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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
PATRIOT COAL CORPORATION, *et al*.	:	Case No. 12-12900 (SCC) Jointly Administered
Debtors.	:	

POST-HEARING MEMORANDUM OF BANK OF AMERICA, N.A., AS SECOND OUT DIP AGENT, IN FURTHER SUPPORT OF ITS JOINDER TO THE DEBTORS' OBJECTION TO THE MOTIONS TO TRANSFER VENUE FILED BY (i) THE UNITED MINE WORKERS OF AMERICA, (ii) CERTAIN SURETIES AND (iii) THE UNITED STATES TRUSTEE

Bank of America, N.A. ("BofA"), in its capacity as administrative agent (in such capacity, the "Second Out DIP Agent") for itself and the other lenders under that certain Amended and Restated Superpriority Secured Debtor-in-Possession Credit Agreement, dated as of July 11, 2012 ("Second Out DIP Facility"), by its undersigned counsel, hereby submits this post-hearing memorandum in further support of its joinder [Docket No. 428] ("Joinder") to the Debtors' objection [Docket No. 425] ("Objection") to (i) the Motion of the United Mine Workers of America ("UMWA") to Transfer the Case to the Southern District of West Virginia [Docket No. 116, 127] (the "UMWA Motion"), (ii) the Sureties' Motion to Transfer Jointly Administered Cases to Southern District of West Virginia [Docket No. 287] (the "Sureties' Motion"), and (iii) the United States Trustee's Motion, Pursuant to 28 U.S.C. § 1412 and Fed. R. Bankr. P.

1014(a)(1), to Transfer Venue of These Cases [Docket No. 406] (together with the UMWA Motion and the Sureties' Motion, and together with all joinders thereto, the "Motions").

PRELIMINARY STATEMENT

The Second Out DIP Agent joins in the arguments set forth in the Debtors' Post-Hearing Memorandum and has joined in the Debtors' Proposed Findings of Fact, which are being filed contemporaneously herewith.[1] In addition, as set forth more fully below, the Second Out DIP Agent respectfully submits that:

- the Sureties have exaggerated their real economic exposure and the extent to which it relates to West Virginia;
- the Sureties' have offered no evidence in support of their assertion that the Debtors will not comply with environmental laws and regulations unless these cases are transferred to the Bankruptcy Court for the Southern District of West Virginia (the "West Virginia Bankruptcy Court");
- the Debtors carefully weighed many variables, including their urgent need for an unusual and complex debtor in possession financing facility, before deciding that their best prospects for a successful reorganization were in this District; and
- on the undisputed record before this Court, it is clear that justice will be best served by this Court retaining venue.

Since the Movants have failed to meet their burden of proof on all issues, the Motions should be denied, and these cases should remain before this Court.

I. The Sureties Overstated Their Real Economic Exposure In These Cases, Which Is Largely Unrelated to West Virginia

The Sureties' Motion is based on the faulty premise that West Virginia entities with substantive economic risk are raising critical West Virginia issues that need to be heard by the West Virginia Bankruptcy Court. However, in 40 pages of briefing, more than 100 pages of

[1] Capitalized terms not defined herein have the meaning ascribed to such terms in the Debtors' Proposed Findings of Fact, citations to which are abbreviated herein as "FF. ¶ __." Copies of the transcripts and other record evidence cited in this memorandum are not attached hereto because of their volume but are being hand-delivered to Court by the Debtors' counsel.

exhibits and extensive argument at the hearing on the Motions on September 11-12, 2012 (the "Hearing"), the Sureties offered virtually no evidence related to the bonds they issued, the obligations they support, or the collateral the Sureties have for those contingent obligations. Instead, the Sureties repeatedly stated that they have approximately $70 million in exposure and implied that this exposure all relates to West Virginia.

When the Court asked counsel for the Sureties to describe each of the Sureties' exposure, the Sureties' counsel responded that their aggregate contingent exposure is approximately $67 million based on the penal sum of the bonds.[2] At no point have the Sureties offered competent evidence to support their claim that this sum reflects the Sureties' West Virginia-related exposure. That is because the undisputed evidence shows that their contingent unsecured exposure, and in particular, their West Virginia exposure is substantially less than $70 million.

