hadn't  
11 heard anybody mention before to Your Honor and give us an  
12 opportunity to talk about that.

13 And, finally, I would like to, to a limited extent,  
14 try to weigh in on what the injustice prong means as we see it.  
15 And, generally, I'm going to approach this from a very  
16 simplistic fashion if it pleases Your Honor. We're newer to  
17 the case, and we certainly don't have the facts that everybody  
18 else who has spoken before, and I won't presume to try to  
19 answer factual questions the way they have, but I think I can  
20 share a perspective from a hundred plus million dollar  
21 unsecured creditors with claims at ninety-nine out of ninety-  
22 nine debtors and how we see the cases at this point and perhaps  
23 that might help Your Honor.

24 THE COURT: Well, I have to make a preliminary comment  
25 about your preliminary statement in your pleading.

**PATRIOT COAL CORPORATION, et al.**

347

1 MR. STARK: Yes, ma'am.

2 THE COURT: It reflects a whole lot of hyperbole, a  
3 whole lot of words that I think are not used appropriately.

4 MR. STARK: Okay.

5 THE COURT: And I just, frankly, I have to call you on  
6 it.

7 MR. STARK: Okay.

8 THE COURT: Okay? So, you start by saying, and I'm in  
9 your -- in the joinder of the ad hoc consortium at paragraph 1.  
10 "The Venue Transfer Motions are a matter of extreme gravity."  
11 That much I completely agree with. "Discretionary relief  
12 requested by the Movants courts disaster."

13 MR. STARK: Yes. We believe that.

14 THE COURT: Well, you need to define disaster, because  
15 you have a different definition of disaster than I do. And  
16 I'll continue so that you can answer this all at once.

17 I'll skip -- well, little i. "(i) wholly unsettle  
18 myriad facets of case administration". Wholly unsettle. "(ii)  
19 interpose different legal principles...that...threaten  
20 continued access to post-petition financing". You've heard me  
21 say a number of times, and you've heard a number of the other  
22 parties disagree with that perspective.

23 "(iii) lay waste", big word, "to substantial  
24 management efforts". "(iv)", and I'm not quoting everything in  
25 its entirety, "exchange unsecured creditor confidence in this

**PATRIOT COAL CORPORATION, et al.**

348

1 Court's oversight of sensitive 'mega'-cases". By the way, I  
2 don't know that there are any other kind, but that's a  
3 different issue. "And its facility for complex matters of  
4 corporate finance and enterprise valuation, for the unknown".  
5 I think that's insulting to other Courts in this country.

6 MR. STARK: We didn't mean it as such, and I'll  
7 explain.

8 THE COURT: "(v) dramatically" -- dramatically -- "add  
9 administrative inconvenience and expense, elongating resolution  
10 of everyday contested matters and creating serious logistical  
11 challenges for emergency relief; and potentially cast a heavy  
12 cloud over plan negotiations". That is a really, really bleak  
13 picture, and, frankly, not one that even the debtors, I think,  
14 would ascribe to. So either you are smarter than everybody  
15 else or just have more of a flair for the dramatic, but --

16 MR. STARK: Well, maybe --

17 THE COURT: I take very seriously the words on the  
18 page that people put down. You're a high-priced lawyer among  
19 other high-priced lawyers. I assume this wasn't a first draft.  
20 So, I'm done with my little speech, and now you can respond.

21 MR. STARK: Your Honor wouldn't be the first to have  
22 said I have a flair for the dramatic, but --

23 THE COURT: I'm a big fan of simple declarative  
24 sentences.

25 MR. STARK: And we will follow that.

**PATRIOT COAL CORPORATION, et al.**

349

1 THE COURT: Big fan.

2 MR. STARK: And we will follow that to the T, Your  
3 Honor, henceforth. But the words that were chosen reflect the  
4 gravity of the sense that we perceive about the issues that  
5 have been presented before Your Honor.

6 Your Honor has had an awful lot of discussion about  
7 the perspectives of different people, and I'll share ours, but  
8 these words reflect the gravity that we see in this particular  
9 contested matter and the damage that we see as potential if it  
10 does move elsewhere. And I'll explain that. That's part of my  
11 presentation today. But in so doing I just want to say there  
12 was never an intent, and I think we worked pretty hard, and I  
13 gather we were unsuccessful. This is not a Court versus Court  
14 issue from our perspective. This is a party versus party under  
15 the auspices of a Court issue. And I will explain that as  
16 well, Your Honor.

17 THE COURT: Okay.

18 MR. STARK: But before I do, I did, oh, as the U.S.  
19 Trustee was not in the room, I did hand up a copy of the 2019  
20 statement.

21 THE COURT: Right.

22 MR. STARK: And I know now that Your Honor has a copy.

23 The one thing that I did want to do at the forefront  
24 simply to make sure that we're all operating from the same  
25 factual case, because this is a matter of record, is reflect

**PATRIOT COAL CORPORATION, et al.**

350

1 the addresses of the holders of the senior notes that are  
2 members of my group, and what this 2019 statement reflects is  
3 about twenty-three million is held by institutions in New York,  
4 about twenty-six million is held by institutions in  
5 Minneapolis, twenty-five million held by an institution in  
6 Milwaukee, and seven million held by an institution in Houston.  
7 All of my committee members, my consortium members, Your Honor,  
8 believe that New York is a more convenient forum, first and  
9 foremost, but their views go to a more fundamental level, and,  
10 again, and, I guess, the hyperbole reflects that, of their  
11 fears about venue transfer.

12 Delving into my first agenda item, our read of the  
13 applicable case law on a thematic basis -- you've heard so much  
14 about the case law. I don't want to necessarily go over where  
15 points have before, but, obviously, things seem to start,  
16 analysis seems to start from CORCO, the 1979 Circuit Court  
17 case, and so much has changed since 1979. We've had many more  
18 1412 cases, obviously, and debtors are bigger, more complex in  
19 issues.

20 THE COURT: I'm going to stop you and pick one nit  
21 with the 2019 statement, and I think it's -- I don't know what  
22 the facts are. I only know what you tell me in the 2019  
23 statement. But I think that 2019 requires you to disclose what  
24 members of your group held as of the petition date.

25 MR. STARK: I was under the impression that's if we

**PATRIOT COAL CORPORATION, et al.**

351

1 intended to represent other folks other than ourselves. If  
2 we've misread or misinterpreted the rule than we will  
3 immediately correct it, Your Honor, but we were under the  
4 impression that it's only when a group suggests to a Court that  
5 it intends to represent interests beyond those of the members  
6 of the group, and we most certainly do not. But the more --  
7 the further disclosure requirements, I was under the impression  
8 that 2019 is only when a party suggests to a Court that it  
9 intends to go beyond.

10 THE COURT: Well, we can clear this up at a --

11 MR. STARK: And that's --

12 THE COURT: -- at a later date. My --

13 MR. STARK: -- (c)(2)(C). I'm sorry, Your Honor.

14 THE COURT: All right. Why don't you keep going?  
15 It's late.

16 MR. STARK: After CORCO we have had a number of cases,  
17 and, as we've, sort of, laid out in our pleading, we've tried  
18 to thematically group them, and this is under the interest of  
19 justice prong. Granted, much of this otherwise overlaps with  
20 convenience, but as our groupings of the cases they show four  
21 generalized groupings with respect to situations where Court  
22 found in the interest of justice it is appropriate to transfer  
23 venue, and those four groupings are first, where cases of  
24 relatively modest size, and there's, sort of, an obvious  
25 geographic routing in another single forum. This is the --

**PATRIOT COAL CORPORATION, et al.**

352

1 THE COURT: Right.

2 MR. STARK: -- apartment building, the real estate  
3 project, the nightclub in Miami.

4 The second areas where venue selection perpetuates  
5 serial findings or other, sort of, improper evasive purposes,  
6 those are obvious, and everybody knows which ones those are.

7 The third grouping is where the debtor and the primary  
8 creditors consent to argue for venue shift. That's Winn-Dixie,  
9 in our opinion, and numerous others.

10 And, fourth, and I think this one's particularly  
11 important, where the Court seems to have confidence that venue  
12 transfer will not create substantial issue in the case,  
13 substantial case dislocation or value deterioration. The  
14 Courts in B.L. of Miami, 1606 New Hampshire Avenue seem to  
15 focus on that point, and Judge Gerber's articulation in  
16 Houghton Mifflin, quote, "everything in the venue jurisprudence  
17 emphasizes the goal, and ability, of judges to protect the  
18 creditors and other stakeholders in the cases on those judges'  
19 watch". And I don't think that those --

20 THE COURT: All right. But that was -- Judge Gerber  
21 was coming from a completely different place in that decision,  
22 because the facts in Houghton Mifflin were so different. I'm  
23 sure you're familiar with them. It was a hundred percent  
24 consensual prepackaged plan, and the U.S. Trustee had  
25 determined to challenge venue as being improper, and Judge



**PATRIOT COAL CORPORATION, et al.**

353

1 Gerber, I think, properly, was reflecting dismay over the  
2 course that he had to embark on in light of the creditor  
3 consensus. So, I don't think that that consideration really  
4 came into play. I don't think Houghton Mifflin can be cited  
5 for that proposition.

6 MR. STARK: Understood. But let's approach it from  
7 the flip side, and I think it reiterates the point. Where  
8 courts typically do not transfer venue, and they seem to fall  
9 into four other categories, and they do seem to connect, in  
10 some ways, to the previous four.

11 First, where the debtor is a large business enterprise  
12 regularly transacting across state or national boundaries  
13 there's a disinclination towards transfer. One could look at  
14 the Enron and Bruno's decisions to support that proposition.

15 Second, where rehabilitation pertains more to  
16 overleveraged balance sheet than something that, perhaps, is  
17 intrinsically wrong with the business operations. That's the  
18 LeBlanc, troubles of the business were not manufacturing but  
19 financial, and Judge Gonzalez's reference to financial  
20 restructurings in Enron.

21 The third category is where the primary creditor  
22 constituencies support Enron's venue choice, and that was a key  
23 determinant in Enron, amongst others, and then the flip side to  
24 the point where Your Honor wasn't necessarily following my  
25 Houghton Mifflin reference, where the movant fails to prove

**PATRIOT COAL CORPORATION, et al.**

354

1 that venue can be transferred without significant case  
2 disruption or value deterioration. That's a theme that we  
3 think is implicit, and Mr. Huebner touched upon this, I  
4 thought, quite eloquently, in LeBlanc and Manville and Enron  
5 and others.

6 And on this point I think it bears repeating again --

7 THE COURT: But then you -- keep going, though,  
8 because then in paragraph 18 you say "The Debtors' case does  
9 not fit into any of the first four categories (where courts saw  
10 fit to transfer venue)", and it "fits squarely into all of the  
11 second four categories".

12 MR. STARK: Yes, Your Honor.

13 THE COURT: But it ignores a number of the issues that  
14 have been raised, because none of these cases -- I don't know  
15 if you've slotted Winn-Dixie into any of these, but none of  
16 these cases involve -- I'm sorry. Winn-Dixie is in the consent  
17 category. I mean, those facts are so unique. They are so  
18 unique and, frankly, bizarre to have a debtor who makes a venue  
19 choice, things don't go well, it gets really ugly. They change  
20 their mind. The debtor makes a venue motion to transfer its  
21 own case, gets opposed by the creditors' committee. I mean,  
22 it's a law school hypothetical.

23 MR. STARK: Right.

24 THE COURT: Okay?

25 MR. STARK: And suggests that, I think, as Mr. Huebner

**PATRIOT COAL CORPORATION, et al.**

355

1 indicated, eleven different reasons why it's a difficult  
2 precedent to necessarily support one way or the other.

3 THE COURT: Okay. But as everyone keeps telling me,  
4 the discretion is mine under 1412, right? So I don't know that  
5 this categorization is helpful, because it doesn't deal --  
6 other than Winn-Dixie it doesn't deal with the fact of the  
7 creation of the New York entities for the purpose of ensuring  
8 that there was a venue predicate. It doesn't deal with it. So  
9 I don't know how helpful that is.

10 MR. STARK: Well, you know what, Your Honor? I'm just  
11 going to leave the outline and go directly to that, because  
12 I've watched other people try to stick to their outline, and I  
13 just think that's something that Your Honor needs to at least  
14 hear our perspective on. If, perhaps, Your Honor would like to  
15 talk with us about it I'll offer our perspective and see if  
16 it's persuasive.

17 And I don't think I have much new to offer except  
18 perhaps repackaging of what other people have said. I do look  
19 at -- Your Honor raised artificial impairment under 1129(a)(7)  
20 and other provisions of the Bankruptcy Code that are  
21 interpreted.

22 There are provisions of the Bankruptcy Code, 11,  
23 510(c), for example, where Congress specifically said to the  
24 court you are to do -- you are to develop a sort of case law  
25 about this. But otherwise, the Bankruptcy Code is, from some

**PATRIOT COAL CORPORATION, et al.**

356

1 people's perspective, judicial interpretation as if the Court  
2 was acting as a court of law, understanding what the statute  
3 says. If there is ambiguity with respect to a particular set  
4 of facts and applying the principle, as it's interpreted plain  
5 meaning wise from the statute, you look to legislative history,  
6 you look to other bankruptcy court provisions. So in  
7 artificial impairment it's not so hard to find a seven matched  
8 up with a three in good faith.

9 In looking at legislative history and saying, well, we  
10 don't -- there is a purpose why we wanted an impaired accepting  
11 class before we went to cram-down and this seems to eviscerate  
12 that purpose that seems to be antithetical to what the  
13 legislative history is, seems to be on a gut instinct basis  
14 antithetical to good faith. Hence, it's easy for us to  
15 interpret the statute in a way that's consistent that makes it  
16 all jive holistically.

17 That, I would posit, Your Honor, is a different rubric  
18 of thinking than what 1412 postulates for Your Honor.

19 THE COURT: Well, I don't know that that's necessarily  
20 the case. I just don't -- you made a lot of leaps, and I just  
21 don't know that that's necessarily the case, that I couldn't  
22 apply that same kind of analysis to the venue statute.

23 MR. STARK: Perhaps you can't. Let me continue and  
24 see if I can do a little ---

25 THE COURT: Go ahead.

**PATRIOT COAL CORPORATION, et al.**

1 MR. STARK: -- if I can do a little better in  
2 persuading you. If one were to think of interpreting  
3 1129(a)(7) along that sort of court of law, here are the  
4 rubrics, here are the ways in which I am supposed to try to  
5 interpret the statute. Then you look at 1412, and it says,  
6 "You may transfer venue in the interest of justice."

7 THE COURT: Right.

8 MR. STARK: There are fewer statements that I can  
9 think of -- and I can't think of any -- that are in any of  
10 these statutes, Bankruptcy Code, or surrounding procedural  
11 statutes that is such a clear statement of congressional  
12 delivery of discretion to a court to make a fact-based  
13 determination --

14 THE COURT: Right.

15 MR. STARK: -- holistically.

16 THE COURT: Right.

17 MR. STARK: Okay. I don't know that that's  
18 controversial except to the extent that it is a holistic  
19 endeavor. Let me try to explain what I mean by that through a  
20 hypothetical. And, again, I'm doing this a little on the fly,  
21 so forgive me if we move in a direction here.

22 THE COURT: Go ahead.

23 MR. STARK: But let's take us back to 2008, in the  
24 height of the great recession and there is zero credit  
25 availability for debtors-in-possession, okay. And there is one

**PATRIOT COAL CORPORATION, et al.**

358

1 lender that's available for Patriot Coal offering up the  
2 necessary liquidity to keep this company in bankruptcy and  
3 moving forward but conditions liquidity on a venue staying  
4 here, for whatever reason. And a venue moves -- that's a  
5 default under that agreement -- and they won't be liquidated  
6 any more.

7 THE COURT: I'm not going to buy into a gun at the  
8 Court's head hypothetical. I'm just not going to. And frankly  
9 on a Friday in 2008, in September, there was a court in this  
10 building who faced exactly that choice. Prove the sale of the  
11 Lehman Brothers' assets to Barclays or else.

12 MR. STARK: Uh-huh. And --

13 THE COURT: So there are really those kinds of  
14 situations, but I'm going to accept the hypothetical --

15 MR. STARK: It's not applicable today.

16 THE COURT: -- that you put out.

17 MR. STARK: No, no, no. I'm putting it out for  
18 purposes only of eliciting what we're supposed to do. That's  
19 all. Let me just -- let me see if I can finish this very  
20 quickly.

21 THE COURT: Okay.

22 MR. STARK: Because I was also involved in cases just  
23 like that, at that time, and faced the gun to the head, but I  
24 was doing it from the perspective of representing clients at  
25 lower levels of the capital structure, creditors' committees

**PATRIOT COAL CORPORATION, et al.**

359

1 who didn't think that that was appropriate, but the court did  
2 feel the gun to the head. And I would posit, Your Honor, that  
3 under that scenario -- if a venue transfer motion under that  
4 scenario was put before this Court, under those circumstances,  
5 Your Honor would not hesitate to find in the interest of  
6 justice it's best for this company to stay, because  
7 holistically, looking at this company, having liquidity, and  
8 keeping the business running, and the jobs preserved, and the  
9 value potential there is better for everyone than moving it and  
10 facing that loss. That's all I'm suggesting.

11 THE COURT: Well, you know, it's a hypothetical that I  
12 said I just can't buy into, because then it suggests that the  
13 rule would be if somebody credibly takes the witness stand and  
14 says, it's my money, and I'm not lending it unless you stay  
15 here.

16 MR. STARK: Uh-huh.

17 THE COURT: That's being a terrorist, and we're not  
18 going to do that, okay. That's inconsistent with justice and  
19 the rule of law. So I am not going to take your invitation to  
20 go down that path.

21 MR. STARK: No, no, no. I'm not -- this is a  
22 hypothetical to enable us to figure out what the statutory  
23 rubric means. I completely agree, and Your Honor phrased it  
24 differently with what's the limiting factor of a DIP lender who  
25 follows that philosophy.

**PATRIOT COAL CORPORATION, et al.**

360

1 THE COURT: Right.

2 MR. STARK: And the limiting factor I would posit to  
3 Your Honor is the holistic investigation of what's best for the  
4 company overall, looking at all evidence, looking at  
5 everything. It could be in the DIP financing, it could be in  
6 the benefit of employees, it could be in contracts that need to  
7 be assumed, it could be any host of various different issues of  
8 large dollars and small dollars, of soft interest in terms of  
9 people's quality of life to very big financial issues involving  
10 and how they're going to structure the plan or reorganization.

