TRACY HOPE DAVIS
United States Trustee for Region 2
U.S. Department of Justice
Office of the United States Trustee
33 Whitehall Street, 21st Floor
New York, New York 10004
Tel. (212) 510-0500
By: Andrea B. Schwartz, Esq.
Trial Attorney

Hearing Date and Time:
September 11, 2012, at 1:30 p.m.

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.	:	

MEMORANDUM OF LAW IN SUPPORT OF 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 IN THE INTEREST OF JUSTICE

TO: THE HONORABLE SHELLEY C. CHAPMAN,
UNITED STATES BANKRUPTCY JUDGE:

Tracy Hope Davis, the United States Trustee for Region 2 (the "United States Trustee"), by and through her counsel, respectfully submits this memorandum of law in support of her motion (the "Motion"), pursuant to Section 1412 of title 28, United States Code ("Title 28") and Rule 1014(a)(1) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), to transfer venue of these cases in the interest of justice. In support hereof, the United States Trustee respectfully states:

INTRODUCTION

The United States Code provides two alternative bases for venue of a bankruptcy case: (i) a debtor may commence its case in any judicial district where it has a "domicile, residence, principal place of business … or principal assets," 28 U.S.C. § 1408(1); or (ii) it may file its case in any district where the bankruptcy case of an affiliate is pending. 28 U.S.C. § 1408(2). In complex business cases involving multiple affiliated companies, companies frequently select venue based upon the domicile or location of the principal place of business or principal assets of a single company. See generally In re Enron Corp., 274 B.R. 327 (Bankr. S.D.N.Y. 2002) (holding that venue of jointly administered cases was proper despite that the majority of affiliated debtors had their principal places of business in Houston, Texas).

The fact that venue of a company's affiliates may be proper under Section 1408(2), does not necessarily mean that the cases will remain in the district. Rather, under appropriate circumstances, the United States Code authorizes the court to transfer the cases to another district where venue is proper when the "interest of justice" requires. The facts underlying these cases present such a circumstance.

Although there are nearly 100 affiliated debtors in the Patriot Coal cases (collectively, the "Debtors"), as recently as six weeks before the bankruptcy filings, not a single (then existing) Patriot company satisfied any of the requirements of Sections 1408(1) or (2) to support venue in the Southern District of New York. In an apparent effort to meet the statutory requirements, the Debtors, employing the same counsel that they have retained in these cases, created two new non-operating affiliates under New York law just weeks before they filed these cases. The Debtors' declarations and other

filed pleadings do not include information to support that the creation of these entities was for a purpose other than to achieve venue in this district. Thus, the Debtors base venue of nearly 100 companies with little to no ties to this district solely upon these newly created companies.

Even if venue of the Debtors technically is "proper," the Court is not bound to, and does not have to, accord deference to the Debtors' choice of venue when the Debtors have created non-operating entities on the eve of bankruptcy solely to establish affiliate venue. The "interest of justice" prong of Section 1412 is triggered where, as here, a debtor has created facts to fit the statute. Accordingly, the United States Trustee respectfully requests that, in the interest of justice, the Court transfer these cases to a district where venue is proper.[1]

FACTS

1. On July 9, 2012, the Debtors, consisting of Patriot Coal Corporation and 98 of its affiliates, filed voluntary petitions for relief in this district under Chapter 11 of

[1] On July 19, 2012, the United Mine Workers of America (the "Mine Workers") moved to transfer venue of these cases under both the interest of justice and the convenience of the parties prongs of Section 1412. (ECF No. 127). In pertinent part, the Mine Workers seek to transfer venue to the Southern District of West Virginia, which they assert to be the location of the majority of the mines operated by the Debtors and the majority of the Debtors' employees. The Mine Workers' motion to transfer venue is returnable on September 11, 2012. (ECF No. 183).

title 11, United States Code (the "Bankruptcy Code"). (ECF No. 1).[2] Pursuant to an order dated July 10, 2012, the cases are being administered jointly.[3] (ECF No. 30).

2. According to the Declaration of Mark N. Schroeder, Senior Vice President and Chief Financial Officer of Patriot Coal, the Debtors, together with their non-debtor subsidiaries (collectively, "Patriot"), are leading producers and marketers of coal in the United States, with operations and coal reserves in the Appalachia (Northern and Central) and Illinois Basin coal regions. Declaration of Mark N. Schroeder Pursuant to Local Bankruptcy Rule 1007 dated July 9, 2012 (the "Schroeder Declaration") at ¶ 6. (ECF No. 4). Patriot's principal business is the mining and preparation of metallurgical coal and thermal coal, which also is known as steam coal. Id. Patriot was created in 2007, through a spinoff from Peabody Energy Corporation, whose corporate history dates back to 1883. Id. at ¶ 8; see also http://www.peabodyenergy.com/125/pe-125th.html.

