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Jan 23, 2013
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United States Bankruptcy Judge

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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)**
Debtors.	**(Jointly Administered)**

SURETIES' 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, respectfully submit this Motion to Transfer Jointly Administered Cases to the Bankruptcy Court for the Southern District of West Virginia (the "Motion"). In support of this Motion, the Sureties state as follows:

I. INTRODUCTION.

Sureties are commercial surety companies that have issued approximately $70 million in reclamation and other surety bonds on behalf of one or more of the Debtor entities. These surety bonds support the Debtors' obligations under federal, state, and local laws related to coal mining. Based on the fact the Debtors mine no coal in New York, none of the obligations secured by the surety bonds or those of any other surety of the Debtor entities affect the state of New York.

Transferring these cases from the Southern District of New York ("SDNY") to the Southern District of West Virginia ("SDWV") will serve both the interest of justice and the convenience of the parties, many of whom reside or operate in West Virginia or in nearby coal-producing states. The Debtors have no nexus whatsoever with SDNY except for the recent filing of the corporate charters of Patriot Beaver Dam Holdings LLC ("Patriot Beaver Dam") and PCX Enterprises, Inc. ("PCX"), just two of the ninety-nine Debtor entities. In contrast, the Debtors have substantial connections with West Virginia, where the majority of the Debtors' business is conducted, and where the majority of assets required for reorganization are located.

A chapter 11 bankruptcy of this magnitude could not have been entered into lightly. One can assume that the Debtors engaged in months of analysis, consultation, and planning the petition. Notwithstanding Debtors own description of its long history in the coalfields, "We and our predecessor companies have operated in these regions for more than 50 years,"[1] it was not until June 1, 2012, a mere five weeks before the Petition Date, that Debtors took their first steps into New York when PCX filed its corporate charter, followed two weeks later, on June 14, 2012, by Patriot Beaver Dam. Out of the ninety-nine Debtor entities involved in this proceeding, these are the only two with any ties to New York. The timing of these corporate filings just prior

[1] See, http://www.patriotcoal.com/index.php?view=operations&p=3

to filing the petition indicates that the Debtors engaged in "bootstrapping", the practice of forming a subsidiary in the jurisdiction in which corporate debtors seek to file. Certainly, "chapter 11 debtors should not be able to leave their home districts and shop for a forum whose judicial precedent on bankruptcy law they happen to prefer."[2]

In recent years, the bankruptcy courts of SDNY have been inundated with large company filers.[3] When such filings affect "employees, creditors, and the community in which the business operates" to the extent that these entities "feel out of touch with the reorganization process" occurring in a "far-away bankruptcy court," criticism of these filings is warranted.[4] Debtors' decision to file this matter in the SDNY, is similar to the "bootstrapping" strategies criticized in a recent article by the American Bankruptcy Institute that described the resulting limitations on many creditors' meaningful participation and the increased expense of case administration.[5]

West Virginia is the site of the bulk of the Debtors' assets, which consist of coal mining permits, coal reserves, mineral leases, surface property rights to mine surface and underground, mining equipment, coal processing plants and coal transportation centers. Fifty-four (over half) of the Debtors' entities are located in West Virginia. Nine others are located in neighboring Kentucky. The Debtors conduct extensive coal mining operations in the Central Appalachian and Illinois Basin coalfields. The majority of these operations occur within the State of West

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[2]Statement of Judiciary Committee Chairman Lamar Smith Subcommittee on Courts, Commercial and Administrative Law Hearing on H.R. 2533, the "Chapter 11 Bankruptcy Venue Reform Act of 2011", (Sept. 8, 2011) (hereinafter "Committee Statement").

[3]See Committee Statement, Sept. 8, 2011.

[4]Id.

[5]See, Jeffrey G. Hamilton and Kelly Cavazos, *The Venue Reform Debate*, 9 ABI Committee News (July 2012), which states, in pertinent part, as follows:

> Although forum-shopping undoubtedly occurs in cases filed throughout the country for a variety of reasons, the biggest problem with the current venue rule is the concentration of bankruptcy filings in the magnet courts of the District of Delaware and the Southern District of New York. . . . The unfortunate results of this concentration are an increase in the costs of bankruptcy and an inability of many stakeholders to have any meaningful participation in the bankruptcy process.

Virginia where Debtors hold in excess of three hundred (>300) coal mining permits issued by the West Virginia Department of Environmental Protection ("WV DEP") for operations that encompass over 50,000 acres. Additionally, Debtors hold twenty-two (22) coal mining permits from the Kentucky Department of Natural Resource ("KDNR"), authorizing similar activities on over five thousand acres of land, as well as other permits in Illinois and Ohio. These coal mining permits authorize the Debtors to conduct surface and underground mining, construct roads and other transportation facilities, and operate preparation plants and coal processing waste landfills and impoundments. The permits also impose a variety of environmental obligations, including restoring the disturbed land to pre-mining condition and land uses.