11 Your Honor is supposed to look at everything, and you  
12 have congressional discretion to determine what's appropriate.  
13 The interest of justice standard, Your Honor, I would posit,  
14 looking at that hypothetical and extrapolating from it, is look  
15 at everything. Look at the mine worker's interests, look at  
16 what the union's interests are, look at the sureties' interest.  
17 As we said in our papers --

18 THE COURT: Right.

19 MR. STARK: -- they have very legitimate concerns, but  
20 it's all in scale and proportion to everything else in the  
21 case. The problem, Your Honor --

22 THE COURT: And one of the issues surrounding my  
23 interest in your 2019 statement is that one of the challenges  
24 of sitting up here is really understanding what the economic  
25 interests really are in today's world where there are hedges,



**PATRIOT COAL CORPORATION, et al.**

361

1 and derivatives, and claims trading, and I see the very big  
2 number on your 2019 statement, and I assume it's accurate, but  
3 I have no idea, nor am I entitled to know what your consortium  
4 paid for their positions.

5 So in fact your true economic position stake might be  
6 considerably less than the hundred million dollar number on  
7 this page, it might be hedged. I have no idea, and it's not a  
8 good feeling to not know that, but those are the rules, and I  
9 play by them.

10 MR. STARK: I understand, Your Honor. I believe I'm  
11 playing by the --

12 THE COURT: It's not an invitation for you tell me who  
13 bought what, when. Don't get me wrong, but you put on the  
14 table the holistic, and I'm trying --

15 MR. STARK: Sure.

16 THE COURT: -- my level best to do that and to really  
17 give each and every one of you a fair opportunity to be heard  
18 and also a hard time about your positions to find -- to get at  
19 that. To get at the essence of what each of you -- the weight  
20 I should give to what each of you has to say.

21 MR. STARK: Understood.

22 THE COURT: Go ahead.

23 MR. STARK: And, Your Honor --

24 THE COURT: I'm going to try to stop interrupting  
25 everybody, because I want to get you folks all out of here

**PATRIOT COAL CORPORATION, et al.**

362

1 tonight.

2 MR. STARK: Well, let me just leave by saying I think  
3 we've complied with 2019. If Your Honor wants more from us,  
4 we're happy to give, it, but as I understand it, our economic  
5 interests are 102.5 million in senior notes that are at every  
6 debtor in this conglomerate.

7 THE COURT: Okay.

8 MR. STARK: And that's what I have to report --

9 THE COURT: All right.

10 MR. STARK: -- as a lawyer of this -- as a member of  
11 the bar of this court.

12 The point that I'm making though, evaluating our 102.5  
13 versus the mine workers, and the other parties in the case, and  
14 the various different interests here, is Your Honor is supposed  
15 to look at all of that and evaluate on a holistic basis. And  
16 it is very difficult in a mega case, because there is so much  
17 information.

18 The problem, Your Honor, and I would posit this as  
19 respectfully as could be, is that it's not so much the search  
20 for a limiting factor or for standard of determining how one --  
21 how a court ought to interpret 1412. I would respectfully  
22 posit the issue is a lack of proof. It's purely that.

23 Your Honor, our position is you can look at  
24 everything. The burdens of proof are critical. And when you  
25 come to the Court and seek relief you have to come with proof.

**PATRIOT COAL CORPORATION, et al.**

363

1 That was not delivered. The debtors, from our perspective,  
2 delivered a significant amount of proof showing why New York  
3 was a very important place. We support that predicated on the  
4 things that they've said, the evidence that they put forward,  
5 and our own understanding of Chapter 11, but this is not a  
6 legal standard issue. This is a failure of proof issue, which  
7 could lead Your Honor to a very narrow ruling here predicated  
8 on the fact that the movants just simply fail to prove their  
9 case and nothing more than that.

10 If I may just go back into my agenda.

11 THE COURT: Go ahead. Sure. Take your time.

12 MR. STARK: On that point, and I'll just touch upon  
13 this and leave the agenda point with respect to our four  
14 thematic approaches to the case law -- and I do think it is  
15 implicit in all of these cases that the ability to know whether  
16 or not the moving of the case from this venue to another venue  
17 would rattle the company in one form or another, perhaps that's  
18 a little too much hyperbole, might cause dislocation and  
19 perhaps value deterioration by that movement, is a part of the  
20 factual recitation that a movant has to make and the failure to  
21 do so, they would have to prove the negative. They have to  
22 prove that in fact the movement of this case to another place  
23 won't harm as opposed to the debtors would say it might.

24 And I do want to -- with respect to the evidence, and  
25 I won't go through it again, it's pretty overwhelming about the

**PATRIOT COAL CORPORATION, et al.**

364

1 size of this company, and the complexity, and the  
2 sophistication. There is a point that I think is important to  
3 make that hadn't been made before. The movants' papers and  
4 presentation, especially the sureties focusing on the  
5 particular pieces of land with the pictures fail, in our  
6 opinion, to reflect to the Court other attributes of a  
7 conglomerate -- of an enterprise. A living, breathing  
8 enterprise in certain respects. It's more than physical  
9 location.

10           Albeit when you're dealing with mining companies and  
11 commodity driven companies, that is the reserves and the  
12 operations themselves are significant, because you can value  
13 those reserves against commodity pricing, but what's critically  
14 important, and I think was reflected in the Schroeder  
15 affidavit, and I'll get the citations in a minute, is the fact  
16 that this company is more than just what is under the earth.  
17 It is the contracts with the parties in various different  
18 places, in various different countries, as to the selling of  
19 that coal to those other parties.

20           In our view, Your Honor, Section 365 is a central  
21 provision of Chapter 11 reorganization. The dealing with  
22 contracts for selling the product goes implicitly to the  
23 enterprise worth, because it ultimately determines whether or  
24 not that coal under the ground can be sold profitably or for a  
25 loss, and how that ultimately bears on the decisions about

**PATRIOT COAL CORPORATION, et al.**

365

1 rejection, and assumption, and replacement, if necessary, is  
2 just as critical. In certain respects more critical to the  
3 outcome on a profitability study.

4 THE COURT: But I think out of all the things in this  
5 case that are so difficult I think that's actually a pretty  
6 easy one --

7 MR. STARK: It might be.

8 THE COURT: -- because a debtor's decision to reject a  
9 contract it's hard to think of cases where that decision gets  
10 second guessed. The debtor makes the determination.

11 MR. STARK: Business judgment rule.

12 THE COURT: Business judgment rule. In the absence of  
13 anything untoward, there you go. Then it's a question of what  
14 the rejection damages are, and bankruptcy courts or trial  
15 courts, and they can listen to the evidence and put a number on  
16 it, in the absence of an agreement, and most of the time it's  
17 an agreement in my experience. Assumptions same thing.  
18 Business judgment and also adequate assurance.

19 So I hear you, 365 is one of the biggies, but I just  
20 don't see that as being something that weighs, one way or the  
21 other, in terms of where this case plays out.

22 MR. STARK: Well, there's two parts -- two responses  
23 to that.

24 THE COURT: Okay.

25 MR. STARK: First is what Your Honor sees, in terms of

**PATRIOT COAL CORPORATION, et al.**

366

1 the activity before Your Honor is, oh but a small segment of  
2 the --

3 THE COURT: Tip of the iceberg, right?

4 MR. STARK: Yes, the tip of the iceberg.

5 THE COURT: Okay.

6 MR. STARK: And I would respectfully posit in my  
7 experience, in cases such as this, the determination on  
8 contracts that are critical to the company's well being where  
9 they may be commodity pricing driven or replacements are  
10 predicated on competing with, for example, natural gas prices  
11 as low as they are in light of fracking.

12 THE COURT: Right.

13 MR. STARK: And what can be done to mitigate losses  
14 and how business combinations through contracting otherwise can  
15 be used to augment profitability, that's why debtors have very,  
16 very expensive financial advisors --

17 THE COURT: Right.

18 MR. STARK: -- and assistants to assist in that.

19 THE COURT: Okay.

20 MR. STARK: So Your Honor sees very little of that.

21 The iceberg is very large.

22 THE COURT: Okay. So give me the punch line.

23 MR. STARK: The punch line is --

24 THE COURT: All of that is true, big iceberg, right?

25 MR. STARK: Right.

**PATRIOT COAL CORPORATION, et al.**

367

1 THE COURT: But what does that have to do with the  
2 Court?

3 MR. STARK: When you're talking about moving --  
4 transferring the venue, okay, and you're thinking about what is  
5 this big company that we're talking about. It's all too easy  
6 at times to say it's simply the coal under the earth. And I'm  
7 simply positing, Your Honor, that in the valuation context, in  
8 the negotiating context, in the rehabilitation context that's a  
9 part of it. It may be -- it's a massive part of it, but it is  
10 not the only part of it. The contracts themselves are  
11 significantly important too and that there's more to this  
12 company than simply a piece of dirt.

13 And all I'm suggesting, Your Honor, is that Patriot  
14 Coal is more than the mines in West Virginia and Indiana. It  
15 is all of the people that are around, that are working, that  
16 are selling, that are negotiating, that are making that call  
17 profitable for the company eventually if not soon. That's all  
18 I'm positing.

19 And, Your Honor, if I may before I move on. Your  
20 Honor's looking at me as if you may want to ask me a question.

21 THE COURT: I hear you, but none of that's happening.  
22 There's nothing to sell without the coal. The coal is the  
23 product. In that case -- in that respect, this case is  
24 different. It's unique. It's not -- indulge me.

25 MR. STARK: Sure.

**PATRIOT COAL CORPORATION, et al.**

368

1 THE COURT: It's not a fiber optic network. It's not  
2 a cable company. It's not any variety of industries that I can  
3 name that look at complex business models, business lines,  
4 worries about are cellular phones going to replace pagers, are  
5 Smartphones going to replace other phones. All of these kinds  
6 of things that -- we've seen them all here, right?

7 MR. STARK: Right.

8 THE COURT: We've seen -- I mean we've gone through it  
9 already today, but just in my short time doing this I've had a  
10 parade of people telling me about all kinds of industries, but  
11 this is coal. And on the beginning of the case the debtors  
12 explained to me about the difference between thermal coal, and  
13 metallurgical coal, and I understand that there's a  
14 relationship between the price of coal and the price of natural  
15 gas.

16 And the debtors -- part of the reason that the debtors  
17 are where they are is because of the price of natural gas.

18 MR. STARK: Right.

19 THE COURT: And because of other factors beyond their  
20 control. It's warmer than it was. People need less heat. I  
21 mean, this is incredibly complicated in that respect, but not  
22 in the respect of it's coal. And everything else derives from  
23 that. People selling contracts. It's all about the coal.

24 MR. STARK: Oh, absolutely. And Delta Airlines was  
25 all about the airplanes.



**PATRIOT COAL CORPORATION, et al.**

369

1 THE COURT: No, but Delta Airlines was also about what  
2 routes?

3 MR. STARK: Right.

4 THE COURT: What services? How are you going to  
5 present yourself? What kind of carrier are you going to be?  
6 Are you going to give peanuts on the plane? I think that was  
7 one of Judge Beatty's favorite issues at the beginning of the  
8 case.

9 MR. STARK: And on that point, Your Honor, if I may  
10 just quote from the Schroeder affidavit, paragraph 12 on page  
11 5: "Approximately 78 percent of the debtors' 2011 coal sales  
12 were under term one year or longer coal supply agreements that  
13 specified the coal sources, the quality and technical  
14 specifications, the shipping arrangements, pricing --

15 THE COURT: Sure.

16 MR. STARK: -- force majeure --

17 THE COURT: Because on the first day I was also told  
18 that coal is not just coal.

19 MR. STARK: Right.

20 THE COURT: Every piece of coal from one mining  
21 complex to another is different and there are very specific  
22 specifications that need to be followed and complied with. I  
23 get all that.

24 MR. STARK: Right.

25 THE COURT: And maybe we're belaboring this point --

**PATRIOT COAL CORPORATION, et al.**

370

1 MR. STARK: Perhaps.

2 THE COURT: -- unnecessarily, but --

3 MR. STARK: My point actually was simply responding to  
4 the fact, in supplement to everything else, that when the  
5 sureties in particular and the union as well suggests to Your  
6 Honor that this case belongs in kind of a Dunmore Homes sort of  
7 a way in Western Virginia, because it's all about the coal, I'm  
8 positing, Your Honor, that it's not only about the coal.  
9 There's much more here.

10 THE COURT: Sure.

11 MR. STARK: And there's much more to be done.

12 THE COURT: I agree. I agree with you, but let's get  
13 down to what I think one of your pivotal points is on page 15  
14 of your pleading, at the bottom. You say, "The balance of the  
15 equities does not favor transferring the case to a 'hometown  
16 venue' to further advance the UMWA and sureties' parochial case  
17 agenda." And we've talked a lot about what the sureties'  
18 agenda really is. I think the record is not definitive on that  
19 point, but it's that your constituent feels that this is their  
20 hometown for a case of this kind.

21 MR. STARK: Well, I think we've characterized that  
22 differently.

23 THE COURT: Go ahead.

24 MR. STARK: I think the way that I'd like to phrase  
25 it, Your Honor, is that the debtor selected a venue, and we

**PATRIOT COAL CORPORATION, et al.**

371

1 support that selection. We have no allusions that if we file  
2 motions in this Court we have to prove them. If it's  
3 inconsistent with the law we will not win. We don't expect any  
4 particular favoritism. We expect, only as Your Honor said  
5 yesterday, sort of a blind justice. So I don't think we're  
6 looking for anything beyond that. We simply support the  
7 decision that was previously made.

8 But I do want to go on the flipside, because Your  
9 Honor focused on that particular paragraph, and if I can just  
10 begin the response by sort of responding to a quote from me  
11 with a quote from them. "Judges in the Southern District of  
12 West Virginia live near coal miners, grew up with them, worship  
13 with them, and break bread with them." That's from page 24 of  
14 the reply.

15 Your Honor, I don't think we're looking for anything  
16 more than blind justice, a fair day in court.

17 THE COURT: Well, I commented on that exact  
18 statement --

19 MR. STARK: Yeah.

20 THE COURT: -- at least once or twice during the  
21 course of these proceedings --

22 MR. STARK: Yeah.

23 THE COURT: -- so far, didn't I?

24 MR. STARK: Yes.

25 THE COURT: And I said that that bothered me.

**PATRIOT COAL CORPORATION, et al.**

372

1 MR. STARK: And it bothers us. It terrifies us. But  
2 let me go on a little bit beyond --

3 THE COURT: Well, again, terrified is a strong word.  
4 Disaster is a strong word. Please.

5 MR. STARK: I'll try to avoid the dramatic --

6 THE COURT: Please.

7 MR. STARK: -- as best I can. It certainly concerns  
8 us a great deal. But I will say this, Your Honor, and I do  
9 think this is important; it bears repeating. Forty-two percent  
10 of the employees are unionized. Nine out of ninety-nine  
11 companies are obligated in collective bargaining agreements.  
12 It's unclear, at least to us today, what other entities --  
13 asset rich entities as opposed to the holding companies are  
14 entitled to value that's not otherwise -- have claims that are  
15 employee or retiree related.

16 Our view, at this moment in time, Your Honor, is that  
17 there's likely to be or we hope there to be substantial value  
18 for senior noteholders who've got claims at all debtor  
19 entities. And that's one of our big issues in this case is how  
20 can we look through the companies, and look through the asset  
21 classes, and look at the claims, and see who's entitled to  
22 what. And all we're looking for is a fair shake on that. But  
23 it is important, I think -- and it was phrased earlier as it's  
24 not a binary debtor versus union kind of a thing.

25 There are many of us and many of us with interests

**PATRIOT COAL CORPORATION, et al.**

373

1 that are disparate around the company, around the conglomerate,  
2 and the movement to West Virginia, at least as that was  
3 phrased, reflects -- saying nothing about the judge, but says  
4 everything about the perspective of the party that made the  
5 statement and that is of great concern to us.

6 If I can make a couple more points --

7 THE COURT: Sure.

8 MR. STARK: -- on -- I'll phrase it as sort of the  
9 impact is just sort of how I agendaized it before, if that's a  
10 word.

11 Two other points. On the soft landing, we make a  
12 point in our papers about soft landing, and I think this  
13 debtor -- I think Mr. Huebner represented enough to the Court,  
14 but every debtor intends to soft land into bankruptcy with a  
15 DIP in place and presumably talking to the employees, and the  
16 vendors, and the customers, and everybody else to make sure  
17 they understand what's happening in the case.

18 Transferring venue always, at least in my experience,  
19 at least questions of venue, has some degree of unsettlement to  
20 it. Perhaps not great, perhaps great. We don't know. It is,  
21 again, the movants' burden. In this vain, we did raise the  
22 question of the doctrine of necessity payments, the allowances  
23 that Your Honor approved, and I don't want to get into -- I  
24 know that the debtors and the committee have to and  
25 appropriately said, listen there's no default here, and I

**PATRIOT COAL CORPORATION, et al.**

374

1 certainly don't want to do anything more than indicate the  
2 concerns and reflect how legal principals from one jurisdiction  
3 to another may impact -- inadvertently may impact the case.

4 But, Your Honor, if you take a close look at the first  
5 out DIP, the senior level DIP, there is a negative covenant,  
6 its 7.17, it's on page 107, and it obligates the debtors that  
7 first day orders, which is a defined term, shall not be  
8 amended, modified or changed in any way. And first day orders  
9 are defined, on page 21, as orders "based on the motions filed  
10 on or about the petition date."

11 THE COURT: But this is where I think that Ms.  
12 Schonholtz and Ms. Goldstein are very capable of protecting  
13 their clients' interests, and they don't agree that this is a  
14 concern.

15 MR. STARK: And I heard Ms. Goldstein say we think  
16 that we're 364(e) protected and Your Honor agreed.

17 THE COURT: Okay.

18 MR. STARK: And that's great for the DIP lenders. Not  
19 so great for the people who are not DIP lenders if in fact  
20 there are issues there. I'm not suggesting --

21 THE COURT: I'm not following you.

22 MR. STARK: Well, 364(e) protects a lender who  
23 delivers capital to a company in good faith.

24 THE COURT: Right.

25 MR. STARK: Okay. It says that that loan will be

**PATRIOT COAL CORPORATION, et al.**

375

1 protected.