Though the Sureties try to obscure the facts, the undisputed evidence shows that more than 34 percent ($23,866,398) of the sum of the bonds they issued ($69,725,178) consists of bonds in favor of state and local regulators outside of West Virginia (the "Non-West Virginia Bonds").[3] In addition, BofA issued letters of credit under the Second Out DIP Facility (the "Second Out DIP Letters of Credit") in the aggregate principal amount of $32,424,864, as collateral for three of the four Sureties' obligations under the bonds. That collateral reduces the Sureties' alleged $70 million of contingent exposure by nearly 50 percent.[4] The Sureties do not and cannot deny that they have the benefit of this collateral support.

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2 Transcript of September 12, 2012 Hearing ("9/12 Hr'g Tr.") 17:22-18:7.

3 FF ¶ 118.

4 *Id.*; see also 9/12 Hr'g Tr. 423:18-23 (Sureties' counsel's acknowledgement that the Sureties' "uncollateralized exposure across the Debtors' obligations" is only $37,300,314).

At the Hearing, the Second Out DIP Agent offered the Court a demonstrative exhibit, a copy of which is annexed hereto as Exhibit A (the "BofA Exhibit"). The BofA Exhibit summarizes undisputed record evidence of (i) the specific bonds issued by each Surety, (ii) the beneficiaries of those bonds and (iii) the Second Out DIP Letters of Credit issued in favor of three of the four Sureties.[5] Presenting this evidence in the light most favorable to the Sureties' position, the BofA Exhibit shows that, contrary to Sureties' counsel's suggestion, in a "worst case" scenario, the Sureties' maximum contingent unsecured economic exposure on account of bonds supporting obligations to regulators in West Virginia (the "West Virginia Bonds") is $25,395,191. Specifically:

- **Argonaut Insurance Company ("Argonaut")**: The record shows that Argonaut issued $26,480,455 in bonds, of which $6,183,275 are Non-West Virginia Bonds. Argonaut is the beneficiary of a Second Out DIP Letter of Credit issued by BofA in the amount of $11,775,000. The BofA Exhibit shows that in the unlikely event that all of Argonaut's Non-West Virginia Bonds are called, then assuming Argonaut draws on its Second Out DIP Letter of Credit to cover Non-West Virginia Bond obligations, Argonaut will still have letter of credit availability of $5,591,725 to cover its contingent exposure under its West Virginia Bonds. Were that additional letter of credit availability to be exhausted, Argonaut's maximum unsecured contingent exposure on account of West Virginia Bonds would be **$14,705,455**.
- **Indemnity National Insurance Company ("Indemnity National")**: The record shows that none of the $14,304,558 in bonds issued by Indemnity National are West Virginia

[5] The Second Out DIP Agent is not aware of any letter of credit or other collateral securing obligations to the fourth Surety (Westchester Fire) in respect of Patriot bonds. The Second Out DIP Agent notes that the Debtors' contracts with Westchester Fire are governed by New York law and contain a New York forum selection clause, which calls into question its motivation for seeking transfer of these cases away from a New York venue. FF ¶ 50.

Bonds. Thus, the BofA Exhibit shows that Indemnity National has **zero** West Virginia-related economic exposure.

- **U.S. Specialty Insurance ("U.S. Specialty")**: U.S. Specialty issued West Virginia Bonds in the amount of $24,7856,440, and its obligations are secured by a Second Out DIP Letter of Credit in the amount of $14,871,864. Thus, at most, U.S. Specialty's unsecured contingent exposure on account of West Virginia Bonds is **$9,914,576**.
- **Westchester Fire Insurance Company ("Westchester Fire")**: Of the $4,153,725 in bonds issued by Westchester Fire, $3,378,565 are Non-West Virginia Bonds. Thus, Westchester Fire's maximum contingent exposure to the Debtors on account of West Virginia Bonds is **$775,160**.

The Sureties' counsel did not challenge the underlying factual support for the BofA Exhibit.[6] Instead, the Sureties' counsel reversed course at the Hearing and suggested, contrary to their Motion, that the size of the Sureties' exposure is not a relevant consideration for the Court's venue analysis.[7] The Second Out DIP Agent believes it is important for the Court to understand the Sureties' true economic exposure in these cases – contingent as it might be – when assessing their request for a venue transfer. The Sureties' limited contingent unsecured economic exposure, which is far less than the amount they suggested in their Motion and during the Hearing, is relevant since creditors with far greater non-contingent collective economic exposure support the Debtors' choice of venue.

[6] Nor could the Sureties challenge that support, since it is included in a lengthy exhibit attached to the Sureties' Motion. See Sureties' Motion at Ex. C.

[7] 9/12 Hr'g Tr. 424: 6-12.