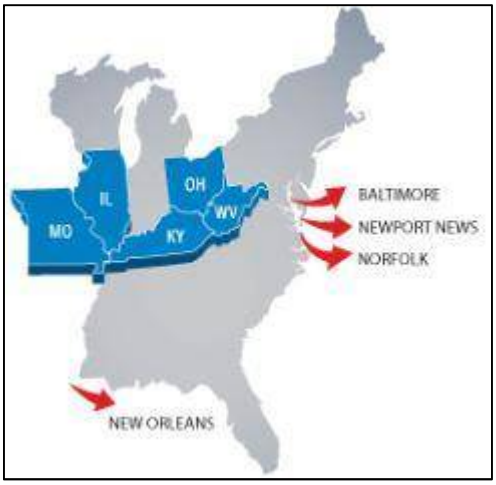

Figure 1. Location of Patriot Coal Operations
(source: www.patriotcoal.com/index.php?view=operations&p=3)

Moreover, West Virginia law will control many of the issues relating to Debtors' operations and much of the litigation, including adversary actions, anticipated in this case. Transfer of this action to SDWV will serve the interest of justice by providing efficient and experienced adjudication of the issues, which include leasehold and other mineral property rights, coal supply contracts, specialized equipment leases, and compliance with the environmental laws that regulate Debtors' coal mining and related operations. SDWV has overseen many bankruptcy cases of Debtors involved in mining operations including, among others, In re The Lady H Coal Company, Inc., Case No. 2:94-bk-20449; In re White Mountain Mining Co., L.L.C., Case No. 5:02-bk-50480; and In re Island Fork Construction, LTD, Case No. 5:02-bk-50789.

Many of the creditors in this action are based in West Virginia and contiguous states, but none of the fifty largest unsecured creditors is located in New York. Transfer to SDWV would be more convenient to the many parties, large and small, affected by this bankruptcy than maintaining this case in SDNY.

Finally, the Debtors' business, coal mining, is the primary economic base activity in West Virginia. The State of West Virginia oversees this industry through state and a federally-approved legal and regulatory framework that is administered by the WV DEP. This framework allows extraction of an economically important natural resource while protecting the many facets of environmental and public health and safety issues associated with coal mining. Thus, West Virginia has a profound interest in the resolution of the matters that will likely arise in this case.

This Court has recognized that in the interest of justice, when considering a motion to transfer venue, courts should consider, **"whether either forum has an interest in having the controversy decided within its borders."**[6] This Court further noted that "**there is a state interest in deciding local controversies within its borders by those familiar with its laws."**[7] For these reasons and others set out more fully below, a transfer to West Virginia would serve the interest of justice and the convenience of the parties.

II. BACKGROUND.

On July 9, 2012, (the "Petition Date"), each Debtor commenced a voluntary case under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") with this Court. The Debtors are authorized to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. Debtors-in-possession must "manage and operate property . . . according to the requirements of the valid

[6] Enron Corp. v. Arora (In re Enron Corp.), 317 B.R. 629, 646 (Bankr. S.D.N.Y. 2004) (emphasis added).

[7] Id. (emphasis added).

laws of the State in which such property is situated." 28 U.S.C. § 959(b). The property of Debtors is not located in New York, but in West Virginia and other nearby coal-producing states.

A. Debtors Have Extensive Mining And Related Operations In West Virginia and Kentucky but None in New York.

As previously noted, the Debtors are coal producing and marketing companies with extensive coal mining operations in the Central Appalachian and Illinois Basin coalfields. In 2011, Patriot produced 31.1 million tons of coal. None of these operations is located in New York. Debtors sometimes describe their operations as 13 mines: ten in Central Appalachia and three in the Illinois Basin.[8] This simplistic label understates the magnitude of those operations. In reality, each of the 13 "mines" is a large complex that consists of numerous mining operations (surface and/or underground), haul roads, water treatment facilities, coal processing preparation plants, coal waste disposal facilities (including major waste impoundments), and loading facilities, which may include provisions for rail, truck, and/or river barge loading and transport.

The Debtors' business of underground and surface mining and the related operations impact the natural environment and the health and welfare of the employees and residents living near the operations. Several of Debtors' mining operations include large areas mined by the controversial "mountaintop mining" technique where the soil and rock overlying the coal seams are removed via blasting and placed in valleys or "hollows" in the headwater areas of the Appalachian mountains. Strict requirements of both state and federal law attempt to mitigate mining's adverse impact on the environment. These laws make restoring (reclaiming) the land and water disturbed by mining an integral part of modern mining operations. Workers' compensation programs protect workers injured on the job, and federally-required Black Lung Benefits programs provide aid for those workers who suffer lung damage and disease caused by

[8] See, Patriot Coal Corp. Report 10-K/A, page 10 (May 8, 2012) (excerpt attached as Exhibit A).

exposure to coal dust. Sureties and other entities provide surety bonds that secure Debtors' obligations under those programs.

B. Debtors' Operations Are Heavily Regulated By Federal and State Law.

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"),[9] the Mine Safety and Health Act of 1977 ("Mine Safety Act"),[10] and the Clean Water Act.[11]

1. SMCRA Requires Permits That Demand Reclamation of the Land Disturbed by Mining.

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.[12] Although it is a federal statute, SMCRA allows states to implement the program within their boundaries with federal approval.[13] 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.[14] 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 authorities of Kentucky and West Virginia play the major role in governmental oversight of the Debtors' environmental compliance.

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[9] 30 U.S.C. § 1201 et seq.