2 THE COURT: Right.

3 MR. STARK: It doesn't obligate the lender to continue  
4 making loans to a company if the agreement is in default. It  
5 simply says that if there are problems subsequently from a  
6 legal procedure with respect to the reversal of the change of  
7 the order you are protected as of that date and time.

8 THE COURT: Okay.

9 MR. STARK: If the DIP is in default they need not  
10 lend anymore. That's not a good day for unsecured creditors.  
11 I'm not suggesting that's what they're going to do. I'm simply  
12 saying that the DIP, as it's written, indicates that if  
13 something happens --

14 THE COURT: Well, maybe I read too much into what they  
15 were saying. I basically interpreted what they were saying as  
16 they don't see any risk that any court, where this case may be  
17 transferred, would undo the DIP. That's what I took them to be  
18 saying. I didn't take them to be saying that it was only --

19 MR. STARK: Okay.

20 THE COURT: -- that their lien positions were  
21 protected. I don't think -- nobody else, not the debtor, not  
22 anybody has raised this. Nobody else has raised the specter of  
23 some court undoing the duly entered orders of this Court. I  
24 just don't -- I'm just handicapping it at zero.

25 MR. STARK: Okay. Well, Your Honor, I'm not -- I'm

**PATRIOT COAL CORPORATION, et al.**

376

1 sitting here reflecting purely on what the DIP provides and  
2 what the law here allows versus what the law in West Virginia  
3 allows, which is not to allow doctrine of necessity payments  
4 period. It's an issue, perhaps it's a zero handicapped issue  
5 for everybody else. Perhaps I'm the only person in the room  
6 that sees it as an issue --

7 THE COURT: And I just would find it impossible to  
8 imagine a situation where any court would sua sponte decide  
9 that it was going to undo payments to creditors when nobody is  
10 asking it to. I just find that that's just a -- I just can't  
11 wrap my head around that.

12 MR. STARK: Okay. Your Honor, we didn't raise it in  
13 the context of suggesting that there should be a DIP default.  
14 That it is a gun to --

15 THE COURT: And interestingly enough the precedent  
16 that you cite is in reverse. The West Virginia case says the  
17 court may continue the prior court's orders per the inherently  
18 flexible law of the case doctrine, and you cite an SDNY case --

19 MR. STARK: Right. That says you don't have to.

20 THE COURT: -- for the proposition that the Court can  
21 modify or rescind the orders. It's a little backwards, isn't  
22 it? It would be -- wouldn't it be scarier to you if the West  
23 Virginia court said --

24 MR. STARK: Of course.

25 THE COURT: -- they could rescind the order?



**PATRIOT COAL CORPORATION, et al.**

377

1 MR. STARK: Of course, Your Honor. Look, again, I  
2 want to make sure that I'm conveying appropriately and Your  
3 Honor is hearing me. If I'm not doing a good job let me try to  
4 do it again. What I'm trying to do is say that when one moves  
5 a case from one jurisdiction to another issues crop up  
6 inadvertently, okay.

7 THE COURT: Okay.

8 MR. STARK: There isn't --

9 THE COURT: I don't think this one of them.

10 MR. STARK: Then we'll move on.

11 THE COURT: Okay?

12 MR. STARK: Then we'll move on.

13 THE COURT: All right.

14 MR. STARK: I do think, in connection with this, and I  
15 do think Your Honor asked questions along these lines, and  
16 people gave different answers than the one I'm about to give  
17 you, is about -- called the judicial footprint, okay. This  
18 Court has a judicial footprint. It's understood. We  
19 understand -- the parties understand what generally in the  
20 Southern District of New York works, in certain respects, in  
21 terms of plans, in terms of DIP loans, in terms of exit loans,  
22 in terms of enterprise valuation, in terms of a whole list of  
23 other reasons that are market specific and helpful and  
24 determinative in the way that people negotiate.

25 When you don't have a judicial imprint --

**PATRIOT COAL CORPORATION, et al.**

378

1 THE COURT: But let's go -- I'm sorry to interrupt  
2 you. I really do apologize, but this is the most helpful thing  
3 for me.

4 MR. STARK: Sure. No, I'm here to answer your  
5 questions.

6 THE COURT: So, yes, I think I understand what you're  
7 saying.

8 MR. STARK: Yeah.

9 THE COURT: But certainly there are lots of times that  
10 debtors or large creditors ask for stuff here, they don't get  
11 it.

12 MR. STARK: Understood.

13 THE COURT: The answer is no, right?

14 MR. STARK: Sure.

15 THE COURT: Management incentive plans comes through  
16 here, not approved. Plan support agreements come into here,  
17 not approved. Terms and DIP credit agreements that a court may  
18 feel are overreaching, not approved.

19 MR. STARK: And when Mr. Huebner comes and asks for  
20 105(a) relief of some sort he may not get that at all.

21 THE COURT: He may not. So yes, I guess I understand  
22 what you mean by a footprint, but every case --

23 MR. STARK: It only goes so far.

24 THE COURT: -- is its own case.

25 MR. STARK: Understood. Understood.

**PATRIOT COAL CORPORATION, et al.**

379

1 THE COURT: And nobody gets relief just because  
2 they're asking for it, not because they're a debtor, or not  
3 because they're a money center bank, or not because they're  
4 represented by a particular law firm. Everybody comes in here  
5 tabula rasa. Tell me what you want, tell me why you should get  
6 it, and tell me what the support is. That's the way we do it.

7 MR. STARK: Right.

8 THE COURT: And it may seem different to those who  
9 aren't here every day, but that's the way it is.

10 MR. STARK: And one of the critical points, among many  
11 that Your Honor just said, is coming here, and give me the  
12 support, and help me, as the Court, understand why the relief  
13 that you're asking for is one that we should give, right?

14 THE COURT: Right.

15 MR. STARK: And that support --

16 THE COURT: We hate to be wrong. We hate to be wrong.

17 MR. STARK: And the support is what I refer to as the  
18 footprint, okay. It's guidelines, it's precedent, it's  
19 experience that the parties have appearing before the courts in  
20 the Southern District of New York and knowing what works in  
21 cases of this magnitude. Elsewhere, courts don't have that  
22 footprint and that's not a criticism of the other courts,  
23 that's not a suggestion that they're not perfectly capable to  
24 do the job. What it is, is simply a factual statement that  
25 without the precedent, without the guidelines, the parties, not

**PATRIOT COAL CORPORATION, et al.**

380

1 the courts, but the parties have less to work with.

2 Now, I think it's fair to make some sweeping  
3 statements about the dynamics by which large company Chapter 11  
4 cases work their selves through bankruptcy. Let me try this  
5 and see if Your Honor will follow me this far.

6 Folks at the higher end of the capital structure have  
7 a tendency --

8 THE COURT: You see, I'm sorry, I just have to stop  
9 you --

10 MR. STARK: Sure.

11 THE COURT: -- because a long time ago, now it seems,  
12 I gave Ms. Jennik a very hard time about the, with all due  
13 respect, Your Honor, you don't know anything about coal  
14 argument. I gave her a very hard time. So I have to give  
15 you --

16 MR. STARK: Sure.

17 THE COURT: -- also a hard time about this issue that  
18 you're asking me to consider that courts elsewhere, a court  
19 elsewhere, may not have as established a footprint or as  
20 significant experience, because there are cases that get filed  
21 in courts everywhere, in the federal system and elsewhere,  
22 where it's the first time you have that particular type of  
23 case.

24 So I wasn't really willing to go along with Ms.  
25 Jennik's argument about this Court's experience with coal. So

**PATRIOT COAL CORPORATION, et al.**

381

1 you need to explain to me why I should go along with your  
2 argument other than the desire of you folks --

3 MR. STARK: Right.

4 THE COURT: -- to enjoy the predictability and the  
5 comfort --

6 MR. STARK: Right.

7 THE COURT: -- that you feel with kind of feeling that  
8 you know how things are going to fall out around here.

9 MR. STARK: Right. Predictability does not  
10 necessarily equate with comfort and that's the key part of what  
11 I'm suggesting. And, again, this is not a court versus court,  
12 sophistication or intelligence versus sophisticated  
13 intelligence. This is purely party versus party dynamics.

14 The parties outside of this Court, or a West Virginia  
15 court, or any other court's auspices as they go about the  
16 business of negotiating a plan of reorganization and obtaining  
17 exit financing what do they do when they're not here. And what  
18 I'm positing is something very, very different. What I'm  
19 suggesting is when there's precedent, and guidelines, and  
20 understandability, okay, there is a governor, in a way, on the  
21 behavior of people who are bargaining, who are negotiating.  
22 They sort of have a sense, whether it's through past  
23 experiences, or precedent, or guidelines about what will work  
24 and what will not work.

25 THE COURT: You see I can't go down that. I will not

**PATRIOT COAL CORPORATION, et al.**

382

1 go down that path, this path, because implicitly it suggests  
2 that that governor doesn't exist in other courts, and I simply  
3 cannot agree with you. There are fewer numbers of big cases in  
4 other places, but I cannot agree with you that that governor  
5 wouldn't exist. The largest governor is the conduct of the  
6 parties to the case driven by experienced counsel, which all of  
7 you are, who know that the best thing to do is to get to a deal  
8 and to not litigate. To get to a deal. You all know that.  
9 And that's going to happen no matter where you are. In the  
10 same conference rooms that it's going to happen in if you stay  
11 here. That's the way it is.

12           You know that I practiced in this area for twenty-five  
13 years before I got this job. So, you know, I can't park that  
14 knowledge at the door either, much as I've said that I only  
15 take into account what people tell me on the record, and it's  
16 not about what people understand or are familiar with. But I  
17 have to push back on this notion that somehow the oversight of  
18 the Court or the looming omnipresence of the Court is not going  
19 to be the same.

20           And the other thing is that, you know, we bankruptcy  
21 judges we talk to one another in this building, Poughkeepsie,  
22 White Plains, Wisconsin, Atlanta. I mean, we talk to each  
23 other. So I'm sure that if any other judge had any question,  
24 and we get questions a lot, how do you folks do this? And  
25 sometimes they think that it's good and sometimes they don't.

**PATRIOT COAL CORPORATION, et al.**

383

1 And everybody, every judge has their own little purview.

2 So I just -- I'm sorry I'm giving you an exceedingly  
3 hard time, but I just feel very strongly about defending the  
4 integrity of the bankruptcy courts everywhere.

5 MR. STARK: I understand, Your Honor, and my argument  
6 was never intended to impugn the integrity of any court  
7 anywhere. I was simply suggesting that --

8 THE COURT: I just don't want anything to be taken out  
9 of context and --

10 MR. STARK: I understand. Your Honor, one of the  
11 notions of litigating is sometimes it's appropriate to sit down  
12 if you're not persuading. I've done my best. If Your Honor  
13 has any more questions for me I'm happy to answer it.

14 THE COURT: Thank you very much.

15 All right. Who's next? We're flirting with the  
16 lateness record, at least for this Court, but --

17 MR. RECKMEYER: And I don't even think I'm last.

18 THE COURT: -- we've got two hours before we hit the  
19 record. So hopefully we'll not break the record.

20 MR. RECKMEYER: Thanks, Your Honor. Bear with me I  
21 have a script, but I'm fully prepared to answer questions as  
22 appears to be the --

23 THE COURT: All right. You can give me your script,  
24 but only to the extent that it covers points that haven't  
25 already been covered.

**PATRIOT COAL CORPORATION, et al.**

1 MR. RECKMEYER: It will be very short.

2 THE COURT: Go ahead.

3 MR. RECKMEYER: I promise, Your Honor.

4 Officially, my name is Jeremy Reckmeyer. I work for  
5 Andrews Kurth. We represent Wilmington Trust Company as the  
6 indentured trustee to 250 million principal amount of the eight  
7 and a quarter percent senior unsecured bonds issued by Patriot  
8 Coal and guaranteed by each of its debtor affiliates.

9 We filed a joinder to the debtors and the official  
10 committee's objections to the motions to transfer and the  
11 various joinders thereto. Briefly, I'd just like to reiterate  
12 our support to the arguments there and to the arguments made in  
13 the lengthy presentations yesterday and today, or at least  
14 today, and I guess the objections yesterday.

15 Now, the pleadings and the presentations here have  
16 been quite thorough. They certainly have been extensive, so  
17 I'll try to be very brief. I think I can promise this to be  
18 the briefest presentation today.

19 THE COURT: Well, you know what, now that I'm looking  
20 at your papers again I can't help it.

21 MR. RECKMEYER: It's very brief.

22 THE COURT: I can't help. Just one. Let me just ask  
23 one, okay.

24 MR. RECKMEYER: By all means.

25 THE COURT: You need to say yes. Of course, Your



**PATRIOT COAL CORPORATION, et al.**

385

1 Honor.

2 MR. RECKMEYER: Of course. Of course. By all means.

3 THE COURT: Okay?

4 MR. HUEBNER: My client needs to say yes, Your Honor.

5 MR. RECKMEYER: Of course.

6 THE COURT: All right. Page 5, last bullet. "As  
7 detailed in the debtors' objection, the debtors and other  
8 parties' ties to West Virginia are minimal." Really? To quote  
9 Saturday Night Live, "Really?". You don't really mean that.

10 MR. RECKMEYER: Yeah, I suppose the term minimal was  
11 probably a poor choice of --

12 THE COURT: I suppose it was probably a poor choice of  
13 words --

14 MR. RECKMEYER: Yeah, in --

15 THE COURT: -- as poor as the choice --

16 MR. RECKMEYER: -- in hindsight.

17 THE COURT: -- as the choice of the word disaster.

18 MR. HUEBNER: Yeah, indeed. If I could take it back  
19 now I would.

20 THE COURT: It's back.

21 MR. RECKMEYER: Am I allowed to take that back?

22 THE COURT: It's gone.

23 MR. RECKMEYER: Okay. I guess the point was not that  
24 they were minimal, but that when compared to the context in New  
25 York, particularly in connection with tests under 1412, that I

**PATRIOT COAL CORPORATION, et al.**

386

1 guess that they would be overridden or outweighed in  
2 connection with the relief sought. But I'm officially  
3 retracting that word.

4 THE COURT: Okay.

5 MR. RECKMEYER: Okay. So first and foremost I just  
6 want to note that Wilmington, at least in its representative  
7 capacity as indentured trustee, is the single largest unsecured  
8 creditor in these cases. It's an unsecured creditor of all the  
9 debtors, not a handful, not nine, not twenty-five, all of the  
10 debtors.

11 The constituency that it represents, the eight and a  
12 quarter bonds, are collectively the largest unsecured creditor  
13 constituency in these cases.

14 Simply put for both Wilmington Trust and the  
15 bondholders that it is a fiduciary for that I represent, New  
16 York is a much more convenient venue than West Virginia and  
17 frankly a much more convenient venue than -- I mean I guess  
18 nobody has really posited any other potential venues. You  
19 know, the U.S. Trustee didn't put any forward or whatever, but  
20 New York is a particularly convenient venue. West Virginia is  
21 decidedly inconvenient.

22 Wilmington is located not in New York, but is located  
23 near New York, regularly conducts business in New York,  
24 regularly travels to New York, has a number of substantial  
25 contacts in New York, obviously has counsel in New York as I'm

**PATRIOT COAL CORPORATION, et al.**

387

1 standing here. But it's not just Wilmington, it's constituents  
2 as well, the eight and a quarter bonds. A number of them are  
3 located in or around New York. I don't have the number  
4 offhand, but certainly a substantial number of them are either  
5 located in New York or conduct a substantial amount of business  
6 and have contacts in New York.

7 Now, it seems that the flow of this hearing has moved  
8 away a little from convenience to the interest of justice, but  
9 I just wanted to note that. It is significantly more  
10 convenient for our clients here.

11 THE COURT: Okay.

12 MR. RECKMEYER: Now, the creditor movements, so  
13 obviously not the U.S. Trustee, to the extent they hold  
14 claims -- and so I'm kind of referring to the sureties -- I  
15 guess, contingent claims, but to the extent they hold claims,  
16 they hold claims against a limited number of the debtors. I  
17 think it's nine out of ninety-nine, at least that's what Mr.  
18 Huebner noted, as opposed to all the debtors like my client.

19 It is at least in question and has certainly not been  
20 proven whether they hold claims against the debtors that hold  
21 the principal assets in these cases, the mines. I think that  
22 question is still kind of up in the air, but it may well be the  
23 case that the union, for example, does not hold claims against  
24 the debtors that hold the primary assets here. I think that's  
25 an important point when you have the largest unsecured creditor

**PATRIOT COAL CORPORATION, et al.**

388

1 constituency holding claims against everybody.

2           Now, unfortunately, I think this is going to lead  
3 right into the minimal comment, but if you would just give me a  
4 little bit of leeway. Except for the physical location of the  
5 mines, the union employees, and retirees, I think at this point  
6 these cases do revolve around New York. Now, part of that is  
7 because the cases were filed in New York, and so obviously the  
8 proceedings here for the last several months have been taking  
9 place in New York, but as Mr. Huebner noted at length, the  
10 debtors have not -- it's not simply post-petition or post the  
11 formation of a couple entities prior to the petition date that  
12 they have contacts with New York. They have had contacts with  
13 New York since prior to the formation of the two New York  
14 debtors; pre-petition -- excuse me -- contract counterparties,  
15 lease counterparties, pre-petition creditors, post-petition  
16 creditors, pre-petition professionals that predated any  
17 bankruptcy, I guess, contemplation, I guess, obviously post-  
18 petition professionals.

19           And although the point has been repeatedly made that,  
20 you know, the court in West Virginia, the court in another  
21 jurisdiction would be very competent to determine the issues  
22 that are at issue in this case, the fact of the matter is that  
23 this Court has experience -- significant experience dealing  
24 with complex mega cases including coal cases and is frankly up  
25 to speed on the myriad issues that have been presented so far

**PATRIOT COAL CORPORATION, et al.**

389

1 in the case.

2 So I think as of right now, where we are, particularly  
3 at least from our perspective, the proximity and the interest  
4 of creditors, revolves around New York more so than West  
5 Virginia. Obviously, the number of employees are in West  
6 Virginia, the mines are down there, but, you know, when we get  
7 to the 1412 factors with respect to the conveniency analysis, I  
8 think that simply the fact that there are assets in West  
9 Virginia gets outweighed by the contacts that are in New York.

