**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE SOUTHERN DISTRICT OF NEW YORK**

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

**FIRST OUT DIP AGENT'S POST-HEARING BRIEF IN FURTHER SUPPORT OF ITS OPPOSITION TO (I) MOTION OF THE UNITED MINE WORKERS OF AMERICA TO TRANSFER THE CASES TO THE SOUTHERN DISTRICT OF WEST VIRGINIA, (II) SURETIES' MOTION TO TRANSFER JOINTLY ADMINISTERED CASES TO THE SOUTHERN DISTRICT OF WEST VIRGINIA, AND (III) THE UNITED STATES TRUSTEE'S MOTION TO TRANSFER VENUE OF THESE CASES IN THE INTEREST OF JUSTICE, AND JOINDER OF THE FIRST OUT DIP AGENT IN THE DEBTORS' POST-HEARING BRIEF AND FINDINGS OF FACT**

As requested by the Court at the conclusion of the hearing held on September 11, 2012 through September 12, 2012 (the "***Venue Hearing***"), the First Out DIP Agent[1] hereby files this post-hearing brief in further support of its opposition to the Motions filed by the Union, the Sureties, and the U.S. Trustee, pursuant to which such Movants seek a transfer of the venue of these Cases. In connection with its opposition to the Motions and with this post-hearing submission, the First Out DIP Agent joins in and adopts the Debtors' proposed findings of fact (the "***Findings of Fact***") and their post-hearing brief (the "***Debtors' Post-Hr'g Br.***" and,

[1] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Opposition of the First Out DIP Agent to (I) Motion of the United Mine Workers of America to Transfer the Cases to the Southern District of West Virginia, (ii) Sureties' Motion to Transfer Jointly Administered Cases to the Southern District of West Virginia, and (III) the United States Trustee's Motion to Transfer Venue of these Cases in the Interest of Justice, and Joinder of the First Out DIP Agent in the Debtors' Memorandum of Law in Opposition to the Foregoing Motions [D.I. 427].

together with the Findings of Fact, the "***Debtors' Post-Hearing Submissions***") in their entirety, and further states as follows:

## PRELIMINARY STATEMENT

1. The Movants have conceded that venue is properly placed in the Southern District of New York and have failed to meet their heavy burden of demonstrating that the Cases should be transferred. The Movants have not asserted bad faith on the part of the Debtors and have not challenged the Debtors' business judgment in selecting the Southern District of New York as the best forum to reorganize the Debtors. Therefore, the Motions must be denied. Section 1412 of title 28 of the United States Code is not a jump ball. By its express terms, Section 1412 authorizes a court to transfer venue only if it first finds, by a preponderance of the evidence, that such a transfer is "for the convenience of the parties" or "in the interest of justice," such that the Cases should only be transferred if the evidence demonstrates that it is more likely than not that at least one of these interests would be furthered. The Movants have failed to establish a record that supports the resolution of either such test in their favor. Accordingly, the Court should not grant the relief requested in the Motions, and the Cases should remain in the Southern District of New York where, as all parties agree, venue is proper.

2. As demonstrated at the Venue Hearing, the First Out DIP Agent has a legitimate interest to protect in this venue dispute due to, among other things, the hundreds of millions of dollars of new money financing such lenders have provided, the maturity date with respect to such loans in October 2013 (subject to a conditional extension for an additional three months), and the many regulatory and business challenges the Debtors would face, such as those that counsel for the Sureties alluded to at the Venue Hearing, in the event the Debtors' restructuring efforts do not succeed. In light of these circumstances, it is critical that the First Out DIP Agent

closely monitor and frequently participate in hearings in these Cases to represent and protect the First Out DIP Lenders' economic interests.

3. As the representative of significant creditors in these Cases, moreover, the First Out DIP Agent takes issue with the Movants' contention that their Motions should be granted regardless of whether a venue transfer is in the best interests of the Debtors' estates. The Union and the Sureties openly seek a transfer of the Cases to the Southern District of West Virginia on the basis of assertions that their *individual interests* will be better served in that forum, notwithstanding uncontroverted evidence that such a transfer would inconvenience the other stakeholders and would deprive the Debtors of a venue chosen because it is the best venue for ensuring a successful reorganization. With similar disregard for stakeholders' economic interests, the U.S. Trustee asserts that consideration of the convenience of the parties, the costs of administration of the estates, and the likelihood of a successful reorganization are not even relevant to this venue transfer analysis. As discussed herein, this position is not consistent with any general notion of justice and, indeed, is the antithesis of the notion of justice the U.S. Trustee advocated in a similar case. Because the Movants have failed to establish that a transfer is warranted for the convenience of the parties or in the interest of justice, the Motions should be denied.