[10] 30 U.S.C. § 801 et seq.

[11] 33 U.S.C. § 1251 et seq.

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

[13] 30 U.S.C. § 1235.

[14] The Office of Surface Mining has approved the states' programs as follows: Indiana, 30 C.F.R. Part 914; Illinois, 30 C.F.R. Part 913; Kentucky, 30 C.F.R. Part 917; Ohio, 30 C.F.R. Part 935; and West Virginia, 30 C.F.R. Part 948.

Coal mining and its related operations, by their nature, significantly affect the environment. When it adopted SMCRA, Congress recognized the impacts that are associated with surface coal mining and the surface impacts of underground mining and made the following legislative finding:

> [M]any surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources . . . .[15]

To mitigate the potential adverse impacts on the environment, mining operations must first obtain SMCRA-mandated state mining permits that carry with them the obligation to reclaim the sites disturbed by mining.[16] The obligations include restoring the land affected by mining to a condition capable of supporting pre-mining uses, backfilling and grading to the approximate original contour, establishing successful revegetation on the permit area and abating adverse impacts to the waters of the United States.[17]

Before Debtors could obtain their mining and related permits they had to provide acceptable financial assurance to secure "faithful performance of all of the requirements" of SMCRA.[18] In very general terms, the required amount of financial assurance is supposed to be "sufficient to assure the completion of the reclamation plan if the work has to be performed by

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[15]30 U.S.C. § 1201(c).

[16] W. Va. Code § 22-3-10; KRS 350.090(1); Natural Resources and Environmental Protection Cabinet v. Whitley Development Corp., 940 S.W.2d 904, 907 (Ky. Ct. App. 1997).

[17]See, e.g., W. Va. Code §§ 22-3-13; KRS §§ 350.405, 350.410, 350.095(1).

[18]30 U.S.C. § 1259(a); W. Va. Code § 22-3-11(a); .KRS 350.064.

the regulatory authority in the event of forfeiture . . . ."[19] Should Debtors default on the required reclamation activities, the state agencies issuing the permits could forfeit the bonds.

By their very nature, unreclaimed mines and coal processing facilities contain safety and environmental conditions that present risks of substantial and imminent harm. Surface mines may include unreclaimed and unstable highwalls, hollow fills, open pits, and sediment control ponds, all located on steep slopes. Underground mines exhibit openings to the coal beds that include vertical shafts, horizontal entries or slope entries for worker ingress and egress, ventilation, and coal removal. Due to the magnitude of some undergrounds mines, small entries or "bore holes" may be thousands of feet away from the main entries. Additionally, coal processing facilities include coal waste disposal landfills and impoundments, which are often "Class C high hazard dams"[20] and slurry impoundments, and dangerous structures. Under SMCRA and related environmental laws, all of these facilities and conditions must be reclaimed in accordance with approved reclamation plans prior to the release of the surety bonds and release of permittees' liability. None of the Debtors' facilities that produced 31.5 million tons of coal in 2011 and that are subject to SMCRA requirements and covered by the surety bonds are located in New York.

2. The Mine Safety Act Creates Additional Obligations for the Debtors in the Locations Where They Operate.

Congress likewise recognized the health and safety hazards inherent with coal mining operations when it passed the Federal Mine Health and Safety Act of 1977. Under the Mine Safety Act, the Mine Safety and Health Administration ("MSHA") has the authority to establish health and safety standards regarding various aspects of mining operations and facilities. Among

[19] 30 C.F.R. § 800.14(b).

[20] See, e.g., Mine Safety and Health Administration, MSHA Coal Mine Impoundment Inspection and Plan Review Handbook (2007); 405 KAR 1:020 §5(2)(d).

the standards established by MSHA are those governing coal waste impoundments. Impoundments, in the context of coal mining regulations, are defined as meaning "all water, sediment, slurry or other liquid or semi-liquid holding structures and depressions, either naturally formed or artificially built."[21] An impounding structure is "a dam, embankment or other structure used to impound water, slurry, or other liquid or semi-liquid material."[22] As a result of the Buffalo Creek disaster in 1972,[23] MSHA promulgated regulations addressing the construction, inspection and abandonment of these waste impoundments.[24] Coal waste impoundments and related coal waste structures are necessary features of coal processing. Therefore, Debtors face the related requirements of the Mine Safety Act at each mining complex where coal processing occurs. None of the coal processing facilities and related waste impoundments are located in New York.

3. Discharges of Polluted Water from Debtors' Operations are Highly Regulated Under the Clean Water Act.

The Clean Water Act ("CWA"), 33 U.S.C. §§1251 et seq. establishes a national goal to restore and maintain the chemical, physical, and biological integrity of the Nation's waters and to eliminate the discharge of pollutants into surface waters. Section 1342 of the CWA establishes a National Pollutant Discharge Elimination System ("NPDES") permit program to implement the CWA's prohibition on unauthorized discharges by requiring a permit for discharges of pollutants from a point source into the waters of the United States. Discharge of any pollutant is unlawful

[21] 30 C.F.R. § 701.5.

[22] 30 C.F.R. § 701.5.