10 Okay. Now, just another note with respect to the  
11 individual employees and retirees that are represented by the  
12 union, I know this has been noted before, and I'm sorry for  
13 repeating other people's arguments. I guess part of that is  
14 because it's nine o'clock at night, and I'm the last speaker,  
15 second to the last, but, you know, with all respect to these  
16 employees and retirees who are obviously very important to this  
17 business enterprise, they are represented by a single  
18 bargaining, you know, representative. The union is speaking on  
19 their behalf. So any seat at the negotiating table is going to  
20 be occupied by the union representative, not by an individual  
21 retiree or an individual union employee. The union is not  
22 located in West Virginia. They are located outside of D.C.

23 THE COURT: Okay, we've covered all of this.

24 MR. RECKMEYER: I understand. I'm almost done, Your  
25 Honor. I just wanted to make that point.

**PATRIOT COAL CORPORATION, et al.**

390

1 Okay. Now, I guess frankly this is kind of the final  
2 point before I lead just into a quick note on 1412 since  
3 frankly 1412 is obviously what's important here, but I think it  
4 is important that it is absolutely uncontested that venue has  
5 been established. I'm not going to say proper, that's a loaded  
6 term, but it's been established under 1408. There's been no  
7 allegation all. And, again, that's been kind of hammered home  
8 the last couple of days that there's not bad faith involved in  
9 the filing. They followed the letter of the law and because of  
10 that -- I mean, there's no question that they are two New York  
11 debtor -- domiciled debtors and everybody -- all the other  
12 debtors are affiliated.

13 So I guess I just want to make the minor point, again,  
14 you know, you mentioned imposing loopholes, but, you know, you  
15 take -- and not to read into what Congress was thinking or  
16 anything -- but, I mean, you take them at their word. If the  
17 language is clear, then it's supposed to be interpreted in that  
18 way. I think the language of 1408 is exceptionally clear.

19 And so if it is very easy to satisfy 1408, and I think  
20 it's acknowledged by everybody that it's very easy to satisfy  
21 1408, I think the issue of maybe changing is just not an issue  
22 for this Court today.

23 THE COURT: I agree.

24 MR. RECKMEYER: And I'm not --

25 THE COURT: But then I'm still in 1412.

**PATRIOT COAL CORPORATION, et al.**

391

1 MR. RECKMEYER: Okay. Understood.

2 THE COURT: So that doesn't get me there.

3 MR. RECKMEYER: Understood. And I guess the point is  
4 that, you know, when you assume that -- or when you when you  
5 acknowledge that 1408 has been satisfied you jump to 1412 and  
6 the question is whether or not, under the two tests; one,  
7 whether they've met their burden of proof, and I'm not even  
8 going to even go there, because, again, we've talked about that  
9 quite a bit. I happen to think that they haven't, but whether  
10 or not under the convenience of the parties or the interest of  
11 justice it warrants leaving this venue that the debtors chose.  
12 And, again, Mr. Huebner spent a lot of time today citing very  
13 specific factual references as to why they got their --

14 THE COURT: Okay. All right, anything new that hasn't  
15 been already -- that hasn't already been covered? You are  
16 suffering from the disadvantage of going last.

17 MR. RECKMEYER: I'll take your word, and I'll take Mr.  
18 Huebner's advice.

19 THE COURT: I have no idea what Mr. Huebner's advice  
20 to you just now was.

21 MR. RECKMEYER: I'm sorry. He said take your word. I  
22 was doing both at the same time. I think he just wants to go  
23 home. No offense.

24 I guess the one thing that I would note is that  
25 obviously he rattled off a number of factual reasons and other

**PATRIOT COAL CORPORATION, et al.**

392

1 reasons why we think the two tests do not warrant transfer.

2 THE COURT: All right.

3 MR. RECKMEYER: I happen to agree with all them.

4 THE COURT: Okay, good.

5 MR. RECKMEYER: So I happen to think that those  
6 tests -- it is not more convenient for the parties to transfer.

7 THE COURT: Okay.

8 MR. RECKMEYER: And in the interest of justice it's  
9 not an interest of justice to transfer.

10 I would want to make just one point. I'm not quite as  
11 familiar with the names of the all the professionals in the  
12 room as maybe everybody else is.

13 THE COURT: Okay.

14 MR. RECKMEYER: I haven't gone back quite as far, I  
15 think, as some of the professionals in this room.

16 THE COURT: Yes, I'll take judicial notice of the fact  
17 that you're a lot younger than a lot of us.

18 MR. RECKMEYER: And that's now on the record. But I a  
19 think Ms. Goldstein made the point of saying that the needs of  
20 a limited number of creditors should not outweigh the need of a  
21 great number of creditors, and I think that's appropriate here.

22 THE COURT: Okay.

23 MR. RECKMEYER: When the needs of the many outweigh  
24 the needs of the few. I think in this case, certainly when  
25 you're balancing all of the different things that are going



**PATRIOT COAL CORPORATION, et al.**

393

1 On.

2 THE COURT: All right. Well, but for the fact that  
3 it's 9 o'clock we could have a very long discussion about  
4 utilitarianism and other models of justice, but I somehow think  
5 that this is not the time.

6 MR. RECKMEYER: Yeah, indeed. Indeed.

7 THE COURT: But remember if you were here -- I don't  
8 know if you were here when we started eleven hours ago, but I  
9 did say at a certain point that I may ask for post-hearing  
10 submissions.

11 MR. RECKMEYER: Understood.

12 THE COURT: And not withstanding the length of these  
13 proceedings, and particularly in light of some of the  
14 presentations that were made, I think that's going to be -- I  
15 think I'm going to stick with that plan.

16 So I want to save enough time at the end to go over  
17 what I'd like to see from the parties and that includes you.  
18 You'll be able to submit something.

19 MR. RECKMEYER: Okay.

20 THE COURT: All right?

21 MR. RECKMEYER: Understood.

22 THE COURT: All right.

23 MR. RECKMEYER: And I assume you don't have any  
24 questions.

25 THE COURT: I don't.

**PATRIOT COAL CORPORATION, et al.**

394

1 MR. RECKMEYER: All right, thank you very much.

2 THE COURT: Thank you.

3 All right. Is Caterpillar still here?

4 MS. DAVIDSON: Yes.

5 THE COURT: Come on up.

6 MS. DAVIDSON: Kristy Davidson, Buchanan Ingersoll &  
7 Rooney for Caterpillar Financial Services Corporation,  
8 Caterpillar Global Mining, LLC.

9 Judge, I am going to try to be very brief. I am not  
10 going to direct my remarks at substance of the motions unless  
11 Your Honor has questions for me based upon the joinder we  
12 filed.

13 The only point that I would like to respond to that  
14 came up during the course of the questioning today is the  
15 weight that should be accorded the joinders that were filed and  
16 the impression that I received was that the Court may be  
17 leaning toward not giving those joinders as much weight  
18 because --

19 THE COURT: It's an open question, because there's  
20 going to be an affidavit that's submitted outlining the  
21 procedure. Ms. Schwartz is going to have rights to comment on  
22 that. I may give them a lot of weight. I may give them less  
23 weight. And I'm looking at the creditors' joinder, and I don't  
24 know that it qualifies as one of the so-called identical  
25 joinders.

**PATRIOT COAL CORPORATION, et al.**

395

1 MS. DAVIDSON: And, Judge, that was going to be my  
2 point.

3 THE COURT: It's not the form.

4 MS. DAVIDSON: Correct.

5 THE COURT: Okay?

6 MS. DAVIDSON: We did not follow the form, and I just  
7 wanted to make it clear for the record that putting aside  
8 whatever may have happened with the other creditors and how  
9 they came to file the "form" joinders, the Caterpillar  
10 creditors were aware of the motions, were planning to object to  
11 the motions. They then saw the amended schedule that called  
12 for a joinder deadline in addition to just an objection  
13 deadline. They then learned that the debtors were planning to  
14 oppose and had some suspicion that perhaps some other people or  
15 stakeholders were going to oppose as well. And so Caterpillar  
16 creditors made the reasoned choice and decision to file a  
17 joinder as opposed to filing an objection, and they did so with  
18 the understanding and frankly the expectation that that filing  
19 would be accorded the same weight and deference as if it had  
20 filed an objection, and we would ask the Court --

21 THE COURT: Okay.

22 MS. DAVIDSON: -- to accord it that same weight. And  
23 as the joinders, I think, spells out -- and, again, you know, I  
24 won't get into substance unless you have questions, the  
25 Caterpillar creditors do support continued venue in the

**PATRIOT COAL CORPORATION, et al.**

396

1 Southern District of New York.

2           The Caterpillar creditors believe that this venue is  
3 more convenient for them and based upon the evidence it has  
4 seen may very well be, and based on the evidence, is more  
5 convenient for the bulk of the creditors. And frankly, the  
6 Caterpillar creditors shared some of the same concerns that  
7 have been expressed already throughout the day that I won't  
8 belabor and that is that the main movant for West Virginia, the  
9 union, seems to have done so based upon a belief that its  
10 constituents feel that the people whom they interact with every  
11 day that are in their churches, are in their grocery stores,  
12 and I don't have the quote in front of me, will understand  
13 better their plight.

14           And while I know that counsel did not go so far as to  
15 say that they would be sympathetic with that plight, when  
16 you're talking about the appearance of justice and according  
17 justice, it's the Caterpillar creditors' position that you have  
18 to take into account the flip side of that and that by moving  
19 this to West Virginia there will at least be the appearance or  
20 the suggestion that perhaps some party in this case believes  
21 that that court is more sympathetic whether they are or not.  
22 And I think we can all agree in the room today that one court  
23 is not going to be any more inclined to side with one party or  
24 another than another, but the point remains that the  
25 constituency of the union apparently believes that may be true

**PATRIOT COAL CORPORATION, et al.**

397

1 and that leads us right into the appearance of what is just and  
2 what is right.

3 And for that reason, frankly, we think it is more  
4 appropriate to keep the case in what may be a more neutral  
5 territory, and I will say, and then I'm going to sit down, the  
6 Caterpillar creditors are not in New York, and they're not in  
7 West Virginia. So they don't have any reason to be in either  
8 court. They're Illinois companies. So, you know, we'll leave  
9 for another day whether another one of the venues would have  
10 been better, but as between New York and West Virginia their  
11 clear preference is for the Southern District of New York.

12 THE COURT: All right.

13 MS. DAVIDSON: If you have any questions, happy to  
14 answer them.

15 THE COURT: I don't. Thank you very much.

16 MS. DAVIDSON: Thank you.

17 MR. HUEBNER: Your Honor, I need to actually retract  
18 my retraction and apology from about 51 hours ago. I  
19 apologize, but integrity matters a lot. What I told Your Honor  
20 the first time you asked about our role in the Peabody's spin  
21 was correct. And then some yoyo from our firm --

22 THE COURT: Mr. Huebner, please?

23 MR. HUEBNER: -- sends me a note that says you're  
24 wrong. So I just want to be clear that nobody -- I don't want  
25 to be accused of going afterwards, my declaration says the

**PATRIOT COAL CORPORATION, et al.**

398

1 exact facts, which is that we were retained in 2007, exactly as  
2 I said the first time. We did represent Patriot in connection  
3 with the Peabody spin. We were opposite Simpson Thacher. I  
4 just don't want anybody to say later you misspoke, you let the  
5 Court have a misimpression.

6 THE COURT: Okay. So last time. Davis Polk  
7 represented Patriot.

8 MR. HUEBNER: Patriot. Yeah, Your Honor, here's the  
9 money quote from my declaration, which is what I told you the  
10 first time. "Davis Polk was retained in March 2007 to  
11 represent Patriot in connection with Patriot's spinoff from  
12 Peabody Energy. Patriot was incorporated on September 25,  
13 2006, and was a wholly owned subsidiary of Peabody as of  
14 October 31, 2007."

15 So I was right the first time. Someone's going to get  
16 a lot from me --

17 THE COURT: Okay. Don't --

18 MR. HUEBNER: -- because I stood up and was wrong the  
19 second time and now we're done.

20 THE COURT: Okay. I'm directing you not to give  
21 whoever that is a lot, whatever that might mean, okay, because  
22 things happen --

23 MR. HUEBNER: We're done. Right.

24 THE COURT: -- associates are tired.

25 MR. HUEBNER: No, he's a senior partner, okay. I

PATRIOT COAL CORPORATION, et al.

399

1 don't --

2 THE COURT: All right, we're going to have the U.S.  
3 Trustee make a note that Davis Polk is not allowed to bill for  
4 time spent figuring this out three different times, and the  
5 time entry shouldn't say supplying erroneous information to Mr.  
6 Huebner .2.

7 MR. HUEBNER: Your Honor, we will look at the bill  
8 with a fine-tooth comb, but anyway --

9 MS. SCHWARTZ: Oh, we wouldn't say .2, Your Honor.

10 MR. HUEBNER: Never getting --

11 THE COURT: All right, let's stop.

12 MR. HUEBNER: Thank you, Your Honor.

13 THE COURT: I want to get everybody out of here  
14 tonight. Okay, rebuttal? Ms. Jennik. It gets to a certain  
15 point where I think folks begin to get a little giddy because  
16 they're so tired.

17 MS. JENNIK: Good evening, Your Honor.

18 THE COURT: Good evening.

19 MS. JENNIK: Susan Jennik of Kennedy Jennik & Murray,  
20 representing the United Mine Workers. With me is Grant  
21 Crandall who is the general counsel for the United Mine  
22 Workers, and he will answer the questions that Your Honor had  
23 yesterday that I was not able to answer.

24 THE COURT: Okay, but -- I'm sorry, hold on. Hold on.  
25 It's ten minutes after 9. We've been doing this for sixteen

**PATRIOT COAL CORPORATION, et al.**

400

1 hours almost, and what it appears to me now that you're telling  
2 me is that someone's about to give me evidence and testimony,  
3 and maybe I'm misinterpreting what you're suggesting, but we're  
4 not going to do that. The time has come and gone.

5 MS. JENNIK: I understand, Your Honor. You had asked  
6 questions specifically regarding the location of the union and  
7 the nonunion employees in the mines and that information is in  
8 fact contained in the declaration of Michael Buckner, which  
9 was --

10 THE COURT: Okay, if the information is in the  
11 materials that's in the record you can certainly point it out  
12 to me, but we're not going to supplement what's in there now.

13 MS. JENNIK: Okay, so I will clarify that.

14 THE COURT: Okay. Hold on. Let me get -- I need to  
15 get the declaration. Okay, it's the declaration of Michael  
16 Buckner dated 30th of August 2012.

17 MS. JENNIK: Yes, Your Honor.

18 THE COURT: Okay.

19 MS. JENNIK: And it starts at paragraph, and it goes  
20 through paragraph 6 and 7, and it describes where the union  
21 workers are working.

22 THE COURT: You said paragraphs 5, 6, and 7?

23 MS. JENNIK: Yes, Your Honor.

24 THE COURT: Okay, well I don't think it answered --  
25 those paragraphs answer the questions that I posed to you.



**PATRIOT COAL CORPORATION, et al.**

401

1 MS. JENNIK: Okay, maybe I'm -- what it states is  
2 that -- in paragraph 5 -- first of all, it's about a district  
3 which is located in West Virginia.

4 THE COURT: Right.

5 MS. JENNIK: So the mines that are referred to in  
6 paragraph 5 are all in West Virginia.

7 THE COURT: Okay, and there's --

8 MS. JENNIK: -- they include 1,200 working coal miners  
9 in -- and it specifies the mines that they work in.

10 THE COURT: Okay.

11 MS. JENNIK: All right? Then paragraph 6 is another  
12 district which is also located in West Virginia and it  
13 specifies that those workers work at the Federal 2 mine which  
14 is in West Virginia.

15 THE COURT: But is there a number there?

16 MS. JENNIK: There is not the number of employees.

17 THE COURT: All right.

18 MS. JENNIK: I will tell you its agreed there are  
19 roughly 2,000 --

20 THE COURT: Hold on. That's inconsistent with the  
21 ground rules. It's not in the declaration.

22 MS. JENNIK: It is not in that declaration. In the  
23 declaration of Mr. Schroeder it states that there are about  
24 2,000 workers represented by the UMW and 1,200 of them are  
25 located in West Virginia --

**PATRIOT COAL CORPORATION, et al.**

402

1 THE COURT: Okay.

2 MS. JENNIK: -- in paragraph 5.

3 THE COURT: Right.

4 MS. JENNIK: The other 800 are divided, and I --

5 THE COURT: Okay, so --

6 MS. JENNIK: -- cannot give you the numbers.

7 THE COURT: -- you're saying we can back into the  
8 number by putting those two pieces of information together.

9 Look, I hear you and I think you understand the ground  
10 rules which I think are appropriate to stick to, but perhaps  
11 what you ought to do is that when you submit your post-hearing  
12 submission, which I am going to ask for and we can go over what  
13 the parameters are of that, if you can give me part of what I  
14 said I was going to ask for was record citations for each of  
15 the facts that you believe supports your position. So if you  
16 can do that in your submission, I'm happy to consider it. I'm  
17 not sharp enough at this hour to follow yes or no as to whether  
18 or not putting that information together in the way that you  
19 suggest satisfies all of my questions. I'm not doubting that  
20 you did this and that you believe that it's correct. Okay?

21 MS. JENNIK: Okay.

22 THE COURT: Can we do it that way?

23 MS. JENNIK: Absolutely.

24 THE COURT: Okay, good.

25 MS. JENNIK: No problem.

**PATRIOT COAL CORPORATION, et al.**

403

1 I'm not going to repeat any of the arguments that I  
2 made yesterday and --

3 THE COURT: I mean, just to take you up on that. They  
4 are, in paragraph 7 of Mr. Buckner's affidavit, he says that  
5 there are 4,000 retired members in Illinois, Indiana and  
6 Western Kentucky. Right? So we don't have a breakdown of the  
7 retirees.

8 And I think there was another spot where somebody  
9 talked about the number of retirees in West Virginia and I  
10 might have observed that there, by doing the math, you could  
11 tell that that there were more retirees outside of West  
12 Virginia than inside West Virginia. And I believe it was a  
13 footnote in the sureties' papers that indicated that the UMWA  
14 had had a meeting with the members, perhaps in Indiana and in  
15 some other location.