II. The Sureties' Hypothetical Concerns Regarding the Debtors' Future Compliance with Environmental Laws and Regulations Are Unsupported By Evidence and Are Not Grounds to Transfer Venue.

Notwithstanding the Sureties' limited contingent economic exposure in West Virginia, the Sureties' counsel suggested at the Hearing that the case should be transferred to the West Virginia Bankruptcy Court because that State and its regulators are concerned that the Debtors may not comply with their environmental liabilities.[8] There is no evidence that: (1) the Debtors have ever defaulted on environmental obligations;[9] (2) any West Virginia regulatory authority has raised a concern that the Debtors will default on such obligations; or (3) the West Virginia Bankruptcy Court is better equipped than this Court to address such issues. If the Sureties or the applicable regulators ever need to be heard with respect to any environmental compliance issues, they will have access to this Court, including the ability to participate in hearings by video conference or telephone.

This Court has made clear that it expects the Debtors to comply with applicable environmental laws and regulations during these chapter 11 cases. The Second Out DIP Agent shares that expectation. Though the Second Out DIP Agent and the Sureties are on opposite sides of the Motions, they are on the same page with respect to the substantive issues in these chapter 11 cases. They all want the Debtors to (1) reorganize successfully and not liquidate, (2) continue to observe and honor their actual environmental obligations and (3) avoid conduct that would result in a call on the bonds and/or a draw on the Second Out DIP Letters of Credit.

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[8] 9/12 Hr'g Tr. 20:22-21:5, 23:20-25:14; see also Sureties' Reply Memorandum in Further Support of Motion to Transfer Jointly Administered Cases to Southern District of West Virginia [Docket No. 502] at 7-8.

[9] FF ¶ 117; 9/12 Hr'g Tr. 129:25-130:6 (counsel for Patriot represented to the Court that the Debtors have never in its history had to have a surety bond called); 421:24-422:13 (counsel for Sureties acknowledged that no surety bonds have been called).

In fact, the Sureties' interests with respect to environmental compliance issues are covered in the First Out DIP Facility and the Second Out DIP Facility, which require the Debtors to comply with applicable environmental laws and regulations. Section 6.13 of the First Out DIP Facility, which is incorporated by reference into the Second Out DIP Facility, is a broad covenant that requires the Debtors to comply with environmental laws so long as any commitments, obligations or letters of credit remain outstanding under the DIP Facilities.[10]

Since the Sureties' environmental compliance concerns, important as they are, are shared by this Court as well as the lenders under the DIP Facilities, it was never clear to the Second Out DIP Agent why the Sureties filed their Motion. In any event, the Sureties' counsel commented during his rebuttal argument at the Hearing that "the sureties, I think, will take great comfort in what we've heard over the last two days about environmental obligations and about

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[10] Section 6.13 of the First Out DIP Facility (Compliance with Environmental Laws) provides as follows:

> "Except as otherwise excused by the Bankruptcy Court, [Borrower shall and shall cause each Subsidiary to] (a) comply, and use commercially reasonable efforts to cause all lessees and other Persons operating or occupying its properties to comply, in all material respects, with all applicable Environmental Laws and Environmental Permits and obtain, to the extent necessary based on its current operations, and renew all Environmental Permits for its operations and properties, except in such instances in which (i) the requirement of an Environmental Permit is being contested in good faith by the Borrower or any of its Subsidiaries by appropriate proceedings diligently conducted, or (ii) the failure to so comply, obtain or renew, in addition to the risk thereof, has been disclosed in the Borrower's most recent annual, quarterly or other reports filed with the SEC or on Schedule 5.09; and (b) undertake and perform any cleanup, removal, remedial or other action necessary to remove and clean up all Hazardous Materials from any of its properties, in accordance with the requirements of all Environmental Laws, except in such instances in which (i) the requirement to undertake or perform is being contested in good faith by the Borrower or any of its Subsidiaries by appropriate proceedings diligently conducted, or (ii) the failure to so undertake or perform has been, in addition to the risk thereof, disclosed in the Borrower's most recent annual, quarterly or other reports filed with the SEC or on Schedule 5.09."

Copies of the DIP Facilities were filed with the Court. See FF. ¶ 86; Docket No. 78-1 § 6.13; Docket No. 78-3 Article VI.

continued compliance with law."[11] Counsel's comment suggests that the concerns that motivated the Sureties to file their Motion have been alleviated.