[23] "On February 26, 1972, a coal waste impoundment failed at Buffalo Creek, West Virginia resulting in the deaths of 125 people and leaving over 4,000 homeless." Mine Safety and Health Administration, MSHA Coal Mine Impoundment Inspection and Plan Review Handbook 3 (2007).

[24] 30 C.F.R. § 77.216.

except as in compliance with section 1342 and other sections.[25] Moreover, it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited.[26]

Therefore, in addition to their SMCRA-related mining permits, Debtors must obtain, and operate under, state-issued water discharge permits required by the CWA (in Kentucky these are Kentucky Pollutant Discharge Elimination System or "KPDES" permits, while West Virginia has adopted the NPDES designation for these permits). Ongoing compliance requires water monitoring and maintenance of surface water drainage and treatment, including removal of sediment and other pollutants by use of treatment ponds and other methods. Many mines in the Central Appalachian coalfields, including numerous mines operated by the Debtors, develop problems with acid mine drainage. Mines with acid mine drainage, which cannot be abated, require treatment long after the mining operations are complete, and the treatment obligations can prevent final release of the surety bonds. Furthermore, a recent evaluation by the U.S. Environmental Protection Agency concluded that mountaintop mining and its associated valley fills resulted in degraded water quality, elevated concentrations of selenium and other pollutants, and degraded fish and macroinvertebrate communities.[27] None of Debtors' wastewater discharges occur in New York.

Pollutional discharges containing selenium have been the subject of citizens' suits brought against some of the Debtors. These citizens' suits brought by environmental advocacy groups in the U.S. District Court for the Southern District of West Virginia alleged discharge of the metal, selenium, into waters of West Virginia in violation of the CWA and the Debtors'

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[25]33 U.S.C. §1311.

[26]33 U.S.C. §1251(a).

[27]U.S. E.P.A. The Effects of Mountaintop Mines and Valley Fills on Aquatic Ecosystems of the Central Appalachian Coalfields. EPA/600/R-09/138F (March 2011).

NPDES permits.[28] Plaintiffs in these cases allege that selenium is a toxic pollutant and that the Debtors' operations discharged selenium in harmful amounts. Resolution of these legal actions has included the parties' entering into court-approved consent decrees in the U.S. District Courts in West Virginia that require Debtors, among other obligations, to develop and implement long-term and expensive treatment projects to limit the discharge of selenium. A copy of the most recent consent decree in Ohio Valley Environmental Coalition v. Patriot Coal Corp., Case No. 11-CV-00115 (S.D. W.V. Mar 15, 2012), is attached as Exhibit B. The obligations in this consent decree apply to four of the Debtor entities (Patriot Coal Corporation, Apogee Coal Company, LLC, Catenary Coal Company, LLC, and Hobet Mining, LLC) and involve numerous NPDES permits and point sources of water pollutants. None of the facilities subject to these consent decrees or NPDES permits is located in New York; all are located in West Virginia.

C. State-Based Mineral and Contract Law Affect Debtors' Operations.

The laws of West Virginia and Kentucky, the sites of Debtors' operations, will establish the issues and determine the outcomes of disputes in this matter. Applications to obtain a coal mining permit must identify all owners of record of surface and subsurface interests and describe the legal authority by which the mining applicant claims the right to enter the property and mine coal.[29] Mineral ownership, rights to mine, and access to surface if the mineral rights have been severed are questions of state law that affect the relative rights of the mining permittee and property owners.[30] Similarly, disputes and litigation over leases and coal supply contract turn on

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[28] See, e.g., Ohio Valley Environmental Coalition v. Apogee Coal Co., Case No. 3:07-CV-00413 (S.D. W.V.); Ohio Valley Environmental Coalition v. Patriot Coal Corp., Case No. 11-CV-00115 (S.D. W.V. Mar 15, 2012).

[29] See, e.g., W. Va. Code § 22-3-9(a) (2) and (9).

[30] See, e.g., Ramage v. South Penn Oil Co., 118 S.E. 162 (W. Va. 1923); Buffalo Mining Co. v. Martin, 267 S.E. 2d 721 (W. Va. 1980).

questions of state law.[31] The overwhelming majority of these disputes will turn on interpretations of West Virginia law, not the laws of New York.

D. The Majority of Debtors' Assets and Creditors are Outside New York.

The Debtors conduct their coal mining, processing, and sales businesses primarily in the West Virginia coal fields. As discussed above, the Debtors hold more than three hundred coal mining permits issued by West Virginia regulatory authorities, covering tens of thousands of acres owned and leased to the Debtors by many West Virginia surface and mineral owners. The bulk of the Debtors' assets, including the Debtors' mineral and surface property interests and their various rights to mine these properties, are located in West Virginia. The machinery and other fixtures used in the Debtors' mining operations also constitute a substantial portion of the Debtors' assets. Most of these assets are located in West Virginia. None are located in New York.

Not surprisingly, West Virginia is also the site of many of the Debtors' creditors. Based on the Debtors' statement of the fifty largest unsecured creditors [Doc. No. 1, pages 9 - 13], the following analysis shows no connection to New York, but many strong connections to West Virginia and neighboring states.