16 MS. JENNIK: In West Virginia also.

17 THE COURT: In -- or in West Virginia and in Indiana.  
18 Anyway, the point is that I don't think that paragraph 7 really  
19 advances the ball, but --

20 MS. JENNIK: Well, paragraph 7 also states that there  
21 is one mine where UMWA workers are employed and that's in  
22 Kentucky. There's one Kentucky mine.

23 THE COURT: Right. And I think --

24 MS. JENNIK: Okay.

25 THE COURT: -- everyone agreed with that, but --

**PATRIOT COAL CORPORATION, et al.**

404

1 MR. HUEBNER: Your Honor, to be clear, there's on  
2 Kentucky union mine. There's a very big Kentucky nonunion --

3 THE COURT: Okay. I was about to get to that. Okay?

4 MR. HUEBNER: Sorry; I apologize.

5 THE COURT: So you're only addressing union and part  
6 of my question before was fill out the geographic map for me in  
7 terms of where the nonunion workers are. And I don't have  
8 anything on that, yet, as far as I can tell.

9 MS. JENNIK: Well, all of the mine complexes except  
10 one are union or nonunion.

11 THE COURT: Right.

12 MS. JENNIK: There are three in Kentucky; one is  
13 union. So we know that. There are three in Kentucky and one  
14 of them is union.

15 THE COURT: Each of the mine complexes is union or  
16 nonunion. In other words, there are not at the same mine  
17 complex union workers working alongside nonunion workers. Is  
18 that accurate?

19 MS. JENNIK: Except in one case.

20 THE COURT: Except in one case.

21 MS. JENNIK: Yes.

22 THE COURT: Okay. Well, again, hold on. Everybody  
23 stay calm.

24 I need record citations. I don't know if it's in  
25 there. If it's in there, you can give it to me in your post-

**PATRIOT COAL CORPORATION, et al.**

405

1 hearing proposed findings. If it's not, it's not.

2 MS. JENNIK: Okay.

3 THE COURT: Okay?

4 MS. JENNIK: Yes.

5 THE COURT: Okay.

6 MS. JENNIK: So I will move on to my rebuttal argument  
7 and I was saying I won't repeat what was stated yesterday.

8 What I would like to talk about today is the issue  
9 that I think Your Honor is most interested in and that is what  
10 is the interest of justice standard and what does that mean. I  
11 talked about it some yesterday, I thought about it last night,  
12 today during the various arguments of other parties and one  
13 thing I think it does not mean. It does not mean that there is  
14 a need to show an intent to manipulate venue. It is -- the  
15 standard is not a subject of standard (sic). Of course, if  
16 there was bad faith shown that is something that a Court would  
17 consider. We're not alleging that here and we don't think  
18 that's an issue here. But in the absence of bad faith, intent  
19 is not part of the interest of justice standard.

20 The standard is objective and it is stated in an  
21 objective way, not what was the subjective intent of the  
22 debtors. In our motion on page 8, we set forth some of the  
23 formulations of the standards. And they're a little bit  
24 different. And the one set I would like to address here, our  
25 first -- this is paragraph 20, we quoted Manville Forest

**PATRIOT COAL CORPORATION, et al.**

406

1 Products, a Second Circuit case. And in that case, one of the  
2 factors that the Second Circuit said was a component of the  
3 interest of justice standard is fairness. And fairness, of  
4 course, is an objective standard although perhaps difficult to  
5 put your finger on.

6 THE COURT: That suggests that it's the most  
7 subjective of all. Is it not?

8 MS. JENNIK: When I'm using the term --

9 THE COURT: I mean, isn't fairness in the eye of the  
10 beholder?

11 MS. JENNIK: Yes, it is. But when I say objective or  
12 subjective, I'm saying from the perspective of the debtor. The  
13 fairness does not have to do with the intent of the debtor.  
14 And so --

15 THE COURT: Well, let me stop you. And I know  
16 everybody's really tired, but this is so important.

17 The debtors pointed to the statements in Mr.  
18 Schroeder's declaration that said they thought about it and  
19 they decided to seek to establish venue here because they  
20 thought this would be the best place to administer their cases  
21 and reorganize.

22 MS. JENNIK: Yes.

23 THE COURT: Okay? And there's been no evidence that  
24 they did that to run away from some set of bad facts somewhere  
25 else or because they had a specific concern about some other

**PATRIOT COAL CORPORATION, et al.**

407

1 Court. So how could it be said to be unfair that they did that  
2 when the uncontroverted record is that they did it to try to  
3 keep this company going, and by implication, to keep as many  
4 employees employed as possible. How could that -- that sounds  
5 laudable. That sounds like debtors discharging their fiduciary  
6 duty. How can that be unfair?

7 MS. JENNIK: It could be unfair --

8 THE COURT: And I don't mean it as a rhetorical  
9 question. I mean it as a real, real question because what you  
10 said to me when I gave you my crystal ball hypothetical almost  
11 twenty-four hours, twelve hours, thirty-six hours ago -- I've  
12 lost my ability to count -- was that even if you could tell  
13 that the results were the same but that it simply cost more to  
14 go to West Virginia, you think the answer would be West  
15 Virginia. That says something.

16 MS. JENNIK: Yes, and --

17 THE COURT: But it's not -- but from the debtors'  
18 perspective, they can't make that kind of a decision. They're  
19 not allowed to make that kind of a decision, but you are; your  
20 client is. And that's their prerogative, and there's nothing  
21 unfair or wrong about that, either. But the debtors are the  
22 only one in this room, with the possible exception of the  
23 creditors' committee, that have the farthest-reaching and most  
24 difficult fiduciary duty to discharge. And there's nothing in  
25 the record, there's nothing in the record that I can see that

**PATRIOT COAL CORPORATION, et al.**

408

1 suggests that they did anything but try to discharge that  
2 fiduciary duty. Correct me if you disagree.

3 MS. JENNIK: I don't disagree that there is nothing in  
4 the record, but I do think that that's not the end of the story  
5 because if all that -- if what a debtor has to do is say, we  
6 made a decision based on what we think is best for everyone and  
7 because we have a fiduciary duty, therefore that must be right.  
8 That would be the end of the interest-of-justice standard for  
9 anyone to challenge because the debtor would always win. If  
10 that's all that the standard means, then who gets to --

11 THE COURT: No, but here's the thing --

12 MS. JENNIK: -- whoever gets to overcome that?

13 THE COURT: But here's the thing. It's your burden of  
14 proof -- I'm sorry, I shouldn't point. It's your burden of  
15 proof, okay, and you agreed with the other parties to the  
16 stipulation to stipulate. And you could have had Mr. Schroeder  
17 on the witness stand and ask him a lot of questions. You could  
18 have plumbed the depths of that analysis, and you could have  
19 asked him point blank, isn't it true that the reason that you  
20 want to be here and not in West Virginia is because, fill in  
21 the blank. But you elected not to do that, and I'm constrained  
22 by your actions. You notice that after all is said and done, I  
23 didn't ask such question, Mr. Schroeder. I have lots  
24 questions, I'm curious about a lot of things, but I didn't ask  
25 him to take the stand because that's not my job. That's not my



**PATRIOT COAL CORPORATION, et al.**

409

1 job, and it would have been wrong to do. So the debtors, for  
2 the purpose of this record, carried the burden.

3 In other cases, sure, the debtors would say that.  
4 Debtors come here all the time and tell this Court what they've  
5 done in the exercise in the their fiduciary duty, and lots of  
6 times we say you're wrong, we disagree, we're not going to let  
7 you do that, we disagree with how you've made a situation.

8 So it's not the end of the story by a long stretch, by  
9 a long stretch, and no one's told me, no one's told me what it  
10 is that would be so bad from the perspective of the unions, and  
11 I'm much more concerned with what the unions have to say than  
12 the sureties; you could probably discern that from what I've  
13 been saying here today. What would be so bad from the  
14 perspective of the unions by being in this court, a court which  
15 turned back the efforts of Hostess to reject the Teamster's  
16 contract, a court which denied the request of American Airlines  
17 to write a blank check with respect to its pilots union, a  
18 court which has successfully presided over the negotiations and  
19 renegotiations of dozens and dozens of collective bargaining  
20 agreements and pension and retiree disputes, the court that  
21 approved the reorganizations of Chrysler and General Motors  
22 that saved millions, millions of union jobs.

23 I haven't heard what it is that's so scary about being  
24 in this court. And nobody, nobody, not Mr. Buckner or anybody  
25 else who's been identified to me, came here to New York to look

**PATRIOT COAL CORPORATION, et al.**

410

1 me in the eye and see if I was as scary as they thought I was.  
2 Maybe there's some of them watching still in West Virginia,  
3 but --

4 MS. JENNIK: Your Honor, this, of course, is  
5 nothing --

6 THE COURT: I'm five feet tall on a good day.

7 MS. JENNIK: -- personal about you. This is not --

8 THE COURT: It's not about me.

9 MS. JENNIK: -- about you. I'm sorry.

10 THE COURT: It's about this court versus some other  
11 court.

12 MS. JENNIK: I would -- this was going to be my second  
13 point --

14 THE COURT: And I'm sorry. I didn't mean to  
15 personalize it, but the point that I'm trying to make is how  
16 strongly I feel about the ability of this court and any other  
17 court to render impartial justice. That's our job, and that's  
18 what we do.

19 MS. JENNIK: And it is certainly not about whether one  
20 court or another court is competent. I'm not making that  
21 argument at all. It was going to be the second point that I  
22 was making, and I would turn to the quote that you gave us  
23 today from Judge Friendly saying that what bankruptcy courts do  
24 must seem right, and it does not seem right to the miners and  
25 the retirees in West Virginia and Kentucky that a judge remote

**PATRIOT COAL CORPORATION, et al.**

411

1 from them would decide their fate. It does not --

2 THE COURT: But a judge --

3 MS. JENNIK: They have --

4 THE COURT: -- remote from them who might be the  
5 toughest judge in the country on environmental issues, they  
6 don't know.

7 MS. JENNIK: No --

8 THE COURT: They don't know.

9 MS. JENNIK: -- they don't know that. They don't know  
10 that --

11 THE COURT: Or the easiest judge in the country --

12 MS. JENNIK: -- but --

13 THE COURT: -- on environmental issues.

14 MS. JENNIK: -- as our venue statutes are written so  
15 that there be some connection between the district and the  
16 debtors, the miners' perception -- the miners' perception and  
17 desire is that a court in their community be the court that  
18 decide their fate. Do we think that means it will necessarily  
19 be in favor of the miners? No. It's not that we think a judge  
20 in West Virginia will be more sympathetic to them, but a judge  
21 in West Virginia understands that the impact of this case, the  
22 decisions that are made in this case will be felt not in New  
23 York but in West Virginia. That's the group of people that  
24 will be impacted by the decisions made in this case.

25 The miners have a saying: the coal is in the ground.

**PATRIOT COAL CORPORATION, et al.**

412

1 And what that means is, unlike General Motors which can build  
2 an auto plant in China or Mexico or anywhere else and produce  
3 and sell cars all over the world --

4 THE COURT: No, but the point, the whole point of the  
5 General Motors case was to save the jobs in the United States.  
6 That's why there was the General Motors and the Chrysler  
7 Chapter 11s, and there was a great hue and cry over whether or  
8 not you could do that in Chapter 11.

9 And to go back to whoever made the point about the  
10 footprint, I think probably the reason those cases came here  
11 was because of the footprint and the precedent of using Section  
12 363 in those kinds of unique circumstances. So I don't  
13 understand your point about -- you're focusing on the coal in  
14 the ground. I get that, but I don't get the point about that  
15 that could manufacture jobs somewhere else. The point of the  
16 bankruptcy was to save the union jobs in the United States.  
17 Sure, you can go anywhere in the world and manufacture stuff  
18 for less, but that doesn't help American workers.

19 MS. JENNIK: And you can go anywhere in the country  
20 and build auto -- have an auto plant. And what I'm talking  
21 about is venue because even though there are auto plants that  
22 are located, many in Detroit, and other parts of the country,  
23 they could be located anywhere, and they truly are a national  
24 and multinational company. Patriot cannot mine coal anywhere  
25 but in those mines. It can't be moved.

**PATRIOT COAL CORPORATION, et al.**

413

1 THE COURT: I agree with you, I do.

2 MS. JENNIK: It is in the ground.

3 THE COURT: Right.

4 MS. JENNIK: And that's important for venue purposes  
5 because it is not the same as an airline or another industry  
6 where the manufacturing can be done anywhere. This work cannot  
7 be done anywhere; it has to be done where it is. And why does  
8 that matter in this case?

9 The Schroeder declaration, the first-day Schroeder  
10 declaration, paragraph 33 is where Mr. Schroeder says the  
11 liabilities of the legacy -- labor legacy liabilities are 1.3  
12 billion dollars. And then in paragraphs 35 through 41, he goes  
13 on to talk in greater detail about the unsustainable, as he  
14 says, labor legacy liabilities. And we fully expect, and I  
15 think everybody in this case fully expects, that Patriot will  
16 be coming to the union with proposals, and those proposals will  
17 be to reduce the wages and the benefits that are now enjoyed by  
18 the miners and the retirees.

19 And it will be -- it will make those negotiations more  
20 difficult not because someone like me or a union officer will  
21 be intransigent because they might be angry that they didn't  
22 win a motion. That's certainly not the point that I'm making.  
23 The point that I'm making is the members -- and we presented  
24 the union constitution in Mr. Buckner's declaration. The  
25 members have a right to ratify any contract that's negotiated.

**PATRIOT COAL CORPORATION, et al.**

414

1 And we've seen in some other cases where the members have not  
2 ratified the --

3 THE COURT: Right.

4 MS. JENNIK: -- agreements that have been made.

5 THE COURT: Right.

6 MS. JENNIK: If the members' perception is that they  
7 are not being treated fairly by the court system, they are  
8 already very anxious, very frightened about their fate, those  
9 negotiations will be that much more difficult if members think  
10 they are not being treated fairly.

11 THE COURT: But now what you're telling me is that if  
12 there's not a decision granting your motion that those facts  
13 will pertain. You're telling me that a decision denying your  
14 motion will equal their not feeling that the Court is being  
15 fair to them, and that's extremely troubling to me. That's  
16 extremely troubling to me.

17 We've had voluminous briefing. We're here at twenty  
18 to 10 at night. A process being fair is hearing what everybody  
19 has to say and considering the record evidence and making a  
20 decision based on all the law and the facts. If I were simply  
21 going to rubber-stamp the debtors' choice, I wouldn't be here  
22 at twenty to 10 at night, and I wouldn't make all of you people  
23 be here at twenty to 10 at night, and yet you're telling me if  
24 that -- is that if I don't grant your motion there's going to  
25 be a perception that it's not fair to them, that the court

**PATRIOT COAL CORPORATION, et al.**

415

1 system is not being fair to them, and I can't -- I hope that  
2 that's not really what you mean.

3 MS. JENNIK: Your Honor, I'm not saying -- I'm not  
4 trying to say the union will react badly if the motion is not  
5 granted. What I am saying is that the members, the members who  
6 make the ultimate decision on whether they will accept any  
7 negotiated agreement are very fearful and distrustful and would  
8 not -- do not perceive that it would be fair to them if the  
9 case is not decided in West Virginia. And so when you asked me  
10 yesterday would the union oppose the -- would the union make  
11 the same motion if the case was brought in St. Louis or  
12 Delaware or somewhere else, the union members believe that the  
13 case should be heard in West Virginia. That's what they  
14 believe. That's what they believe is fair treatment of them.

15 THE COURT: But if it turns out that there are more  
16 mineworkers, putting to one side other employees, mineworkers  
17 not in West Virginia than there are in West Virginia, what am I  
18 to do with that fact?

19 MS. JENNIK: Well --

20 THE COURT: They don't have a voice here.

21 MS. JENNIK: They're all --

22 THE COURT: The union has a voice here, very powerful,  
23 and I'm listening to every word that you have to say, and I  
24 would assume, not to invade attorney-client privilege, but that  
25 when you report back, you're going to give a report that this

**PATRIOT COAL CORPORATION, et al.**

416

1 was a long and serious hearing and that I did not -- I gave  
2 everybody -- I asked searching questions of everybody, not just  
3 you. I mean, at least I tried, because I had them all. I  
4 don't know if you've been seeing all of my papers up here, but  
5 they're rather marked up for everybody. So I'm just -- maybe  
6 it's the lateness of the hour, but I'm just becoming more and  
7 more troubled by what you're suggesting.

8 MS. JENNIK: Your Honor, I'm not trying to suggest  
9 that the union is perceiving that you have been unfair in this  
10 proceeding.

11 THE COURT: Well, what you said --

12 MS. JENNIK: That is not at all what I'm saying. What  
13 I'm saying is the members believe that the case should be heard  
14 in West Virginia. They believe --

15 THE COURT: And that any other result they will  
16 perceive as not being -- as the Court not treating them justly  
17 and that that will color their attitude when they approach the  
18 bargaining table. I think that's what you said.

19 MS. JENNIK: Yes. Judge -- as Judge Friendly said, it  
20 will not seem right to them. It will not seem right to them  
21 that a court very far away from them decides their fate.

22 THE COURT: Well, I'm going to --

23 MS. JENNIK: And it will have --

24 THE COURT: I'm going to ask Ms. Schwartz, who is the  
25 lead proponent on the movants' side with respect to justice



**PATRIOT COAL CORPORATION, et al.**

417

1 only and not convenience, if she agrees with that formulation  
2 when it's her turn, just to give you a heads-up.

3 MS. JENNIK: Okay. I wanted to make just two other  
4 points that relate, I think, more to the convenience of the  
5 parties, and I'll make these points very briefly.

