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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

PATRIOT COAL CORPORATION, *et al.*,

Debtors.

Chapter 11

Case No. 12-12900 (SCC)

(Jointly Administered)

**SURETIES' POST-HEARING MEMORANDUM OF LAW
ON MOTION TO TRANSFER JOINTLY ADMINISTERED CASES TO
SOUTHERN DISTRICT OF WEST VIRGINIA**

Argonaut Insurance Company, Indemnity National Insurance Company, US Specialty Insurance, and Westchester Fire Insurance Company (together, "Sureties"), through counsel and as directed by the Court, submit this Memorandum of Law related to the Sureties' Motion to Transfer Jointly Administered Cases to Southern District of West Virginia [Doc. No. 287].

Despite Debtors' arguments that they sell coal globally pursuant to contracts containing New York choice-of-law provisions, there can be no dispute their coal sales, whether domestic or

international, depend first on the extraction of coal from the earth. There is also no dispute that most of Debtors' coal is located in, and comes from, mines in West Virginia. The nature of the Debtors' business – physically extracting coal from the ground, primarily in West Virginia – creates environmental disturbance and uniquely localized liabilities. These mining activities are regulated by West Virginia law, which is primarily enforced by the West Virginia Department of Environmental Protection (“WVDEP”). Because of mining's profound effect on the environment and people of West Virginia, the Court should give great weight to West Virginia's interest in this case.

I. ARGUMENT

A. Location of the Coal is Important in This Decision.

This Court has recognized that in the interest of justice, when considering a motion to transfer venue, courts should consider whether either the forum has an interest in having the controversy decided within its borders.¹ This Court further noted that “there is a state interest in deciding local controversies within its borders by those familiar with its laws.”² There is no dispute that the Debtors have a profound connection with, and presence in, West Virginia.

1. Debtors' Mining Operations Take Place Primarily in West Virginia.

Approximately \$2.9 billion (80%) of Debtors' \$3.6 billion total assets consist of land and coal interests. (Sureties' Proposed Findings of Fact (“SPFF”), ¶ 2). Considering those extensive coal interests, of Debtors' 1.9 billion tons of coal reserves, 1.2 billion are leased, approximately 920 million of which are leased in West Virginia. (SPFF, ¶ 4). The vast majority of Debtors' mining operations are in West Virginia. (SPFF, ¶ 5). Consistent with the location of operations

¹See, e.g., Enron Corp. v. Arora (In re Enron Corp.), 317 B.R. 629, 646 (Bankr. S.D.N.Y. 2004).

²Id.

in West Virginia, approximately 71% (22.3 million tons) of the total coal sold by Debtors in 2011 was produced by the Debtors from West Virginia mines. (SPFF, ¶ 7).

Debtors currently hold approximately 264 mining permits in West Virginia. (SPFF, ¶ 8). Debtors' mining and related operations in West Virginia are organized into at least nine complexes, one of which is the Paint Creek complex. (SPFF, ¶¶ 5 and 9). The Paint Creek complex consists of approximately 57 permits that allow disturbance of over 15,000 acres and that include many common features such as surface and underground mining operations, drainage control structures, on-bench and instream sediment ponds, valley fills, highwalls, active pits, reclamation areas, haulage and access roads, preparation plants, conveyor belts, refuse disposal area, a slurry impoundment and a railroad trans-loading facility. (SPFF, ¶¶ 10, 11, 12, and 13).

2. Debtors Report \$737 million in Environmental Costs,
Mostly in West Virginia.

In their most recent 10-Q, filed with the SEC on August 9, 2012, (Doc. 417-1), Debtors identified the following asset retirement obligations as of June 30, 2012:

- Reclamation obligations of \$297,611,000
- Selenium water treatment obligations of \$440,033,000
- Total reclamation and water treatment obligations of \$737,644,000

(SPFF, ¶ 19). It is important to note that these sums represent the estimates for work that must be performed to comply with law. They are not merely money owed. Because the majority of Debtors' mining operations occur in West Virginia, the majority of the identified costs relate to mining operations there. Most of Debtors' selenium water treatment obligations arise out of lawsuits and enforcement actions solely relating to the West Virginia mining operations and are subject to a Consent Decree entered in the United States District Court for the Southern District of West Virginia. (SPFF, ¶¶ 20 and 21). Thus, nearly all of Debtors' over three-quarters of a

billion dollars in future environmental obligations arise out of Debtors' West Virginia operations.