Location of Creditor by State	**Number of Creditors**	**Amount of Claims***
West Virginia	11	$9,602,431*
Illinois	6	$4,651,268*
Kentucky	4	$11,529,189
Georgia	3	$1,901,458
Pennsylvania	3	$6,795,513*
Indiana	2	*
Missouri	2	$1,371,701*
North Carolina	2	$4,138,848
Ohio	2	*

[31] See, e.g., The Kanawha-Gauley Coal & Coke Co. Pittston Minerals Group, Inc., Case No. 2:09-cv-01278 (S.D. W. Va.).

Location of Creditor by State	Number of Creditors	Amount of Claims*
Tennessee	2	$1,375,250
Virginia	2	$813,621
Alabama	1	$1,150,614
Arizona	1	*
Arkansas	1	$454,704
Connecticut	1	*
Delaware	1	$250,000,000
Florida	1	$6,352,748
Iowa	1	$532,378
Kansas	1	$1,258,900
Maryland	1	*
Minnesota	1	$200,000,000
Unknown	1	$5,533,576
TOTAL	**50**	**$507,462,199**

* Indicates creditor with unliquidated claim.

Sureties issued bonds to secure the Debtors' regulatory obligation to complete land reclamation and associated environmental remediation at the Debtors' permitted sites.[32] The Debtors' own filings establish that bonds totaling in excess of $170,000,000 have been posted with WV DEP and other state agencies to secure obligations under various permits issued by WV DEP. (Doc. 18). In light of the magnitude of these bonded obligations, it is surprising that Debtors did not include any state or any surety among the list of fifty largest unsecured creditors.

III. ARGUMENT.

Against the backdrop discussed above, both the interest of justice and convenience of the parties compel a transfer of this case to SDWV. Although venue of a bankruptcy proceeding is technically proper in a corporate debtors' state of incorporation,[33] the Court may transfer a case to another district if such a transfer would serve the interest of justice or the convenience of the

[32]Attached as Exhibit C is a listing of the Debtors' surety bonds, including bonds to secure environmental obligations, filed by the Debtors. [Doc. No. 18].

[33]See, 28 U.S.C. §1408.

parties.[34] In applying the "convenience of the parties" and "interest of justice" standards of section 1412, many courts have generally adopted the Fifth Circuit's "balancing test" set forth in Commonwealth of Puerto Rico v. Commonwealth Oil Refining Co., Inc. (Matter of Commonwealth Oil Refining Co., Inc.)("CORCO"), 596 F.2d 1239 (5th Cir. 1979) , for determining whether transfer is appropriate.[35] Enron Corp. v. Arora, (In re Enron Corp.), 317 B.R. 629, 637 (Bankr. S.D.N.Y. 2004), notes that that Section 1412 is worded in the disjunctive so that a case may be transferred under either the interest of justice rational or the convenience of the parties rationale.

A. The Interests of Justice Support Transfer of Venue.

The interests of justice standard is both broad and flexible. See, In re Enron Corp., 274 B.R. 327, 343 (Bankr. S.D.N.Y. 2002). Consideration is given to whether:

> (1) transfer promotes the economic and efficient administration of the bankruptcy estate;
> (2) transfer serves the interests of judicial economy;
> (3) the parties may receive a fair trial in each of the possible venues;
> (4) either forum has an interest in having the controversy decided within its borders;
> (5) enforceability of any judgment would be affected by the transfer; and
> (6) debtors' original choice of forum should be disturbed.

Enron, 317 B.R. at 638-39.

A transfer from the SDNY would not impair the economic and efficient administration of this jointly administered bankruptcy estate. None of the Debtors fifty largest unsecured creditors are located in New York, but twenty percent of these creditors are located in West Virginia. (Doc. No. 98). The Debtors' top five secured creditors are located in five different states. The

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[34] See, 28 U.S.C. §1412; Fed. R. Bankr. P. 1014. Section 1412 provides as follows: "A district court may transfer a case or a proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties." Implementing this statute is Bankruptcy Rule 1014(a)(1), which provides, in relevant part, as follows: "If a petition is filed in a proper district, on timely motion of a party in interest, and after hearing on notice to the petitioners, . . . the case may be transferred to any other district if the court determines that the transfer is in the interest of justice or for the convenience of the parties."

[35] See also, Collier on Bankruptcy ¶ 4.04[4][a][ii] (15th ed. 1999).

surety bond holders are located in four different states. The letters of credit and security deposits are located in three different states. However, none of these creditors are located in New York. (Doc. No. 4, Declaration of Mark N. Schroeder, Senior Vice President and Chief Financial Officer, Patriot Coal Corporation, Exh. A, Sched. 2 and 5; Exh. D). Debtors' President and Chief Operating Officer, Ben Hatfield, lives and works in West Virginia. The Debtors' headquarters is in St. Louis Missouri, where the Chief Executive Officer and Chairman of the Board of Directors, Irl Englehardt resides, along with Mark Schroeder, identified above. (Doc. No. 1).