6 THE COURT: Okay.

7 MS. JENNIK: One is we've heard repeatedly from  
8 virtually every counsel who spoke, the union is located in West  
9 Virginia -- I'm sorry -- the union is located near Washington,  
10 D.C., and I will say again the union is an organization of its  
11 members. It is located where its members are located. The  
12 fact that it has an office in Washington, D.C. --

13 THE COURT: I got you.

14 MS. JENNIK: -- does not mean that is where it is  
15 located.

16 THE COURT: Okay. Understood.

17 MS. JENNIK: All right. Secondly, I just wanted to  
18 point out that the Schroeder declaration, paragraph 43, that  
19 Mr. Huebner referred to earlier, and that is the declaration in  
20 which he said -- Mr. Schroeder said that, we've looked at the  
21 costs and we conclude that it's more expensive to be anywhere  
22 but New York. And I just want to point out --

23 THE COURT: Hold on. That's not what it says. Hold  
24 on. I got to get it, but that's not what it says. Okay. It  
25 says that the costs and inefficiency of administration of the

**PATRIOT COAL CORPORATION, et al.**

418

1 estates would have materially increased.

2 MS. JENNIK: Yes.

3 THE COURT: Okay.

4 MS. JENNIK: What I want to point out is that the  
5 beginning of that sentence says "I believe that had we filed".  
6 And so that is his belief. He believes that that is the case.

7 THE COURT: Wait. So are you drawing a distinction  
8 between -- based on the word "belief", are you suggesting that  
9 that's not reflective of the analysis that the debtors did?

10 MS. JENNIK: I am suggesting that that is his belief  
11 of what the facts are. I think that is different from  
12 establishing those facts.

13 THE COURT: Well, but now we're back to where we  
14 started from twelve hours ago which was that you stipulated to  
15 a record, and you agreed to forego your opportunity to  
16 cross-examine Mr. Schroeder, which I would have been happy to  
17 listen to, and you could have said, Mr. Schroeder, in your  
18 declaration you state, I believe; Mr. Schroeder, what is the  
19 basis of your belief, what did you look at, what did you  
20 analysis, do you have any work papers. But you didn't do that,  
21 and I can't do that, and this is in his sworn declaration.  
22 He's not saying, I believe that nicest color for a shirt is  
23 blue. He's stating this as a fact.

24 MS. JENNIK: He state -- I think he's stating it as a  
25 belief, and I see a belief different from stating it as a fact.

**PATRIOT COAL CORPORATION, et al.**

419

1 THE COURT: So if he --

2 MS. JENNIK: And as we were discussing --

3 THE COURT: If the declaration -- paragraph 43 starts  
4 by saying, the debtors determined, the debtors determined. It  
5 doesn't say, I believe. It says, the debtors determined.

6 MS. JENNIK: Yes.

7 THE COURT: So if he had deleted the words "I believe  
8 that" and had simply said, had we filed in one of the other  
9 jurisdictions -- in other words, does your position turn  
10 literally on the words "I believe that"?

11 MS. JENNIK: Well, yes, it does, and I'll tell you  
12 why. Because as we discussed -- because it is necessarily a  
13 belief and not a fact. As we discussed yesterday, the costs of  
14 proceeding in New York or West Virginia can -- are unknowable,  
15 I think was your word.

16 THE COURT: No, but that's the problem that I have is  
17 that all I have is what the parties tell me, and here have the  
18 debtor telling me they determined this, and I would have been  
19 very happy to listen to lengthy cross-examination of Mr.  
20 Schroeder on this point; indeed, I was looking forward to it,  
21 but it didn't happen. And I just -- this is the first I'm  
22 hearing that the words "I believe" mean that this was just his  
23 view about what someone's favorite song is. I read this as  
24 reflecting analysis that was done. That's what I -- that's the  
25 way I view this. It's a declaration.

**PATRIOT COAL CORPORATION, et al.**

420

1 MS. JENNIK: Well, as we said yesterday, no one knows  
2 whether the costs of staying in New York or going to West  
3 Virginia are going to be higher or lower, and so we --

4 THE COURT: Mr. Schroeder's telling me that he --

5 MS. JENNIK: He believes that. He believes that.

6 THE COURT: This is a declaration. This is what  
7 evidence is. In a contested matter, the parties put in  
8 declarations in lieu of direct testimony. If the opponents  
9 disagree, they cross-examine. The reason that you do it by a  
10 declaration is because it streamlines the proceedings.  
11 Virtually every court in this district, in most cases, does it  
12 this way. That's the way we did it here.

13 No one said to me they want to depart from that model  
14 and they want live witnesses. I mean, we're repeating  
15 ourselves here, but if you want to make that argument to me in  
16 your post-hearing submission, I'm happy to read it, but it's  
17 not the way I was looking at declarations because now I'm going  
18 to have to go back to the other declarations, and if I apply  
19 that standard to it, there might be a lot of other stuff in the  
20 other declarations. They're declarations. They're what people  
21 are testifying to.

22 MS. JENNIK: Okay. I don't have anything else, Your  
23 Honor.

24 THE COURT: Okay.

25 MS. JENNIK: Thank you.

**PATRIOT COAL CORPORATION, et al.**

421

1 THE COURT: All right. Thank you very much, Ms.

2 Jennik.

3 MR. EARLY: Your Honor, I --

4 THE COURT: Where are you going? You're leaving?

5 MR. EARLY: No. I'm --

6 THE COURT: You're taking a shortcut?

7 MR. EARLY: I hope not.

8 THE COURT: All right. Can I ask the parties'  
9 indulgence for five minutes because I do have to go check on my  
10 mother. All right. I'll be right back. Five minutes. Thank  
11 you.

12 (Recess from 9:48 p.m. until 9:57 p.m.)

13 THE COURT: All right. Thank you for allowing me that  
14 break.

15 Okay. We're almost done, right? The only one -- all  
16 right. CourtCall is back connected, I hope. Apparently, they  
17 were inadvertently disconnected. At this point, I have no idea  
18 who's listening to us, where, but I don't want to know, but who  
19 is ever still with us, we're going to try to -- I'd very much  
20 like to get everyone out of here by 10:30.

21 All right. Go ahead.

22 MR. EARLY: Thank you, Your Honor. Blaine Early for  
23 the four surety movements -- movants. Excuse me.

24 Just to address some issues raised really by both the  
25 debtors and Bank of American, with regard to no bond forfeiture

**PATRIOT COAL CORPORATION, et al.**

422

1 yet, I think the phrase they use is there had been no call on  
2 the bonds.

3 THE COURT: Right.

4 MR. EARLY: The appropriate regulatory term, of  
5 course, is forfeiture of those bonds. We addressed that issue  
6 in our reply memo, page 8, footnote 5, in that, in fact, with  
7 the way that this works, if a mining entity has an outstanding  
8 permit revocation and bond forfeiture that prevents any future  
9 permits or at least it's ground for denying any permits. So  
10 the fact that there have been no bond forfeitures in the past  
11 really isn't dispositive of anything. One could say that  
12 Patriots never filed bankruptcy before either, but the fact is  
13 things happen.

14 In fact, the sureties, I think, will take great  
15 comfort in what we've heard over the last two days about  
16 environmental obligations and about continued compliance with  
17 law.

18 In terms of the amounts of bond exposure and  
19 collateral presented by Bank of America -- of course, this was  
20 a demonstrative exhibit and --

21 THE COURT: Right.

22 MR. EARLY: -- isn't evidence -- didn't object to  
23 that, but I think that there are some possibilities of  
24 misinterpretation or misapplication about this that I want to  
25 clear up.

**PATRIOT COAL CORPORATION, et al.**

423

1 THE COURT: Okay.

2 MR. EARLY: We don't quibble with the total amounts of  
3 the bonds issued by the surety, total of a little over --  
4 almost seventy million dollars.

5 THE COURT: Right.

6 MR. EARLY: But it's the application of the collateral  
7 that may be misinterpreted. The amounts of -- or the sizes of  
8 the letters of credit that are held by the three sureties are  
9 found in the Schroeder first-day declaration, schedule 5,  
10 beginning on page 11, and on page 12, the second page of that  
11 schedule, there are the three letters of credit indicated for  
12 Indemnity National 5,778,000, Argonaut 11,775,000, and U.S.  
13 Surety 14,871,864. Now, those are not split out on a state-by-  
14 state basis, and this demonstrative exhibit nets out other non-  
15 West Virginia and focuses just on the West Virginia exposure.  
16 That may give a -- well, it does give a misapplication of the  
17 collateral.

18 If you take the total of the three letters of credit  
19 and you look at these in the aggregate, if there are 69,725,000  
20 and change in total bond penal amounts, the total of the three  
21 letters of credit held by the three sureties, one surety has no  
22 letter of credit, the total letters of credit total 32,424,864  
23 for a net difference of 37,300,314. So the assumption that  
24 there's only a twenty-five million dollar delta, a twenty-five  
25 million dollar difference between the total bond exposure and

**PATRIOT COAL CORPORATION, et al.**

424

1 the total letters of credit is -- or could be misunderstood.

2 THE COURT: Okay.

3 MR. EARLY: And we can put that in our post-hearing  
4 submissions, if you'd like.

5 THE COURT: Okay. Great.

6 MR. EARLY: The -- but even that may be inappropriate  
7 because the amount of the claim, the size of the claim -- I  
8 don't think these issues about venue consideration are  
9 determined on a dollar per vote. The issues we raised are  
10 significant, whatever the size of the claim is. Certainly, the  
11 sureties have uncollateralized exposure across the debtors'  
12 operations.

13 Others raised concerned about why the regulators are  
14 not here. The Court has heard from the two states that are  
15 responsible for implementing the SMCRA. Kentucky Department  
16 for Natural Resources filed papers. Mr. Wood, Michael Wood,  
17 was on the phone today, the West Virginia AG representing the  
18 State of West Virginia, filed a joinder in the motion to change  
19 venue. So the states have been heard from. The fact that the  
20 federal regulators are not playing a part, again, is related to  
21 the very things we talked about today about the state  
22 implementation of SMCRA. That's done at the state level by the  
23 West Virginia DEP by the Kentucky DNR. This is not a RCRA  
24 case, the Resource Conservation and Recovery Act, that may be  
25 applicable in an underground storage tank case, so you wouldn't



**PATRIOT COAL CORPORATION, et al.**

425

1 see the EPA involved necessarily.

2 THE COURT: Okay.

3 MR. EARLY: You wouldn't see the Department of Justice  
4 representing EPA.

5 THE COURT: Okay.

6 MR. EARLY: And then finally, we'll address this again  
7 in our post-hearing briefs, but there was a lot of talk about  
8 the importance of the sales contracts. The sales contracts, of  
9 course, come only from the sale of coal produced.

10 One of the things that we've relied on -- and again,  
11 we'll submit this in our post-hearing submissions, but the  
12 Schroeder first-day declaration, schedule 6, begins on page 67,  
13 begins a whole list of owned and leased properties. And on  
14 page 67, schedule 6 of the Schroeder declaration, is a  
15 company-by-company, state-by-state, listing of the coal  
16 reserves that are owned and leased, columns showing the tons  
17 recognized as recoverable and tons that are shown as leased,  
18 significant amounts of the coal leased in West Virginia, and  
19 again, we'll extract that information. It is of record; it's  
20 just a matter of putting the numbers together in our  
21 post-hearing brief.

22 THE COURT: Okay.

23 MR. EARLY: And that's all I have, Your Honor.

24 THE COURT: All right. Thank you very much.

25 I think we are at Ms. Schwartz, and then I think we're

**PATRIOT COAL CORPORATION, et al.**

426

1 done.

2 MS. SCHWARTZ: Okay. Your Honor, I asked for thirty  
3 minutes. I'm timing it because I respect the Court's time, and  
4 I don't think I'll use all of that time.

5 THE COURT: I hope you can do it in fifteen.

6 MS. SCHWARTZ: I will make every effort, Your Honor.

7 THE COURT: Okay.

8 MS. SCHWARTZ: I tried to overestimate on that.

9 THE COURT: Okay.

10 MS. SCHWARTZ: Okay. First, Your Honor, I would like  
11 to say that I would be remiss if I didn't comment on the  
12 enormous amount of gratitude and honor that I feel appearing in  
13 this court throughout this proceeding, for the excellent  
14 lawyering that has taken place here, the seriousness that all  
15 parties have devoted to the issues and certainly the amount of  
16 time that the Court, and particularly noting the hour now that  
17 the Court has extended itself is really --

18 THE COURT: That's our job.

19 MS. SCHWARTZ: That's right.

20 THE COURT: Everyone's doing their job.

21 MS. SCHWARTZ: Your Honor, as I stated at the outset,  
22 the United States Trustee's motion is not complicated, and it  
23 is narrowly circumscribed. Simply stated, we have asked the  
24 Court to exercise its discretion in the interest of justice to  
25 transfer these cases to another district where venue is proper.

**PATRIOT COAL CORPORATION, et al.**

427

1 We've made it pretty clear, Your Honor, that we didn't dispute  
2 that the debtors met the requirements of 1408. Our argument is  
3 not about achieving venue, in that sense satisfying the  
4 statute, but rather whether venue can be sustained in this  
5 district. And as we said at the outset, Your Honor, we are  
6 asking this Court to right a wrong and to correct what we  
7 perceive as an injustice. What happened here is undisputed.  
8 On the eve of bankruptcy, the debtors created the two entities,  
9 PCX and Patriot Beaver, to satisfy venue and for no other  
10 purpose. That's a stipulated fact.

11 One of the things that I learned, Your Honor, as a  
12 very young lawyer from the bankruptcy judge that I clerked for,  
13 and I really didn't understand the import of what she had said  
14 to me at the time was, you can't change the facts. And I think  
15 that's the truth.

16 I think that Your Honor has spent a great deal of time  
17 listening to all the parties here. I think that the debtors  
18 somewhat mischaracterized the United States Trustee's argument  
19 that we only based our argument on one fact, and that is the  
20 one admitted fact that they created these entities for no other  
21 purpose. In my opening remarks, Your Honor, I stated a host of  
22 facts that were relevant to our consideration including, among  
23 others, no employees of these companies, no operations, no  
24 offices, no business purpose, and no stated reorganization  
25 purpose. There's a lot of facts. Those facts are in the

**PATRIOT COAL CORPORATION, et al.**

428

1 record, and we will cite them in our submissions -- in our  
2 post-submission brief.

3 In light of that -- and we will show you, Your Honor,  
4 that we've met our burden of proof for our narrow issue of what  
5 we're arguing before the Court. We didn't make the argument  
6 that convenience of -- the convenience of the parties was the  
7 discretionary mechanism by which we were asking this Court to  
8 transfer these cases. Your Honor has two separate bases. The  
9 interest of justice is a broad and flexible standard. And when  
10 Your Honor made -- I want to just --

11 THE COURT: So let me just stop you and go back to  
12 paragraph 43 of the first-day declaration that the parties have  
13 focused on so much.

14 MS. SCHWARTZ: Right.

15 THE COURT: And I think that a number of the parties  
16 raised this in their remarks, and that is that it is stated in  
17 paragraph 43 that the debtors determined that this was the  
18 optimal venue and that filing in a different venue would have  
19 impaired the efficient administration of the case, et cetera.  
20 And I think everybody agreed that that reflects or supports the  
21 notion that there was no bad faith, and the U.S. Trustee hasn't  
22 claimed that there was bad faith in the filing or in the venue  
23 choice.

24 So the question is, under what circumstances -- or how  
25 compelling a showing would have to be made in order for the

**PATRIOT COAL CORPORATION, et al.**

429

1 United States Trustee to believe that justice means allowing a  
2 case to proceed in a venue such as this where the entities on  
3 whom venue rests didn't have a whole lot of up-and-running  
4 operations. I'm still going back to where I started twelve  
5 hours ago, which is to try to figure out what the contours are  
6 of the rule of law, the precedent, the take-away that the U.S.  
7 Trustee is asking me to adopt here because justice is -- it's a  
8 living, breathing concept, right?

9 MS. SCHWARTZ: No dispute, Your Honor.

10 THE COURT: And I'm having a hard time with a little  
11 bit of something that just about everybody said, but with  
12 respect to the U.S. Trustee's position, I'm having a hard time  
13 with the notion that if I am -- if the Court is convinced that  
14 the best result either -- take two hypotheticals by -- it's a  
15 close call but the better result for the creditors is in venue  
16 X, or by a country mile, the better result is in venue X. At  
17 what point does that prevail in terms of justice versus  
18 technical compliance, stretching the language, pushing the  
19 envelope, however you want to formulate it.

20 If no party had made this motion, not the union, not  
21 the sureties, not the pension trust, if no party had made this  
22 motion, would you be standing there?

23 MS. SCHWARTZ: You mean no other party than --

24 THE COURT: No other party, yes.

25 MS. SCHWARTZ: Right.

**PATRIOT COAL CORPORATION, et al.**

430

1 THE COURT: No other economic stakeholder. The U.S.  
2 Trustee is a party, but they're not an economic stakeholder.

3 MS. SCHWARTZ: Right.

4 THE COURT: I need to know the answer to that  
5 question.

6 MS. SCHWARTZ: I'm going to answer that question, and  
7 I'm going to answer it -- the answer is yes, the United States  
8 Trustee would still be standing here. That's the first part of  
9 your question. Your Honor, what -- well, I'm --

10 THE COURT: So we're beyond Houghton Mifflin --

11 MS. SCHWARTZ: Yeah.

12 THE COURT: -- where a hundred percent of the  
13 creditors agreed they wanted to be here, but the United States  
14 Trustee, discharging her duties, looked at the facts and  
15 determined there was no compliance, there was no venue, right?  
16 And in that case, your office's position was, we got to do what  
17 we got to do. And yet you're telling me in my hypothetical, if  
18 no economic stakeholder raised the issue, you would, under  
19 1412, come and tell me that you have a better idea about  
20 justice than what the economic stakeholders have. I'm having a  
21 hard time with that.

22 MS. SCHWARTZ: Your Honor, I'm not saying that we have  
23 a better idea about what the economic stakeholder -- we have a  
24 different mission, Your Honor. The mission of the United  
25 States Trustee is to preserve the integrity of the process and

**PATRIOT COAL CORPORATION, et al.**

431

1 to see that the laws are upheld. Now, in that --

2 THE COURT: That's my mission, too.

3 MS. SCHWARTZ: Okay. But --

4 THE COURT: That's my mission, too. I took an oath  
5 when I took --

6 MS. SCHWARTZ: Right.

7 THE COURT: -- this job to up -- to defend the laws  
8 and the Constitution of the United States. So that's my job,  
9 too.