B. Both This Court and the Court in West Virginia Can Address the Environmental Issues.

The Sureties do not doubt that either forum will provide fairness in these bankruptcy proceedings. However, West Virginia, and to a smaller extent Kentucky, have an extraordinary interest in resolving this bankruptcy within the borders of West Virginia. The Debtors' underground and surface coal mining operations are regulated under several state and federal environmental and mine safety laws, including the federal Surface Mining Control and Reclamation Act ("SMCRA"),³ the Mine Safety and Health Act of 1977 ("Mine Safety Act"),⁴ and the Clean Water Act.⁵

SMCRA and its state counterparts require that mining and related operations be conducted only under authority of a permit issued by the applicable regulatory authority.⁶ Although it is a federal statute, SMCRA allows states to implement the program within their boundaries with federal approval.⁷ West Virginia and Kentucky have been granted authority by the United States Department of Interior's Office of Surface Mining ("OSM") to implement SMCRA according to approved state statutory, regulatory, and administrative programs.⁸ Therefore, Debtors' mining permits in West Virginia were issued by the WV DEP and in Kentucky by the Kentucky Department of Natural Resources ("KDNR"). These state regulatory

³30 U.S.C. § 1201 et seq.

⁴30 U.S.C. § 801 et seq.

⁵33 U.S.C. § 1251 et seq.

⁶W. Va. Code § 22-3-8; KRS 350.060(1)(a).

⁷30 U.S.C. § 1235.

⁸The Office of Surface Mining has approved the states' programs as follows: Kentucky, 30 C.F.R. Part 917; and West Virginia, 30 C.F.R. Part 948.

authorities of Kentucky and West Virginia play the major role in governmental oversight of the Debtors' environmental compliance.

In addition to their SMCRA-related mining permits, Debtors must obtain, and operate under, state-issued water discharge permits required by the Clean Water Act (in Kentucky these are Kentucky Pollutant Discharge Elimination System or "KPDES" permits, while West Virginia has adopted the NPDES designation for these permits).⁹

Bankruptcy courts in all districts face complex legal issues, and the Sureties have no doubt or concern in this Court's ability to evaluate the facts and apply the law to the facts. The Sureties take great comfort in statements by the Court and others regarding the interaction of bankruptcy and environmental law, including the following in an exchange with Ms. Susan Jennik, counsel for the UMWA:

THE COURT: I think that one or more parties have suggested that the debtor intends to try to escape, I think was the word, their environmental liabilities. But that actually can't happen. That actually can't happen. It has to happen in accordance with law.

(Transcript, Sept. 11, 2012, page 67, lines 19 – 24). Later, referring to Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection, 474 U.S. 494 (1986), the Court further observed that "a debtor cannot abandon assets, when it's in a bankruptcy, in contravention of state environmental statutes designed to protect the public health and safety. So it's not going to happen."

(Transcript, Sept. 11, 2012, page 68, lines 4 – 8).¹⁰ Moreover, Ms. Margot Schonholtz, counsel for Bank of America, noted that the applicable DIP financing agreements "contain broad

⁹ See, e.g., 33 U.S.C. §1311.

¹⁰ Other, similar statements include the following: THE COURT: "there is no way that this Court or any other court is going to allow this debtor to violate Midlantic or going to allow this debtor to walk away from its environmental obligations as they may be determined in due course." (Transcript, Sept. 12, 2012, page 318, lines 5 – 9).

covenants – underline – requiring – compliance with environmental laws and regulations.”

(Transcript, Sept. 12, 2012, page 318, lines 14 – 18).

The court in West Virginia would similarly apply the law related to Debtors’ environmental obligations. In light of the controlling law that would be implemented in either forum, a primary consideration should be the West Virginia forum’s interest in the outcome of the case as discussed above in section I. A.

II. CONCLUSION

The Court should give significant weight to the profound impact that Debtors’ mining operations have on the people and environment of West Virginia and find that the interest of justice requires transfer of venue to the Southern District of West Virginia.

Lexington, Kentucky

Dated: October 5, 2012

By: /s/ William T. Gorton III

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served on October 5, 2012, electronically in accordance with the method established under this Court's CM/ECF Administrative Procedures.

Dated: October 5, 2012
Lexington, Kentucky

/s/ Chrisandrea L. Turner
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