The Debtors' assets needed for reorganization are located outside of New York. These include its coal operations located in the Central Appalachian and Illinois Basin coalfields which consist of mining complexes where surface and/or underground mining occur, and where the haul roads, water treatment facilities, heavy equipment, coal processing preparation plans, coal waste disposal facilities, and loading facilities exist. Over half the Debtors' entities performing these operations are located in West Virginia, with nine others in neighboring Kentucky. This means the employees, including management that would need to testify during the bankruptcy, will be located not in New York, but in West Virginia, Missouri, and/or Kentucky. Anyone purchasing or financing the Debtors' business will, in all likelihood, conduct most of the necessary due diligence in West Virginia and Kentucky, where the operations are located. Thus, transferring venue from SDNY to SDWV would promote judicial economy and administrative efficiency in the reorganization of the bankruptcy.

The Sureties do not doubt that either forum will provide fairness in these bankruptcy proceedings.[36] However, West Virginia, and to a smaller extent Kentucky, have an extraordinary

[36]The Sureties believe that the enforceability of any judgment would not be affected by the transfer of venue to SDWV, and do not believe it necessary to dissect this factor.

interest in resolving this bankruptcy within the borders of West Virginia. As set forth in more detail in Part I, the Debtors operate under more than three hundred mining permits on over 50,000 acres of land within West Virginia. The environmental and economic issues associated with mining, including disturbance to the land and the effects of mining on the health and general welfare of the communities in which these activities occur warrant resolution of these cases in the areas most affected by the bankruptcy. This factor of justice overwhelmingly favors West Virginia.

Although the Debtors' selection of forum is accorded great weight, any argument that the Debtors would be harmed by a transfer or that the estate will suffer a diminution of value if transfer occurs has no merit. The Debtors have argued that most of their domestic creditors would have been inconvenienced if the SDNY was not the chosen venue, How can that be when the bulk of the domestic creditors reside or operate outside of New York?

B. The Convenience of the Parties Supports Transfer of Venue.

Under the guidance of CORCO, the six factors to be considered in evaluating convenience of the parties include:

(1) proximity of creditors of every kind to the court;
(2) proximity of the debtor to the court;
(3) proximity of witnesses necessary to the administration of the estate;
(4) location of assets;
(5) economic administration of the estate; and
(6) necessity of ancillary administration if liquidation should occur.

CORCO, 596 F.2d at 1247.

Analysis of these factors in light of the undisputable facts in this case demonstrates that the convenience of the parties and the interest of justice require a transfer to West Virginia. Such transfer will allow all stakeholders meaningful participation in the bankruptcy process, not just those with the financial resources to defend their interests in a New York courtroom.

1. Proximity of the Court to Interested Parties.

Factors one and two above, the SDWV's proximity to interested parties, strongly support transfer of these cases to SDWV, because a substantial portion of the Debtors' creditors and a large percentage of the total debt are situated in West Virginia and contiguous states. In contrast, no creditors are located in New York. SDNY is thus a substantially less convenient forum than SDWV for the vast majority of creditors. The Debtors' headquarters are in St. Louis, Missouri and the Debtors' President and Chief Operating Officer lives and works in West Virginia. Thus, the SDWV will be just as convenient for the Debtors as the SDNY.

On the other hand, the SDWV will be far more convenient for most of Debtors' creditors and the other parties who will be affected by this proceeding. These other interested parties include the hundreds of individuals[37] who own the surface and/or mineral estates that are covered by the Debtors' mining permits and who have leased, assigned, or otherwise conveyed an interest in those estates to the Debtors thus giving the Debtors the right to mine those properties. Any resolution of these bankruptcy cases will require the Debtors, pursuant to 11 U.S.C. § 365, to assume or reject the executory contracts and unexpired leases that are the sources of the Debtors' rights to mine. A West Virginia forum would be much more convenient for the many individual land, surface and/or mineral owners and will foster their participation thus serving the interest of justice.

Some of the Debtors are under the supervision of the U.S. District Court in the Southern District of West Virginia in connection with consent decrees entered in citizens' suits brought

[37]These individuals are entitled to notice regarding the Debtors' intent to assume and/or assignor reject the executory contracts and unexpired leases. Fed. R. Bankr.P. 6006(c), and such assumption, rejection, or assignment requires court approval. 11 U.S.C. § 365(a).

under the requirements of the Clean Water Act.[38] In addition, as described above, the significant reclamation and other obligations related to their mining operations are overseen by the WV DEP and the KDNR in nearby Kentucky.

Finally, the State of West Virginia has an interest in the resolution of these cases. The coal industry is a major part of West Virginia's economic base. The Debtors' own filings establish that bonds totaling in excess of $170,000,000 have been posted with the WV DEP to secure the Debtors' obligations under permits issued by the WV DEP. [Doc. 18]. In addition, Debtors have posted bonds with the West Virginia Department of Natural Resources and other state agencies totaling more than $5,000,000 securing Debtors' other, non-reclamation related, obligations. [Doc 18].

As set forth more fully above, the State of West Virginia regulates this industry to ensure the protection of the environment and public health and safety. The Debtors' extensive mining operations in West Virginia are conducted under more than three hundred permits issued by WV DEP that authorize Debtors' activities on over 50,000 acres of land within the state. WV DEP also regulates discharges from coal mines and related facilities to surface waters under both the CWA and SMCRA. WV DEP is responsible for administering the SMCRA, CWA, and other environmental programs and will be active on a day-to-day basis with inspections, enforcement actions if necessary, and review of permit applications, amendments, revisions, and renewals. To the extent that there are disputes that require resolution in the bankruptcy forum, West Virginia is much more accessible to the state regulators and the witnesses that will be required. Thus, the State of West Virginia will be disadvantaged because of the substantial time and cost of defending its interests in these cases if they remain in SDNY.