## ARGUMENT

### A. The Movants Have Not Established that Another Forum is More Convenient

4. With respect to the convenience of the parties, as set forth more fully in the Debtors' Post-Hearing Submissions, the record shows that the parties in interest in the Cases are widely dispersed rather than concentrated in a single location. (See Findings of Fact ¶¶ 36-99.) Transferring venue would merely shift inconveniences and costs from a few constituencies, who

are located in or prefer the Southern District of West Virginia, to the many stakeholders that view the Southern District of New York, a global transportation hub, as the more convenient and economical venue. (See Findings of Fact ¶¶ 105-183; Jones Decl. ¶¶ 14-22; Debtors' Post-Hr'g Br. at 2-4.) As the Court noted, the Movants have provided no empirical data to demonstrate that a case of this complexity can be handled more efficiently or more conveniently for the parties in West Virginia or any other forum:

> What's the evidence for the very sweeping statement that it would be less costly to move the case to West Virginia? . . . . [M]y point, Ms. Jennik, is that you don't know, so you make a—you've made a claim that it would cost less in terms of professional fees, but there is no actual evidence. . . . What I'm trying to say to you in the nicest possible way is that there is no coherent cost model that's been presented on which I can conclude that the statement that you made is supported by the facts or what actually occur.

(Hr'g Tr. 9/12/12 at 81:1-90:19.) In contravention of applicable caselaw,[2] counsel for the Union stated that a transfer of the Cases to the Southern District of West Virginia would be warranted even if, all other things being equal, estate administration would cost less in the Southern District of New York. (See, e.g., Hr'g Tr. 9/11/12 at 73:2-23, 74:16-22 (counsel for the Union stating that even if estate administration would cost less in this Court, "the mine workers—and I'm speculating here—but on that hypothetical, I believe the mine workers would want that case to be heard in West Virginia. . . . That's where they are. That's where they work. And they think the judges in that community should be deciding this bankruptcy case.").) The Union and the Sureties seek a transfer of the Cases to the Southern District of West Virginia on the sole basis of assertions that their individual interests will be better served in that forum, notwithstanding the

[2] It is well established that promotion of economic and efficient administration of the estate is one of the factors courts consider when considering the convenience of the parties. In re Enron Corp., 274 BR 327, 343 (Bankr. S.D.N.Y. 2002) (citing Commonwealth of Puerto Rico v. Commonwealth Oil Refining Co., Inc. (In re Commonwealth Oil Refining Co., Inc.), 596 F.2d 1239, 1241 (5th Cir. 1979)). Indeed, case law has established that this is "the factor given the most weight." In re Enron Corp., 274 BR at 343.

consequences to the Debtors or to other stakeholders.[3] On this record, the Movants have simply failed to establish that it is more likely than not that a venue transfer is warranted "for the convenience of the parties."

5. Notwithstanding their liens and superpriority claims, the First Out DIP Lenders have material economic exposure in these Cases that makes it critical for the First Out DIP Agent to closely monitor and actively participate in the proceedings. Like any other creditor in these Cases, the First Out DIP Agent has a legitimate interest in the Cases being administered in a convenient forum. The loans provided to the Debtors pursuant to the First Out DIP Credit Agreement mature in approximately 13 months, subject to only one possible three month extension. (See Findings of Fact ¶ 78; see also Hr'g Tr. 9/12/12 at 327:24-328:1.) In light of the complexity of the Cases, the multitude of stakeholders asserting competing claims to the Debtors' assets, and the significant financial challenges the Debtors currently face and may continue to face, including, among other things, recently experienced market declines,[4] the First