10 MS. SCHWARTZ: And I respect that, Your Honor.

11 THE COURT: So don't I have to also look at what's  
12 best for all the people sitting in the room?

13 MS. SCHWARTZ: Well, Your Honor, I think that -- of  
14 course you do, but what you've got on the ground here, Your  
15 Honor, what you've got are debtors that created facts to meet  
16 the statute. That's what you have to decide, Judge. You have  
17 to decide --

18 THE COURT: I have debtors --

19 MS. SCHWARTZ: -- whether or not that that's  
20 appropriate.

21 THE COURT: I have debtors that created facts to --

22 MS. SCHWARTZ: Satisfy the statute.

23 THE COURT: -- satisfy the statute.

24 MS. SCHWARTZ: That's right.

25 THE COURT: Yes, they've stipulated to that.

**PATRIOT COAL CORPORATION, et al.**

432

1 MS. SCHWARTZ: That's right.

2 THE COURT: And they've said that the reason that they  
3 did that was because they determined that their stakeholders to  
4 whom they owe a fiduciary duty would fair better here, that a  
5 proceeding here would be better for them. So I'm really  
6 struggling to balance what the parties have agreed is not bad  
7 faith, an exercise of fiduciary duty, with literal compliance  
8 with the statute, but something that's just not sitting right  
9 with some folks but not everybody. And you're telling me that  
10 if it sat right with everybody, you would still take an issue  
11 with it.

12 MS. SCHWARTZ: Well, because, Your Honor, it's not  
13 right. The upshot here is it's not right. What happened here  
14 was there were no contacts with the forum. Let's talk about  
15 what Mr. Huebner says were the contacts.

16 THE COURT: Okay.

17 MS. SCHWARTZ: The contacts --

18 THE COURT: Calm down. Calm down.

19 MS. SCHWARTZ: But the contacts, Your Honor, are  
20 choice-of-law provisions in contracts. That's not what  
21 Congress envisioned as a contact to the forum state. That's  
22 not the nexus. That's what he told you. He said, Your Honor,  
23 a lot of our contracts are governed by New York law, our master  
24 equipment lease is governed by New York law, our 1.25 billion  
25 dollar loan is governed by New York law, we negotiated in New



**PATRIOT COAL CORPORATION, et al.**

433

1 York for the DIP.

2 That's not -- first of all, venue is assessed on the  
3 date of -- that the case is filed. So that's an important  
4 factor as well. But what you have before you, Your Honor,  
5 simply put, is you have -- if Your Honor permitted every debtor  
6 to file an affidavit and say, Your Honor, we prepared an  
7 analysis -- let's say it was a detailed one that you say that  
8 you would have been interested in hearing about, it's our view  
9 that it doesn't matter how detailed an analysis is, they can't  
10 then create facts on the eve of bankruptcy to get into the  
11 venue. That is an abuse of the statute

12 THE COURT: But you see, this is where the factual  
13 record perhaps comes up short because it would depend on how  
14 big the delta was if the difference was -- and in some cases, a  
15 million dollars can be a small number, whether it would be a  
16 million dollar swing one way or the other or a ten million  
17 dollar swing, that can be real money in some cases, but for  
18 better or worse, not real money in cases that are billions and  
19 billions of dollars. So that's one factor.

20 And the other factor could be any showing, any showing  
21 that the venue choice was driven by an affirmative selection of  
22 substantive law that would benefit one constituency at the  
23 expense of another constituency or perhaps most importantly  
24 would benefit, to use the terminology that some folks like to  
25 use, entrenched management or insiders or some other party

**PATRIOT COAL CORPORATION, et al.**

434

1 who's trying to get -- ensure some special treatment for  
2 themselves. And I don't have any of that in the record.

3 I don't know what the future holds. I don't know if  
4 someone's going to come into court with a management retention  
5 or a management incentive program. I don't know anything about  
6 that. I haven't heard anything about that, but I don't have  
7 anything in the record that says on these six big issues, 1113,  
8 1114, environmental obligations in bankruptcy, standards for  
9 assumption and cure, on all those issues that -- I don't have a  
10 spreadsheet, Second Circuit, Third Circuit, Fourth Circuit,  
11 Sixth Circuit. I don't have that. I don't have.

12 MS. SCHWARTZ: That's right. You don't have that.  
13 You don't have that. But what my burden is, Your Honor, is to  
14 put facts before the Court to show the Court that in the  
15 interest of justice the cases should be transferred. It's not  
16 my burden, I don't believe --

17 THE COURT: Right. So you --

18 MS. SCHWARTZ: -- and maybe the Court disagreed, but  
19 it's not my burden to show how expensive the case would be here  
20 or there. One of the factors is efficient administration,  
21 right? That's a factor under the interest of justice.

22 THE COURT: Right.

23 MS. SCHWARTZ: There was nothing in the record that  
24 presented to me any idea that no other court in this country  
25 could efficiently administer these cases. You're not talking

**PATRIOT COAL CORPORATION, et al.**

435

1 about two venues.

2 THE COURT: Well, but you heard me push back  
3 repeatedly on people --

4 MS. SCHWARTZ: I certainly did, Your Honor --

5 THE COURT: -- on the issue of --

6 MS. SCHWARTZ: -- but I'm with you on that, Your  
7 Honor. They have a host of venues where they could go.

8 THE COURT: But your point, Ms. Schwartz, is the  
9 analysis begins and ends with the fact that the New York  
10 entities were created on the eve of and for the purpose of  
11 effectuating the filing here and that the rest of the facts  
12 don't matter.

13 MS. SCHWARTZ: No, that's not what I said, Your Honor.  
14 I said the facts that matter --

15 THE COURT: Okay. Then tell me the right way to say  
16 it.

17 MS. SCHWARTZ: Okay. Well, what matters is they  
18 created two entities on the eve of bankruptcy that have no  
19 business purpose, that have no employees, that have no  
20 operations, that have very little assets, I gave you that  
21 decimal point analysis --

22 THE COURT: Right. Okay.

23 MS. SCHWARTZ: -- yesterday, that were created solely  
24 so that they would create facts to fit the statute. Your  
25 Honor, we have a wonderful system of jurisprudence in this

**PATRIOT COAL CORPORATION, et al.**

436

1 country, and it is based on precedent.

2 Now, Judge Drain's decision in Winn-Dixie is not --

3 THE COURT: Wait. Hold on.

4 MS. SCHWARTZ: -- binding on Your Honor.

5 THE COURT: Hold on. Time out. But that's what I  
6 just said. You just said it in more words, but that's what I  
7 just said. I said that your position is that the creation of  
8 the entities, who have no employees and who have --

9 MS. SCHWARTZ: Okay.

10 THE COURT: -- de minimis assets and whose assets form  
11 a very small fractional proportion of the amount of the assets  
12 that there are in the collective enterprise --

13 MS. SCHWARTZ: And have no business purposes --

14 THE COURT: -- and have no business purpose --

15 MS. SCHWARTZ: -- and no reorganization purpose.

16 THE COURT: Exactly. And the analysis stops there,  
17 that I don't -- I should put blinders on -- and that, in and of  
18 itself, they're disqualified, they're not out of the starting  
19 gate, they --

20 MS. SCHWARTZ: Your Honor, may I just --

21 THE COURT: -- don't -- I don't get to -- I don't get  
22 to look at, putting that to one side, other interests of the  
23 creditors, that the fact of the creation of the entities is  
24 dispositive, dispositive, in and of itself, of the interests of  
25 justice, that it is -- that that means it would not be in the

**PATRIOT COAL CORPORATION, et al.**

437

1 interest of justice to allow the cases to stay here.

2 MS. SCHWARTZ: In this case, and one of the reasons  
3 is, Your Honor, is that Judge Drain said, when you read the  
4 paragraph on page 170 that says, on the other hand I think that  
5 the interests of justice require transfer of venue where,  
6 again, the facts were created to fit the statute; in that  
7 sense, you are building the shop that you choose to act in as  
8 opposed to going to it. The next line says, on that sole  
9 basis, not on any of the other facts of Winn-Dixie that  
10 everybody wants distinguished is not the same here. What Judge  
11 Drain said, on that sole basis of creating facts, of gaming the  
12 statute, of getting into the venue, that's not in the interest  
13 of justice. And I think, Your Honor, that goes to what Judge  
14 Friendly said. When you've got to have a bankruptcy and it's  
15 got to go right --

16 THE COURT: But here --

17 MS. SCHWARTZ: -- but has to seem right. It goes to  
18 what I said to Your Honor the first day. I said, Your Honor,  
19 I've thought a great deal about what is justice, how do you  
20 define justice, how do you advocate justice, et cetera.

21 I have to say, Judge, I bought a book in the context  
22 of this. It's called The Sense of Injustice by Edmond Cahn. I  
23 read it. I didn't come up with the theory that you have to  
24 look at it from the sense of what is injustice, but I think it  
25 makes sense because whereas justice is sometimes hard to pin

**PATRIOT COAL CORPORATION, et al.**

438

1 down. When you think about what's an injustice, it's like what  
2 Judge Friendly said; it doesn't seem right, it doesn't feel  
3 right.

4 THE COURT: Well, you're saying --

5 MS. SCHWARTZ: You're not comfortable with it.

6 THE COURT: I think what you're saying more it's like  
7 Potter Stewart said about obscenity, right? He can't define  
8 it, but he knows it when he sees it. That's what you're  
9 telling me.

10 MS. SCHWARTZ: Yes. And Your Honor, I also want to  
11 say I -- debtors' counsel has said many times how we're  
12 advocating for this per se rule, the per se rule. I've said it  
13 twenty times if I've said it one time, the United States  
14 Trustee is not advocating for a per se rule; we're going on the  
15 facts of this case. We analyzed the facts of this case. We  
16 thought it was a good idea, Your Honor. We thought it would  
17 streamline the hearing before Your Honor to do a stipulation.  
18 I felt comfortable. I examined Mr. Schroeder at the 341(a)  
19 meeting. I put that transcript in. You've got facts, the  
20 facts that I just detailed to you. Those facts are in.

21 To the extent that Your Honor thinks that it's  
22 reasonable or that it's just to consider why or whether or not  
23 an analysis was made by the debtor to choose a particular  
24 venue, I'm telling you, in my view, you're opening the flood  
25 gates to every single case getting filed in New York by the

**PATRIOT COAL CORPORATION, et al.**

439

1 same thing we talked about several times, opening up an LLC,  
2 putting five dollars in the bank account, paying 175 dollars to  
3 the Secretary of State, and bingo, you put in your 1007  
4 affidavit, you copy the paragraph 33 from Mr. Schroeder's  
5 declaration, and you're in. That's not right. That's not what  
6 the statute was intended to do.

7 And the thing here, Judge, is that, yes, it's my  
8 burden of proof. I think I've met my burden of production, but  
9 what you haven't heard at all, what you haven't heard at all  
10 was, well, why is St. Louis an improper place for this to go?  
11 The headquarters are there. Every single one of those  
12 departments that were identified for Your Honor earlier,  
13 they're in St. Louis. Mr. Schroeder, he's in St. Louis.  
14 Everybody's there. We're not saying, Judge, that we're  
15 imposing our view on the debtors in terms of where they can  
16 choose venue, but they have lots of choices, Judge, and there's  
17 nothing here. You've said it yourself, and I agree a hundred  
18 percent, this is a fabulous court in New York. I can see why  
19 parties want to --

20 THE COURT: I didn't say that.

21 MS. SCHWARTZ: Well, I said it. It's a fabulous  
22 court, and I can see why parties --

23 THE COURT: It's a fabulous courthouse.

24 MS. SCHWARTZ: It's all good. I can see why parties  
25 want to be here. I can totally see it. But we have laws, we

**PATRIOT COAL CORPORATION, et al.**

440

1 have laws. And the intent and spirit of a venue law is that it  
2 deals with geographic location.

3 THE COURT: And yet it says "domicile". And yet it  
4 says "domicile."

5 MS. SCHWARTZ: Well, yes, and Your Honor, as you know,  
6 some --

7 THE COURT: And it says -- it has said or its  
8 predecessor has said "domicile" in some form or another since  
9 the nineteenth century.

10 MS. SCHWARTZ: That's right.

11 THE COURT: Right?

12 MS. SCHWARTZ: But, Your Honor, Congress took care of  
13 it. Congress already gave you the discretion. If you have a  
14 situation like this, you have the complete discretion. And  
15 we're imploring Your Honor to exercise the Court's discretion  
16 and transfer these cases. I've said they've got ten districts.  
17 They may even have more. They may even have more. And Your  
18 Honor, think about things like this: the 113 issues -- the  
19 1113 issues --

20 THE COURT: How about Puerto Rico? We could all go to  
21 Puerto Rico.

22 MS. SCHWARTZ: Well, I wouldn't go. My colleague down  
23 there would go; I wouldn't get to go. I'd get to stay up here.

24 But what I'm saying to Your Honor -- and I'm not going  
25 to belabor this point, Your Honor. You have picked up every



**PATRIOT COAL CORPORATION, et al.**

441

1 single point that I think every party here has advanced. At  
2 the end of the day, Your Honor, I think that Judge Drain was  
3 confronted with a similar situation.

4 I want to make one point that was pointed out to me.  
5 You know how you've talked about in a lot of the forum shopping  
6 cases, judges talk about this avoidance, like parties want to  
7 get out of where they were because it's problematic, right? It  
8 seems to me, and I could be wrong, and there's a lot of people  
9 here what can tell me how wrong I am, but it seems to me, based  
10 on the transcript, that the debtors ultimately changed their  
11 mind to go back to Florida because the negative press they were  
12 getting was by virtue of the venue motion.

13 THE COURT: Yes, exactly right.

14 MS. SCHWARTZ: So it wasn't -- they weren't running  
15 away from negative press; they went back because they didn't  
16 want it.

17 THE COURT: No, no, no. In the first instance --

18 MS. SCHWARTZ: That's all right. Sorry. I knew I  
19 wouldn't get it perfect.

20 THE COURT: In the first instance, they filed in New  
21 York because they wanted to avoid the hoopla attendant to the  
22 filing in Florida. I suppose one could make the reasonable  
23 conclusion maybe that you may not want to shop at a supermarket  
24 that's in Chapter 11, maybe the food's not fresh.

25 MS. SCHWARTZ: Right.

**PATRIOT COAL CORPORATION, et al.**

442

1 THE COURT: Like people say they -- sometimes some  
2 people don't want to fly on an airplane of a debtor that is in  
3 Chapter 11. But nowadays, for better or worse --

4 MS. SCHWARTZ: Most of them are.

5 THE COURT: -- Chapter 11's so common --

6 MS. SCHWARTZ: Right.

7 THE COURT: -- you're going to limit your consumer  
8 choices by avoiding debtors, but be that as it may. So they  
9 went to New York, and then the hue and cry was so great that  
10 the debtors themselves said, this was a bad idea, Judge Drain,  
11 we want to go back home. And he -- under that set of unique  
12 and frankly bizarre circumstances and because of the creation  
13 of the entities, he agreed over the objection of the unsecured  
14 creditors' committee and, frankly, over the objection or the  
15 nonjoinder of your office.

16 MS. SCHWARTZ: Right.

17 THE COURT: As far as I can tell from reading that  
18 transcript, and you're not estopped, you can take whatever  
19 position you want --

20 MS. SCHWARTZ: Right.

21 THE COURT: -- in whatever case -- your office said  
22 600 million dollars of debt has spoken and that the Court ought  
23 to listen to them. So that's the quandary that I have here  
24 because I have a lot of debt speaking very loudly and  
25 repeatedly saying that notwithstanding the reservations about

**PATRIOT COAL CORPORATION, et al.**

443

1 the way the venue was achieved, they want to stay here. And in  
2 another case, another big, big case involving 45,000 employees  
3 that were down in the southeast, your office said dollars  
4 count, numbers count, unsecured creditors count.

5 MS. SCHWARTZ: Your Honor, I said --

6 THE COURT: It's hard -- I'm having a very hard time  
7 with that.

8 MS. SCHWARTZ: Well, Your Honor, the only thing I can  
9 say with respect to that is that is in the our position today.

10 THE COURT: Okay.

11 MS. SCHWARTZ: And if you see it as a change in  
12 position, then that's what it is because the upshot is that if  
13 we were prevented from reevaluating our position and evaluating  
14 the context of cases, then we would be stagnant. We have to be  
15 progressive; we have to be able to evaluate what's going on on  
16 the bankruptcy system at large. Your Honor knows our mission  
17 is to uphold and to promote the integrity of the process,  
18 integrity of the system. It may sound somewhat hokey, if you  
19 will, but it's true; that's what we do.

20 THE COURT: And I'm all for that, but it gives me  
21 pause when I have a concern or there's a possibility that it  
22 will -- that I'm sacrificing, in the name of the integrity of  
23 the process, dollars that can go into somebody's pocket, not  
24 the folks, frankly, sitting at the tables here, but --

25 MS. SCHWARTZ: Well, let me say --

**PATRIOT COAL CORPORATION, et al.**

444

1 THE COURT: -- the dollars that the employees and  
2 those who cannot -- who are not here speaking for themselves.  
3 These are the ones that I am most charged with looking out for,  
4 that I, that this Court --

5 MS. SCHWARTZ: Right.

6 THE COURT: -- is most charged with looking out for.  
7 So that's the quandary; that's the quandary that I have is to  
8 spend their dollars in the name of justice.

9 MS. SCHWARTZ: Right.

10 THE COURT: And that's the problem that we have here.

11 MS. SCHWARTZ: Well, also, one thing -- and I just  
12 want to make sure that I say this again, and that is if Your  
13 Honor were to permit big corporate enterprises to be able to  
14 satisfy 1408 by the simple setting up an affiliate, not fund --  
15 funding it with little teeny assets, no employees, et cetera,  
16 then that would render the venue statute meaningless; we  
17 wouldn't need it.

18 Anyway, Your Honor, I went to twenty-one minutes  
19 and -- I want to say one thing. With respect to the "I believe  
20 statement" --

21 THE COURT: Yes.

22 MS. SCHWARTZ: -- I believe that's a fact. The "I  
23 believes" that were -- when Mr. Schroeder uses the terminology  
24 "I believe," I believe it's a way he speaks.