[38] See, e.g., Ohio Valley Environmental Coalition v. Apogee Coal Co., Case No. 3:07-CV-00413 (S.D. W.V.); Ohio Valley Environmental Coalition v. Patriot Coal Corp., Case No. 11-CV-00115 (S.D. W.V. Mar 15, 2012).

Accordingly, the proximity of SDWV to interested parties weighs heavily in favor of transferring venue.

2. The Location of the Debtors' Assets.

Factor four in the CORCO analysis, location of the Debtors' assets, further dictates transferring venue to SDWV. Courts weighing the Commonwealth Oil Refining Co. factors have noted that "matters concerning real property have always been of local concern and traditionally decided at the situs of the property."[39] A large body of cases have also held that while venue is proper at the situs of the management office of the debtor that manages real estate located elsewhere, venue should be transferred to the locus of the realty on motion of the creditors.[40]

Coal mining, by its very nature, is how the Debtors affect real property. The majority of Debtors' principle assets, i.e. real property interests, are in West Virginia. First, the overwhelming majority of Debtors' mineral and surface property interests and their various rights to mine those interests are located in West Virginia. These interests and rights are fundamental to Debtors' business and represent key assets of the bankruptcy estate. Second, the equipment, machinery, and fixtures used in the Debtors' mining operations constitute a further, substantial portion of the Debtors' assets. Most of these assets are located in West Virginia. In contrast, the Debtors have few assets situated in New York, and none of those are related to coal production. Accordingly, administration of these cases will be more efficient and effective in SDWV.

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[39] In re 1606 New Hampshire Avenue Associates, 85 B.R. 298, 304 (Bankr. E.D. Pa. 1988).

[40] Id. See also, In re EB Capital Management, LLC, 2011 Bankr. LEXIS 2764 (Bankr. S.D. N.Y. Jul. 14, 2011); In re Bell Tower Associates, Ltd., 86 B.R. 795 (Bankr. S.D.N.Y. 1988); In re Midland Associates, 121 B.R. 459, 461 (Bankr. E.D. Pa. 1990); In re Wood Family Interests, Ltd., 78 B.R. 434 (Bankr. E.D.Pa. 1987).

3. Transferring these Cases to the West Virginia Bankruptcy Court Will Allow More Economical Administration and Will Be More Convenient for Witnesses and Many Creditors.

Factors three and five of the CORCO analysis likewise support transfer to SDWV. It will be considerably more economical to administer the Debtors' estates in West Virginia. Most of the creditors and other interested parties will save on legal fees and travel costs by transferring these cases to West Virginia. In addition, a transfer to West Virginia will reduce travel expenses for witnesses such as environmental and engineering consultants, land owners, mineral owners, West Virginia and Kentucky regulatory officials and counsel, appraisers and other experts who will likely to be called to testify with regard to the Debtors' mining operations. The Debtors' headquarters are in St. Louis, Missouri, and the Debtors do not appear to have employees in New York. Thus, the SDWV will be just as, or more convenient for the Debtors' witnesses than the SDNY. Because shorter distances to travel will allow more efficient use of time, these cases should be transferred to SDWV.[41]

As legal questions arise during the administration of these cases it will be important for any resulting litigation to take place in a forum with experience in the often complicated areas of mineral rights and mining regulations. Indeed, the recent motions regarding the Debtors' authority to reject leases for real property and to sell certain equipment [Doc. Nos. 136 and 140] are likely to be the beginning of a series of highly contested motions involving issues of West Virginia property law, mineral law, and mining regulations. SDWV has overseen bankruptcy cases involving mining operations and the legal and regulatory issues that will be central to the Debtors' cases.

[41] In re Eclair Bakery Ltd., 255 B.R. 121, 142 (Bankr. S.D.N.Y. 2000).

For example, a determination of parties' rights and obligations under the various leases and the Debtors' obligations to reclaim their permitted areas will require interpretation of West Virginia law. The Debtors must cure any defaults or otherwise provide adequate assurance before they may assume any executory contracts or unexpired leases. See 11 U.S.C. § 365(b). West Virginia law will determine what defaults exist and what will be necessary to cure such defaults. The rights and obligations under mineral leases are frequently litigated, and these cases require construction of leases and other instruments within the framework of West Virginia common law and statutes.

In addition, as set forth more fully above, the Debtors have incurred significant reclamation obligations as a result of their mining operations. To determine the scope of these obligations the Court will need to interpret and to apply West Virginia's mineral laws and mining regulations. These obligations include restoring the land affected by mining to a condition capable of supporting pre-mining uses or other approved land use, backfilling and grading to the approximate original contour, and establishing successful revegetation on the permit area. These and other of the Debtors' reclamation obligations continue until reclamation is completed – even after the permit has expired. A prompt transfer of these cases to West Virginia will place such contested matters in the hands of a West Virginia bankruptcy court that is more familiar with West Virginia law. Moreover, certain of the Debtors' operating entities are under obligations imposed by consent decrees in the U.S. District Courts of West Virginia where the Debtors have ongoing compliance obligations.