III. The Debtors' Venue Choice Was Appropriate Given, Among Other Matters, Their Urgent Debtor in Possession Financing Needs

All of the Movants concede that venue is proper, but they argue that maintaining venue in this Court is not warranted because the Debtors took affirmative steps prepetition to establish venue under 28 U.S.C. § 1408.[12] None of the Movants have accused the Debtors of having acted in bad faith; to the contrary, the record is unrefuted that the Debtors' decision to file the cases in this Court was based on their reasoned determination, in the exercise of their fiduciary duties and in consultation with experienced bankruptcy counsel, that filing the cases in this Court would afford the Debtors their best chance at a successful reorganization.[13]

The Debtors' decision to file these cases in this Court made perfect sense under the urgent circumstances that existed shortly before the filing. At the first day hearing in these cases, the Debtors' lead investment banker from Blackstone testified that he had worked closely with the Debtors for three weeks prior to the bankruptcy filing to find debtor in possession financing after their out-of-court refinancing efforts were unsuccessful.[14] Shortly before the filing, it became clear that the Debtors' only feasible financing option would require the lenders under the BofA-led prepetition credit facility to consent, virtually overnight, to an $802 million complicated debtor in possession financing arrangement with an essential roll up component.[15]

This Court's precise local rules and precedent addressing roll ups and other "extraordinary" provisions in debtor in possession financing arrangements provided all parties

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11 9/12 Hr'g Tr. 422:14-17.

12 9/11 Hr'g Tr. 109:7-9 (U.S. Trustee's concession), 96:13-14 (UMWA's concession); Sureties' Motion at 14-15 (Sureties' concession).

13 FF. ¶¶ 15, 27.

14 Transcript of July 10, 2012, hearing (7/10 Hr'g Tr.) 82:12-22, 85:17-86:7.

15 7/10 Hr'g Tr. 82:23-81:1.

critical guidance that facilitated negotiation of this complicated financing within four business days – and during a holiday week – immediately before the Petition Date. Achieving this feat was both vital and time-sensitive; by the Petition Date, the Debtors' cash on hand was down to approximately $40 million, and the Debtors were at "risk of running out of cash and having to shut down operations" absent approval of the DIP financing.[16]

The Court's rules and precedent also enabled the Debtors to obtain consensus among all parties in interest on the terms of the final DIP financing. It would have been far more difficult for the Debtors to obtain that consensus had the Debtors filed these cases in a jurisdiction without local rules or precedent on these critical issues.[17]

During the Hearing, the Court drew an important distinction between (1) a debtor's determination, after careful analysis and exercise of management's fiduciary duties, that it is in the best interest of the stakeholders to choose a particular venue for its bankruptcy filing, and (2) forum shopping, which suggests that a party is "running away from something bad" and "implies a conclusion that I'm going to do better here versus there."[18] The Movants offered no evidence to suggest that the Debtors are "running from" another jurisdiction or that they are motivated by anything other than their fiduciary obligations to all stakeholders. The undisputed evidence shows that the Debtors chose to file these cases in this Court after carefully analyzing multiple venue options with their counsel and deciding, in the exercise of their fiduciary duties, that filing in this Court would give the Debtors' their best opportunity to reorganize. The Second

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[16] Declaration of Paul P. Huffard in Support of Debtors' Motion For Entry of Interim and Final Orders (I) Authorizing Debtors to Obtain Post-Petition Financing Pursuant to 11 U.S.C. §§ 105, 361, 362, 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) and 364(e) and (B) To Utilize Cash Collateral Pursuant to 11 U.SC. §§363, (II) Granting Adequate Protection to Pre-Petition Secured Parties Pursuant to 11 U.S.C §§ 361, 362, 363 and 364 and (III) Scheduling A Final Hearing Pursuant to Bankruptcy Rules 4001(B) and (C) [Docket No. 25] ¶ 10.

[17] Neither the West Virginia Bankruptcy Court nor the Bankruptcy Court for the Eastern District of Missouri (where the Debtors' headquarters are located) have local rules in place that address rollups. The Second Out DIP Agent searched for but was unable to find precedents in these jurisdictions with respect to rollups.

[18] 9/12 Hr'g Tr. 93:11-94:19.

Out DIP Agent respectfully submits that the Court should give weight to the Debtors' judgment that this is the best venue for these chapter 11 cases.