25 THE COURT: You take it -- you take that as testimony?

**PATRIOT COAL CORPORATION, et al.**

445

1 MS. SCHWARTZ: Yes, I do, Your Honor.

2 THE COURT: You do take that as testimony. Okay.

3 And just let me comment on the last thing that you  
4 said, which was -- you said that if -- to interpret the venue  
5 rules the way the debtors are asking the Court to in this case  
6 would permit big enterprises, and I'm deciding -- this Court is  
7 deciding this case and, with all due respect to my dear  
8 colleague, Judge Drain, courts are often torn between rendering  
9 decisions on the record to expedite the proceedings for the  
10 sake of the parties, not because we don't want to do the work.  
11 In this case, there's going to be a written decision, and it's  
12 going to be -- I assume that it will be cited by somebody for  
13 some proposition or --

14 MS. SCHWARTZ: Right.

15 THE COURT: -- or maybe nobody for no proposition.  
16 But in any event, I'm just deciding this case, and I'm not  
17 deciding what Congress should do, what people should think  
18 about this district, what big enterprises should be permitted  
19 to do or what they might be permitted to do. We're just going  
20 to decide if the Patriot coal case is going to stay here or  
21 not.

22 MS. SCHWARTZ: Right. I understand that.

23 THE COURT: That's the question.

24 MS. SCHWARTZ: And Your Honor, I think -- just before  
25 I close, I think you wanted me to comment on that issue that

**PATRIOT COAL CORPORATION, et al.**

446

1 was -- that arose with the West Virginia --

2 THE COURT: Yes, please.

3 MS. SCHWARTZ: Yeah. I hope I got it right because I  
4 was trying to write my closing at the same time as that was  
5 going on, but I think what Your Honor was getting at and has,  
6 throughout the proceedings, questioned the parties about, made  
7 statements about, et cetera, was about the Court's ability to  
8 discharge fairness here and that whether this Court was  
9 discharging fairness or whether or not a court in another  
10 district, including West Virginia or perhaps St. Louis,  
11 Chicago, Indiana, Kentucky, all the other places it can go,  
12 every court has the same -- takes the same oath. Every court  
13 is going to be presenting with the same -- presented with the  
14 same facts. Every judge has the same exact job. I feel that  
15 we have to have faith in that and --

16 THE COURT: So then the statement that the sureties  
17 made, I believe, perhaps the union, about -- that a court in  
18 West Virginia is more familiar with, has a greater  
19 understanding of and that will be more consistent with certain  
20 of the parties feelings about the justice of the system, do you  
21 concur that such a view --

22 MS. SCHWARTZ: Well, Your Honor --

23 THE COURT: -- is consistent with justice?

24 MS. SCHWARTZ: Your Honor, I am not a judge, so I am  
25 not very familiar with the actual oath and the cannons of the

**PATRIOT COAL CORPORATION, et al.**

447

1 judiciary, but we are a federal system of laws --

2 THE COURT: Right.

3 MS. SCHWARTZ: -- and the federal -- these laws --  
4 every bankruptcy court has to deal with state laws of other  
5 states, et cetera. I can't speak for another party.

6 THE COURT: Okay. That's fair.

7 MS. SCHWARTZ: I can't speak for another party. All I  
8 can say is that, on a personal level, I have faith in our  
9 judiciary whether I'm here or whether I'm somewhere else.

10 Look, we've all been practicing law for a long time.  
11 Some courts discharge justice a little differently than others.  
12 It happens that way. There's a different style. Some judges  
13 would not stay until 10:30 at night to make sure that these  
14 issues could get -- some would. It's going to -- there are  
15 some differences, but at the end of the day, the courts are  
16 charged with the same obligation, to discharge justice fairly.

17 We're saying to you, Your Honor, in the interest of  
18 justice, on the facts of this case, we think that Your Honor --  
19 and we're imploring Your Honor to use the Court's discretion to  
20 transfer the case to one of the many venues that are proper.

21 THE COURT: All right. Thank you.

22 MR. MAYER: Your Honor, this is a housekeeping matter  
23 prompted by a comment you made from the bench.

24 THE COURT: Okay.

25 MR. MAYER: Your Honor, I think that you should take

**PATRIOT COAL CORPORATION, et al.**

448

1 the joinders based on whatever weight you wish to give them. I  
2 would -- I actually would have to object to the submission of  
3 an affidavit based on double hearsay on people who were not in  
4 the court in terms of the way the process was conducted. I  
5 don't think you need to verify the bona fides of each joinder  
6 to take them collectively into account, but I think the  
7 affidavit you've suggested is a mistake.

8 THE COURT: All right. I disagree with you, Mr.  
9 Mayer. We're going to stick to my plan. All right?

10 Okay. Let me talk about the post-hearing submissions,  
11 and let me get you folks out of here.

12 So how long do you think it will take to produce a  
13 transcript for these two days? Today -- what day is today?  
14 Today is Wednesday.

15 MR. HUEBNER: Your Honor, I would think that we would  
16 have the transcript by Friday.

17 THE COURT: By Friday, by the end of the day.

18 MR. HUEBNER: Although given the hour, it might --

19 THE COURT: Right. And it's very --

20 MR. HUEBNER: -- and I believe Monday and Tuesday --

21 THE COURT: It's very long, it's very long.

22 MR. HUEBNER: And I believe Monday and Tuesday are  
23 holidays.

24 THE COURT: Monday and Tuesday are holidays.

25 MR. HUEBNER: So --



**PATRIOT COAL CORPORATION, et al.**

449

1 THE COURT: I mean, I think, for all intents and  
2 purposes, in terms of fairness to all the parties, there are  
3 many parties for whom Monday and Tuesday is not a workday. So  
4 I think in fairness, the earliest that folks are going to have  
5 a meaningful opportunity to get the transcript in their hands  
6 is Wednesday morning. It's just the way it is. All right? So  
7 we're going to start counting from Wednesday morning, which is  
8 not to say that once you have a chance to get some sleep that  
9 there isn't work that can be done Thursday and Friday and over  
10 the weekend in anticipation of getting the transcript because  
11 we have a record, you all took notes, et cetera. So based on  
12 that -- and I want to set a page limit, not on the findings but  
13 on the post-trial brief because I don't want thirty pages from  
14 each of you.

15 MR. HUEBNER: We strongly support that, Your Honor.

16 THE COURT: Okay. So on the findings -- and this is  
17 the way I like findings to be done. I don't want an advocacy  
18 piece on the findings. Fact record cite, fact record cite.  
19 Okay? If you want an example of how I like it done, you can  
20 call chambers, and we'll point you to examples on the docket in  
21 other cases. Very factual, not an advocate's piece. Give me  
22 all your advocacy in your submission, no more than twenty pages  
23 each. Does that make your choke, the twenty-page limit? It's  
24 a push.

25 MR. HUEBNER: Your Honor, personally, we'd be fine

**PATRIOT COAL CORPORATION, et al.**

450

1 with less. We think plenty of ink has been spilled, but this  
2 is obviously the Court's pleasure.

3 THE COURT: I think twenty pages is not too long for  
4 me to read them all, and it's not too short for you to -- I  
5 don't want you to be spending extra time trying to make it  
6 pithy.

7 All right. Questions. Comments. Needs. Concerns.

8 MS. SCHWARTZ: Your Honor, the facts -- excuse me --  
9 facts and law, twenty pages in total?

10 THE COURT: No, no, no, no, no.

11 MS. SCHWARTZ: Oh, sorry.

12 THE COURT: You get to write a brief, that's twenty  
13 pages.

14 MS. SCHWARTZ: Oh, okay.

15 THE COURT: You get to submit separate findings of  
16 fact.

17 MS. SCHWARTZ: Okay.

18 THE COURT: That I'm not going to put a limit on. I'm  
19 just going to state that they need to be non-advocate's piece;  
20 they need to be straight down the middle.

21 All right. So let's talk about timing. And my  
22 contemplation is that these are simultaneous submissions. No  
23 one's going to respond to what anybody else has to say. Last  
24 licks, we're done.

25 MR. HUEBNER: Your Honor, I guess the first question

**PATRIOT COAL CORPORATION, et al.**

451

1 is, I assume this goes without saying, but I want to ask so the  
2 record is clear. Is it correct that the factual record of  
3 these proceedings is now closed?

4 THE COURT: Factual record of these proceedings is  
5 closed --

6 MR. HUEBNER: So of this --

7 THE COURT: -- of these -- of the pending motions is  
8 closed with the following exception: we have the affidavit,  
9 right. So that's going to come in. And frankly, I have to  
10 wait and see what it says in order to hear whether anybody has  
11 an issue with it. But one of the things you need to do in the  
12 affidavit is parse through the joinders because the Cat part --  
13 creditors today pointed out that they stand alone. So I need  
14 someone to, more accurately than I've done, to parse through  
15 the joinders and tell me which ones are on the form or are  
16 otherwise related to the debtors' outreach efforts and the  
17 like. You understand what I'm saying.

18 MR. HUEBNER: I do, Your Honor.

19 THE COURT: Okay.

20 MR. HUEBNER: The second issue, which I think is very  
21 important, is only fundamentally tied to the joinder issue.  
22 There are potentially fifty parties, and I assume that the  
23 Court does not contemplate fifty separate post-trial briefs.

24 THE COURT: Thank you for that clarification.

25 MR. HUEBNER: So if I could make --

**PATRIOT COAL CORPORATION, et al.**

452

1 THE COURT: We're going to name them.

2 MR. HUEBNER: If I could make a proposal --

3 THE COURT: Name them one by one, Mr. Huebner, the  
4 debtors, the creditors' committee.

5 MR. HUEBNER: Would you like --

6 THE COURT: Go ahead.

7 MR. HUEBNER: I mean, I -- the parties who spoke at  
8 this hearing, and I'll just take a fly at them and try to get  
9 it right, are the debtors, the creditors' committee, the first  
10 lien DIP agent, the second lean DIP agent, the indentured  
11 trustee, Caterpillar, the ad hoc noteholders. Have I missed --

12 THE COURT: That's everybody.

13 MR. HUEBNER: I'm going to go to the other side and --

14 THE COURT: We're going to the other side.

15 MR. HUEBNER: I'm aware that there is another side of  
16 the of the room.

17 THE COURT: Yes. Go ahead.

18 MR. HUEBNER: Thanks, guys. I didn't drink Kool-Aid;  
19 I just had dinner.

20 Then, Your Honor, unless I misunderstand, the primary  
21 parties on the other side are the UMWA, the United States  
22 Trustee, and the sureties. The question then is, obviously Mr.  
23 Goodchild is still here, what are we doing with the pension  
24 fund? Are they a separate party?

25 THE COURT: Yes, they're a separate party.

**PATRIOT COAL CORPORATION, et al.**

453

1 MR. HUEBNER: Perfect.

2 And it's just twenty pages per party, period?

3 THE COURT: Twenty pages for the brief and unlimited  
4 for the findings of fact --

5 MR. HUEBNER: Your Honor, on the finding --

6 THE COURT: -- so that -- right? I mean, just to be  
7 granular about it, right? You're going to do your findings of  
8 fact, right. And then when you write your brief, you're going  
9 to refer to finding number 1, finding number 6.

10 MR. HUEBNER: Definitely. Your Honor, can I make one  
11 suggestion --

12 THE COURT: Sure.

13 MR. HUEBNER: -- that I think may save a lot of pain  
14 and blood for everybody. I didn't count, but that's about  
15 thirteen parties, and thirteen parties each doing their own  
16 separate proposed findings of fact could result in literally  
17 hundreds and hundreds of pages. What we've seen in prior  
18 cases, in fact, in Lyondell in this very courtroom is that the  
19 court accepted a suggestion, and actually Judge Gerber may have  
20 imposed this suggestion that the groups get together and have  
21 to hammer out on the one side the movants and their joinders.

22 THE COURT: If you can do that, I'd be delighted. If  
23 you can do that -- I don't know that it would work. I don't  
24 want to impose that on you, but if you can do that, that would  
25 be great. If certain parties want to join with respect to a

**PATRIOT COAL CORPORATION, et al.**

454

1 pleading -- okay, yeah. If certain parties want to join in on  
2 one twenty-pager, that's fine, too.

3 MR. HUEBNER: Your Honor, can I then make a modified  
4 suggestion because I think we don't want a prisoner's dilemma  
5 where, for example, all the objectors do get together on one,  
6 but then the movants have four different ones.

7 THE COURT: I love lawyers.

8 MR. HUEBNER: What I think might make sense --

9 THE COURT: Keep going.

10 MR. HUEBNER: I would like to humbly make a suggestion  
11 which I think --

12 THE COURT: Yes.

13 MR. HUEBNER: -- may help all of us in the long run,  
14 having been in similar fact patterns.

15 THE COURT: Okay.

16 MR. HUEBNER: At a minimum, if Your Honor does not  
17 want to simply impose that each side just needs to get  
18 together, what you do a lot when you have proposed stipulations  
19 of fact where you can agree only in part is what we might want  
20 to do is suggest, and maybe everybody will agree, is that each  
21 side has to get as much commonality as they can --

22 THE COURT: Yes, that's what I said about three  
23 minutes ago before --

24 MR. HUEBNER: -- and then -- right, but the question  
25 is, is it imposed or is it voluntary.

**PATRIOT COAL CORPORATION, et al.**

455

1 THE COURT: No. I think that that's the best way to  
2 proceed. I think you ought to try to agree to as many facts as  
3 you can as a group, and if there are particular findings that  
4 somebody wants to urge that the others don't want to agree on,  
5 you can do it that way. I don't want to impose a process that  
6 takes longer. If the parties on this side of the room don't  
7 want to proceed that way, I'm fine with -- I'll read the  
8 separate ones.

9 I'm going to give you a citation to a case, an  
10 adversary, 11-02225, which had voluminous, voluminous findings  
11 of fact, probably in that one case more than you, in the  
12 aggregate, could manage to give to me. So I'm going to leave  
13 it a little loose here. You have the latitude to do it in the  
14 way that best suits each of your purposes. I don't want to  
15 micromanage to that extent so --

16 MR. HUEBNER: Then, Your Honor, I think the last  
17 question therefore, unless other people want to --

18 THE COURT: Is the date.

19 MR. HUEBNER: -- is the timing.

20 THE COURT: Okay.

21 MR. HUEBNER: I think that the way we see it, Your  
22 Honor, and we very much -- many of us appreciate the courtesy.  
23 In the real world, many people are partially knocked out until  
24 Wednesday, so that is at least a good starting time.

25 THE COURT: Right.

**PATRIOT COAL CORPORATION, et al.**

456

1 MR. HUEBNER: The question then is -- there also is  
2 obviously an issue with the next week.

3 THE COURT: Right.

4 MR. HUEBNER: And since we've all agreed and nobody  
5 has argued that the movants -- certainly they didn't move early  
6 and we didn't make an incremental argument --

7 THE COURT: Right. We all agreed at the beginning  
8 that the passage of time --

9 MR. HUEBNER: Correct.

10 THE COURT: -- was not to be used as a factor in  
11 making this decision.

12 MR. HUEBNER: Exactly.

13 THE COURT: Okay.

14 MR. HUEBNER: And so what I would suggest for the  
15 courtesy of everybody, because we've all work very hard and  
16 have a lot of things to juggle that are yet possibly more  
17 important, is -- I don't know, Mr. Moskowitz, how many --

18 THE COURT: Let me hear from -- Mr. Huebner, let me  
19 hear from some of the other parties.

20 Ms. Jennik --

21 MS. JENNIK: Your Honor, my thought is --

22 THE COURT: -- what's your preferred --

23 MS. JENNIK: -- two weeks --

24 THE COURT: -- time frame for the submission?

25 MS. JENNIK: -- two weeks from Wednesday, from when we



**PATRIOT COAL CORPORATION, et al.**

457

1 get the transcript.

2 THE COURT: Well, the problem is that the  
3 meaningfulness of the weeks is a little deceptive because the  
4 17th and the 18th or not working days for many of the folks,  
5 and most of the day on the 25th and the 26th are not working  
6 days for a lot of the folks. So just by happenstance where we  
7 are on the calendar, we have a lot of business days that are  
8 nonworking days for folks.

9 MR. HUEBNER: Can I just suggest a date, Your Honor?

10 THE COURT: Sure.

11 MR. HUEBNER: Friday, October 5th, at 1 p.m., New  
12 York, Eastern time.

13 THE COURT: All right.

14 MR. HUEBNER: Anybody have a problem with that?

15 UNIDENTIFIED SPEAKER: What time?

16 MR. HUEBNER: 1 p.m.

17 THE COURT: Friday, October 5th, 1 p.m., Eastern.

18 MS. JENNIK: I would just ask for 4 p.m. It's easier  
19 for my office to get with that, if we could.

20 MR. HUEBNER: Yeah, that's good, Your Honor.

21 THE COURT: Friday --

22 MR. HUEBNER: 4 p.m. Eastern.

23 THE COURT: -- October 5th, 4 p.m., Eastern.

24 And I just want to say though that even we're all  
25 agreeing that the passage of time is not a factor in the

**PATRIOT COAL CORPORATION, et al.**

1 decision on this case, that one party can use the other, the  
2 case should proceed.

3 MR. HUEBNER: Thank you, Your Honor.

4 THE COURT: The case needs to proceed. If it stays  
5 here, it stays here; if it doesn't stay here, it doesn't stay  
6 here. But the case needs to proceed, and it would not be  
7 consistent with anyone's best interest to hold on to motions  
8 and hold on to matters and wait to start negotiations. You  
9 need to get going.

10 MR. HUEBNER: We quite agree, Your Honor --

11 THE COURT: Clock is taking.

12 MR. HUEBNER: -- and we will --

13 THE COURT: Money's being spent.

14 MR. HUEBNER: We will not be stopping --

15 THE COURT: Please.

16 MR. HUEBNER: -- in any way, shape or form.

17 THE COURT: All right. Good night, everyone. Thank  
18 you so much. Thank you everybody in West Virginia and in St.  
19 Louis for sticking with us and for -- especially to the folks  
20 at the courthouses there for making this possible. Get home  
21 safely.

22 IN UNISON: Thank you, Your Honor.

23 (Whereupon these proceedings were concluded at 10:48 PM)

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I N D E X

RULINGS

	Page	Line
UMWA Health and Retirement Funds' request	94	23
to call a witness, denied.		

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C E R T I F I C A T I O N

I, Zipporah Geralnik, certify that the foregoing transcript is  
a true and accurate record of the proceedings.



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ZIPPORAH GERALNIK

AAERT Certified Electronic Transcriber CET\*\*D 489

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Date: September 13, 2012