[3] The Venue Hearing transcript is replete with examples of this myopic perspective. (See id.; see also Hr'g Tr. 9/11/12 at 52:22-24 ("Here, it is the workers and the retirees who stand the most to lose in this case, and their opinion as to what is convenient for them should carry great weight."); Id. at 44:4-10 (implying that the location of non-union employees is not a relevant fact because "the interests of the nonunion workers who will be affected by what the debtors may do in this case are not issues that will, for the most part, come before the Court"); Id. at 66:5-6, 67:5-12 71:4-11, & 71:25-72:2 (arguing that the cases should be transferred to West Virginia because "the troubles of this debtor are not financial, but are operational costs," and implying that the convenience of the "financiers and the bankers" should therefore be given little weight); Hr'g Tr. 9/12/12 at 410:14-411:1, 414:6-10, & 415:3-14 (stating that even if this Court could be competent and impartial, it would "not seem right to the miners and the retirees in West Virginia and Kentucky that a judge remote from them would decide their fate" and that any negotiations with the Union will become "that much more difficult" if the Motion is not granted because Union members will believe they have been treated unfairly if the Cases are administered by any court other than the bankruptcy court in West Virginia).) Similarly, counsel for the Sureties stated at the Venue Hearing that his "clients are here" because of "potential liability," implying that the Sureties' Motion is premised on the belief that their economic interests are better protected in West Virginia than in this Court. (See Hr'g Tr. 9/12/12 at 20:12-16.) Counsel for the Sureties stated that the Sureties "probably" would have moved to transfer venue to West Virginia even if the Cases had been filed in St. Louis, where the Debtors are headquartered. (Hr'g Tr. 9/12/12 at 28:10-29:1.)

[4] The First Out DIP Agent notes that, on September 14, 2012, the Debtors issued a press release, a copy of which was filed by Patriot Coal Corporation on form 8-K in its public filings with the Securities and Exchange Commission, in which it disclosed temporary curtailments of approximately 85 million tons of metallurgical coal production per month in response to "rapid" declines in metallurgical coal pricing and demand over the preceding two months as a result of slowdowns in economies around the world.

Out DIP Agent and the First Out DIP Lenders are justifiably focused on the ability of the Debtors to successfully reorganize within the time period required by the First Out DIP Credit Agreement. To the extent the Debtors are unable to achieve their reorganization goals in this period, the process of extracting value from the Debtors' assets has the potential to be costly and complex, to the detriment of all stakeholders. For example, counsel for the Sureties implied at the Venue Hearing that certain parties were likely to contest any sale of the Debtors' assets absent prior demonstration that hundreds of millions of dollars of environmental liabilities unrelated to the assets being sold could be satisfied.[5] It is reasonable to assume, therefore, that the First Out DIP Lenders' recovery in any default scenario could be substantially impacted by developments throughout the Cases and potentially impeded by significant litigation costs and delay. The First Out DIP Lenders' thus have an undeniable stake in where the Cases are being administered and how they proceed. In furtherance of such interests, the First Out DIP Lenders support the Debtors' goal of ensuring the best chances of reorganization.

**B. The Interests of Justice Dictate that the Cases Remain in New York**

6. On the facts of these Cases, a venue transfer is not consistent with general notions of justice, whether defined as the result most likely to achieve the greatest benefit to the greatest number, to penalize bad acts with punishment proportionate to the injury caused, or to allocate benefits and burdens in a fair and reasonable manner. Specifically, the Movants have failed to establish that a venue transfer would result in a better outcome for as a whole, whether such stakeholders are calculated by counting heads or counting dollars. In fact, the vast majority of the evidence suggests that the opposite is true. (See, e.g., supra ¶ 4; Findings of Fact ¶¶ 123-

[5] (See, e.g., Hr'g Tr. 9/12/12 at 23:5-24:23 (counsel for the Sureties, stating that an attempt by the Debtors to sell "reclamation-heavy" assets separately from other assets is "going to raise disputes" about "what are those liabilities? What are the reasonable projections and cost estimates needed? What's the value of what's left? And we think that's going to be very fact intensive.").)