Further, because most of the Debtors' mining operations and a substantial portion of their assets are located in West Virginia and contiguous states, transfer of these cases will benefit rather than harm the Debtors. On the other hand, the overwhelming majority of creditors and

other interested parties will incur excessive if not preclusive costs in protecting their rights in SDNY. Were this case to remain in SDNY, the burden and expense of traveling to New York will severely limit the ability of many creditors and other parties in interest to participate in these cases. It will be much easier and far less costly for the majority of interested parties to travel from within West Virginia, or one of its contiguous states, to a West Virginia bankruptcy court rather than to one located in New York.

As detailed above, all of the relevant factors demonstrate that the convenience of the parties and the interest of justice require a transfer of venue to SDWV.

Upon application of these factors to the facts and circumstances, courts in the SDNY have often found transfer of venue necessary, and have refused to reward forum shopping by a debtor. An illustrative example can be found in the memorandum opinion and order of January 14, 2008, by Judge Martin Glenn (attached as Exhibit D). In that case a West Coast home builder owned by a California resident began experiencing financial hardship, stopped all construction in August 2007, and sold its assets to a newly formed New York corporation on September 8, 2007. The New York corporation filed for relief under Chapter 11 on November 8, 2007. This debtor had no office, employees or bank accounts in New York. Its only connection to the state was its recent incorporation. Recognizing the debtor's attempt to forum shop, Judge Glenn granted the creditors' motion to transfer venue to California. Thirty of the debtor's largest unsecured creditors were geographically dispersed throughout California, Texas, North Carolina, and Ohio. Twenty-four of these creditors were located in California. The debtor was already involved in legal actions proceeding in California. Any potential purchaser of the debtor's assets would have to travel to California to conduct due diligence as that was the location of the bulk of the assets. Testimony regarding the assets would come primarily from employees, including

management, which were located outside of New York. Despite the weight afforded to selection of venue, the court determined that the debtor's interests would not be harmed by a change of venue, and the estate would not suffer a diminution of value.

When the interests of justice and convenience of the parties weigh in favor of changing venue, the New York bankruptcy courts have transferred matters over the debtor's objection.[42] See, e.g., In re EB Capital Management, LLC, 2011 Bankr. LEXIS 2764 (Bankr. S.D. N.Y. Jul. 14, 2011) (transferring case to South Dakota and observing that "the proper forum for this Debtor is the location of the assets and creditors"); In re Vienna Park Properties, 125 B.R. 84 (S.D. N.Y. 1991) (vacating and remanding order that denied venue change); In re Bell Tower Associates, LTD, 86 B.R. 795 (S.D. N.Y. 1988) (transferring case to Texas). See also In re Qualteq, Inc., 2012 Bankr. LEXIS 503, Case No. 11-12572 (Bankr. D. Del. Feb. 16, 2012) (transferring venue from New York to Illinois where, among other facts, only one of the debtor entities was incorporated in Delaware and none of the 30 largest unsecured creditors were in Delaware); In re Rehoboth Hospitality, LP, 2011 Bankr. LEXIS 3992, Case No. 11-12798 (Bankr. D. Del. 2011) (transferring case to Texas where the Debtor's asset was located).

The facts of this jointly administered bankruptcy as detailed herein provide just as strong, if not stronger, evidentiary basis for transferring venue as do the above-cited cases. The Sureties have met their burden of establishing that the interests of justice and convenience of the parties require a transfer of venue to the SDWV.

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[42] See e.g., In re Bell Tower Associates, Ltd., 86 B.R. 795 (Bankr. S.D.N.Y. 1988)(finding factors of convenience of witnesses, economic administration of the estate, location of principal assets, balance of proximity of credits and interests of justice required transfer to Texas); see also, In re Paul Christensen, 2012 Bankr. LEXIS 1619 (Bankr. S.D.N.Y. Apr. 13, 2012)(transferring case to California based on interests of justice).

IV. CONCLUSION.

The Debtor has a 50-year history in the coalfields. West Virginia is the center of the Debtors' operations and assets, and the SDWV is a more convenient forum for the vast majority of parties-in-interest, including creditors, employers, owners of mineral rights, and the State of West Virginia. The outcome of this case will have the greatest impact on the residents, land holders, and natural environment in West Virginia. Moreover, the interest of justice is best served by a transfer to West Virginia because of the greater accessibility of a West Virginia court to the parties-in-interest and because a prompt transfer of these cases to West Virginia will place any contested matters in the hands of a West Virginia bankruptcy court that is experienced with West Virginia law, including the regulatory, mineral, and other legal issues related to mining operations. Under these circumstances, applicable case law within the Southern District of New York clearly supports a transfer of these cases to West Virginia.

WHEREFORE, Sureties respectfully request entry of an Order sustaining this Motion, and transferring venue of these cases to the United States Bankruptcy Court for the Southern District of West Virginia. Movants further request all other relief as is appropriate under the circumstances.

Lexington, Kentucky

Dated: August 7, 2012

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served on August 7, 2012, electronically in accordance with the method established under this Court's CM/ECF Administrative Procedures.

Dated: August 7, 2012
Lexington, Kentucky

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