IV. Deferring to the Debtors' Choice of Venue Will Best Serve the Interests of Justice.

The Movants urge that despite venue concededly being proper in this Court, the Debtors' good faith choice of venue should be disregarded. Instead, they ask the Court to adopt a *per se* rule that under 28 U.S.C. § 1412, the interests of justice are not served by maintaining a case in a venue chosen by the debtor if it "created the facts" to establish venue under 28 U.S.C. § 1408.[19] At the Hearing, counsel for the U.S. Trustee urged the court to disregard the fact that the Official Committee of Unsecured Creditors it appointed in these cases opposes a venue transfer because that committee's argument is based on convenience of the parties, and "[t]he interests of justice is its own separate discretionary vehicle for this Court to use as is convenience of the parties."[20]

Adoption of a *per se* rule would disserve the interests of justice, not serve them. The interests of justice require that the Court take into account all of the undisputed facts in the record, including, most importantly, the Debtors' determination, after careful consideration of many facts, that this venue will afford the Debtors their best prospect for preserving their ongoing businesses and maximizing value for all stakeholders.

At the Hearing, the Court asked the parties to address Judge Friendly's observation that "[t]he conduct of bankruptcy proceedings not only should be right but must seem right." *Knapp v. Seligson (In re Ira Haupt & Co.)*, 361 F.2d 164, 168 (2d Cir. 1966). The UMWA's counsel made it clear that her client's members – unionized workers representing a

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[19] See, e.g., 9/11 Hr'g Tr. 115:9-12 (MS. SCHWARTZ: "We think that when parties use a statute and, in our view, misuse a statute that the Court should not let it stand, the court should do what is just. The court should transfer the case.").

[20] 9/11 Hr'g Tr. 121:13-15.

minority of the Debtors' workforce -- prefer that this case be transferred to the West Virginia Bankruptcy Court because "[t]hey think the judges in that community should be deciding this bankruptcy case."[21] According to the UMWA's counsel, having a presiding judge from West Virginia serves the interests of justice because "[t]he judges in West Virginia are in that community. They know the coal mining industry; they grew up with it just as the mine workers' representatives did. And they understand the debate." [22] Counsel urged that labor contract negotiations with the Debtors "will be that much more difficult if members think they are not being treated fairly," and that the members will not think they are being fairly in this District because "it will not seem right to [the union members] that a court very far away from them decides their fate."[23]

The comments of the UMWA's counsel at the Hearing, as well as certain comments in the UMWA Motion, suggest that the UMWA, not the Debtors, is forum shopping. It would not seem right for this case to be transferred to another jurisdiction at the request of essentially one stakeholder, particularly when that stakeholder has offered no evidentiary support for its claim that its constituents will be treated unfairly if this case proceeds anywhere other than their single venue of choice.

From the perspective of the Second Out DIP Agent, Judge Friendly's words suggest that these cases should remain in this Court, where the Debtors and most of their significant creditor constituencies strongly believe the Debtors have their best prospects for a successful reorganization for the benefit of all interested parties. Accordingly, the Second Out DIP Agent respectfully requests that the Court deny the Motions.

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[21] 9/11 Hr'g Tr. 74:21-22.
[22] 9/11 Hr'g Tr. 63:17-20.
[23] 9/12 Hr'g Tr. 414:9-10, 416:19-21.

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CONCLUSION

For all of the reasons set forth herein and in the Joinder, the Objection and the Debtors' Post-Hearing Memorandum, the Second Out DIP Agent respectfully requests that this Court deny the Motions and grant such other and further relief as is just and proper.

Dated: New York, New York
October 5, 2012

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EXHIBIT A

BOFA EXHIBIT

(See Attached)

Bank of America - Demonstrative Exhibit
September 12, 2012

Sureties' Contingent West Virginia Exposure Under Patriot Coal Bonds

Surety	Total Amount of Bonds Issued By Surety	Bonds Supporting Non-West Virginia Obligations	Surety's Letter of Credit Availability After Full Satisfaction of Non-West Virginia Obligations	Surety's Net Maximum Contingent Exposure for West-Virginia-Related Obligations
Argonaut	$ 26,480,455	$ (6,183,275)	$ (5,591,725) *	$ 14,705,455
Indemnity National	$ 14,304,558	$ (14,304,558)	$ (5,778,000)	$ -
US Specialty	$ 24,786,440	$ -	$ (14,871,864)	$ 9,914,576
Westchester Fire	$ 4,153,725	$ (3,378,565)	$ -	$ 775,160
Total	**$ 69,725,178**	**$ (23,866,398)**	**$ (26,241,589)**	**$ 25,395,191**

* The Letter of Credit in favor of Argonaut is in the amount of $11,775,000. For purposes of this chart, it is assumed that availability is first applied to the $6,183,275 of bonds supporting non-West Virginia obligations.