186; Jones Decl. ¶¶ 14-22; Debtors' Post-Hr'g Br. at 2-4, 6-10 & n.8.) Moreover, the Movants concede that the Debtors have complied with 28 U.S.C. § 1408 and that there is no evidence of bad faith that requires remedial action. (See, e.g., Hr'g Tr. 9/12/12 at 427:1-2 (counsel for the U.S. Trustee stating, "We've made it pretty clear, Your Honor, that we didn't dispute that the debtors met the requirements of 1408."); Hr'g Tr. 9/11/11 at 113:23-114:4 (counsel for the U.S. Trustee agreeing that "[n]o one's saying other than that" the Debtors acted in good faith); Debtors' Post-Hr'g Br. at 5 n.5 & 19-20.) In addition, there is no evidence that any party would be harmed if venue remains in the Southern District of New York. (See Debtors' Post-Hr'g Br. at 9-10.) Accordingly, there is no need to penalize the Debtors and their innocent creditors by transferring venue. Even the U.S. Trustee, whose self-described mission is to "preserve the integrity of the process and to see that the laws are upheld," (see Hr'g Tr. 9/12/12 at 430:24-431:1), argued in Winn-Dixie that acts taken prior to filing to establish venue could be justified by creditor support of such venue choice (see Hr'g Tr. 9/11/12 at 127:20-128:2). Yet its current claim is that the very same actions, here supported overwhelmingly by creditors, are inherently unfair. In light of the foregoing, the evidence does not support a finding that a venue transfer is warranted in the interest of justice, and the Motions should not be granted on this basis.

7. The Union's "interest of justice" argument is easily dismissed, as it appears to be based solely on the mine workers' subjective perception of fairness *to them*. Unable to articulate any specific reason that the outcome of the Cases for employees and retirees would be more fair if the Cases were transferred to the Southern District of West Virginia, counsel for the Union simply argued that *any other result* would not "seem right" to the Union's members. (Hr'g Tr. 9/12/12 at 410:21-411:1.) If the interest of justice is to be defined by what "seems right" to all parties, however, then a transfer of venue to the Southern District of West Virginia does not meet

that standard. As many parties have now brought to the Court's attention, the Union argues that "judges in the Southern District of West Virginia live near coal miners, grew up with them, worship with them and break bread with them." (Union Reply at 24; see also Hr'g Tr. 9/12/12 at 411:210-24 (counsel for the Union stating that "a judge in West Virginia understands that the impact of this case, the decisions that are made in this case will be felt not in New York but in West Virginia. That's the group of people that will be impacted by the decisions made in this case.").) As counsel to the Caterpillar creditors appropriately stated at the Venue Hearing,

> [B]y moving this to West Virginia there will at least be the appearance or the suggestion that perhaps some party in this case believes that that court is more sympathetic whether they are or not. And I think we can all agree in the room today that one court is not going to be any more inclined to side with one party or another than another, but the point remains that the constituency of the union apparently believes that may be true and that leads us right into the appearance of what is just and what is right. And for that reason, frankly, we think it is more appropriate to keep the case in what may be a more neutral territory.

(Hr'g Tr. 9/12/12 at396:14-397:11.) The fact that a single constituency may prefer a particular venue over the Debtor's chosen forum is patently insufficient to warrant a transfer of venue in the interest of justice. In fact, a transfer on such facts would be particularly unjust in the face of an impression that the transfer is being made to advantage such party over other stakeholders. As this Court properly stated at the Venue Hearing, "justice isn't about trading the home court advantage of one party for the perceived home court advantage of another party." (Hr'g Tr. 9/12/12 at 332:6-8.) To the contrary, if the Venue Hearing proved nothing else, it proved that this Court is a neutral and impartial forum and that no party takes issue with that assessment. (See, e.g., Hr'g Tr. 9/11/12 at 65:4-5 (counsel for the Union stating, "I am sure your Honor can be fair and knowledgeable"); Hr'g Tr. 9/12/12 at 416:8-12 ("Your Honor, I'm not trying to suggest that the union is perceiving that you have been unfair in this proceeding. . . . That is not at all what I am saying.").)

8. With respect to the U.S. Trustee's position on the interest of justice, this Court is being asked to create a new venue rule that is not supported by applicable statutory authority. The U.S. Trustee argues that the single fact that the Debtors formed both PCX and Patriot Beaver Dam for no other purpose than to ensure that the provisions of 28 U.S.C. § 1408(1) were satisfied is in and of itself "dispositive" of the U.S. Trustee's motion and requires action under the discretion afforded to the Court under 28 U.S.C. § 1412. (U.S. Trustee Reply at 6.) Not only did the U.S. Trustee decline to seek or introduce any evidence as to whether the Debtors chose the Southern District of New York to gain some unfair advantage, whether the parties that have an economic stake in the Cases preferred the Southern District of New York to other potential forums, or whether a venue transfer will result in either positive or adverse consequences to the Debtors' businesses or reorganization prospects—the U.S. Trustee asserts that *none of these facts matter*. (See, e.g., Hr'g Tr. 9/12/12 at 429:10-431:1 (stating that the U.S. Trustee would have moved to transfer venue even if every economic stakeholder in the case supported maintaining venue in the Southern District of New York).) The U.S. Trustee objects to the characterization that it seeks to establish a *per se* rule, asserting that it is also relevant to the Motion that the Debtors "created two entities on the eve of bankruptcy that have no business purpose, that have no employees, that have no operations, [and] that have very little assets." (Hr'g Tr. 9/12/12 at435:17-20.) These "additional facts," however, do not actually constitute additional relevant evidence; rather, they serve only to prove circumstantially what the Debtors have already acknowledged to be true—that "[t]he Debtors formed both PCX and Patriot Beaver Dam to ensure that the provisions of Section 1408(1) of the Bankruptcy Code were satisfied, and for no other purpose." (Findings of Fact ¶ 33.) And compliance with 28 U.S.C. § 1408 is not being challenged.

9. The U.S. Trustee's position, whether conceded or not, is that this single fact is *per se* unjust and will serve as a ground for transferring venue in each and every case in which this is shown to be true, regardless of the applicable debtor's good faith, creditors' preferences, or consequences to the ultimate outcome of the case. The suggestion is that this "injustice" supersedes all other considerations, even if transfer would lead to an even more unjust result.[6] As the Debtors argue in their post-hearing brief, a *per se* rule is not consistent with governing law and the discretionary standards of 28 U.S.C. § 1412. (Debtors' Post-Hr'g Br. at 16-18.)

10. Adopting the Union's position, the U.S. Trustee insists that justice demands a transfer because allowing venue to remain in the Southern District of New York under the present circumstances would not "seem right." (Hr'g Tr. 9/12/12 at 438:2; Hr'g Tr. 9/12/12 at 438:1-3.) In making this assertion, the U.S. Trustee implies that injustice, though difficult to define, can be said to exist whenever reasonable people would agree that an act shocks the conscience and feels inherently unfair. (See Hr'g Tr. 9/12/12 at 438:6-10 (agreeing that injustice, like obscenity, is something that is difficult to define and yet immediately recognizable).) Although the U.S. Trustee urges the Court to find that the act of taking steps prior to filing to establish venue rises to that level, and is patently wrong, the U.S. Trustee's own flip-flopping on this very issue belies the strength of its conviction. As noted above, in the Winn-Dixie case, the U.S. Trustee took the position that the interest of justice would *not* require a transfer of venue, notwithstanding that it was established solely due to acts taken in contemplation of filing, as long as the chosen venue enjoyed the creditors' support. Indeed, notwithstanding the Winn-Dixie debtor's eve of bankruptcy creation of an affiliate to serve as the

[6] (See also Hr'g Tr. 9/12/12 at 414:6-10 (counsel to the Union indicated that any negotiations with the Union may "be that much more difficult" if the Cases are not transferred, placing undue pressure on this Court to placate the Union's members to the detriment of other constituencies).)

venue hook, the U.S. Trustee encouraged the court to "allow the true stakeholders in [the] case to be heard." (Hr'g Tr. 9/11/12 at 127:20-128:2.) The U.S. Trustee's incongruous position in Winn-Dixie that justice requires the consideration of other factors, such as the convenience of the parties and economic administration of the estates, is entirely reasonable, and the First Out DIP Agent urges this Court to adopt that approach.

11. A *per se* prohibition is not how Congress chose to address venue transfer. Rather, Congress enacted 28 U.S.C. § 1412, pursuant to which parties successfully have obtained a transfer on the basis of *evidence*—such as evidence that a transfer would serve the convenience of the parties, or evidence that a debtor had attempted to gain an unfair advantage. Such evidence does not exist here. On the totality of the record, it is abundantly clear that parties can be heard and justice served in the Southern District of New York.

## CONCLUSION

12. As the Movants have failed to meet their burden of establishing that a venue transfer would further the interest of justice or advance the convenience of the parties, this Motions must be denied. The First Out DIP Agent respectfully requests that this Court deny the Motions in their entirety and grant such other and further relief as it deems just and appropriate.

Dated: October 5, 2012
New York, New York

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