3. The Debtors' petitions and the Schroeder Declaration reflect that two of the Debtors, PCX Enterprises, Inc. ("PCX") and Patriot Beaver Dam Holdings, LLC ("Patriot Beaver Dam"), are organized under the laws of the State of New York. Id. at ¶ 7. In their respective bankruptcy petitions, PCX and Patriot Beaver Dam each asserted, as their basis for venue, that they were "domiciled or [have] had a residence, principal place of business, or principal assets" in the Southern District of New York. (Case No. 12-12898, ECF No. 1; Case No. 12-12899, ECF No. 1). The petitions for the 97

[2] Unless otherwise stated, all references to documents included on the Court's CM/ECF system are to the lead bankruptcy case, Patriot Coal Corporation, Case No. 12-12900 (SCC).

[3] In the Debtors' motion seeking joint administration, the Debtors represent that they are "affiliates" as that term is defined under Section 101(2) of the Bankruptcy Code. See Debtors' Motion for an Order Directing Joint Administration of Chapter 11 Cases at ¶ 3. (ECF No. 3).

remaining Debtors, including the lead debtor, Patriot Coal Corporation, assert venue under section 1408(2) based on the pending bankruptcy of an affiliate.

4. According to the online database for the New York State Department of State ("NYDOS") – Division of Corporations, the initial NYDOS filing for PCX was June 1, 2012, or 38 days prior to the Petition Date. See http://www.dos.ny.gov/corps/bus_entity_search.html. The initial NYDOS filing for Patriot Beaver Dam was June 14, 2012, or 25 days prior to the Petition Date. Upon information and belief, these dates reflect the dates that these business entities were formed. Copies of the data sheets provided on the NYDOS website for each of PCX and Patriot Beaver Dam are annexed to the Declaration of Andrea B. Schwartz as **Exhibits 1 and 2** respectively.

5. The Schroeder Declaration attributes the Debtors' decision to file for bankruptcy to long-term developments, and not to any unexpected events that occurred between June, 2012 and the Petition Date. The Debtors' filed pleadings do not reveal any business purpose for creating these entities, and it is unclear whether PCX and Patriot Beaver Dam have any employees, operations, creditors, or need for reorganization relief. While the Schroeder Declaration states that PCX and Patriot Beaver Dam hold assets in New York, the Declaration does not provide information concerning the nature and amount of those assets, or how and by whom they were funded.

ARGUMENT

6. Section 1412 of Title 28 provides:

> A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties.

28 U.S.C. § 1412.

7. "Section 1412 is written in the disjunctive, which means 'interest of justice' and 'convenience of the parties' are each independent grounds for transferring venue." In re Asset Resolution LLC, No. 09-16142 (AJG), 2009 WL 4505944, at *2 (Bankr. S.D.N.Y. Nov. 24, 2009). The decision of whether to transfer venue under Section 1412 is within a court's discretion based on a case-by-case analysis of equity and convenience. See Gulf States Exploration Co. v. Manville Forest Prods. Corp. (In re Manville Forest Prods. Corp.), 896 F.2d 1384, 1391 (2d Cir. 1990).

8. The "interest of justice" prong of section 1412 "is a broad and flexible standard that is applied based on the facts and circumstances of each case." Enron, 274 B.R. at 349. Among the factors that should be considered is whether transfer of the case would promote "fairness." Id. (citing Manville, 896 F.2d at 1391).

9. Applying the foregoing principles, courts have recognized that unreasonable forum shopping, as well as whether the debtor has met the affiliate requirements of Section 1408(2) on the eve of bankruptcy, are both important factors in determining whether the debtor's choice of venue should be given deference or, instead, whether the case should be transferred in the interest of justice. Notably, in In re Winn-

Dixie Stores, Inc., No. 05-11003 (Bankr. S.D.N.Y. Apr. 12, 2005),[4] the debtor sought venue in New York by incorporating a subsidiary 12 days before its chapter 11 filing, which the debtors later admitted had been done solely to establish venue. See Schwartz Decl. at Ex. 3, Tr. at 166-70. In considering a creditor's motion to change venue, the Court found, in a decision issued from the bench, that venue was technically proper under Section 1408 and that the convenience of the parties prong of 1412 weighed in favor of retaining the cases in New York. The Court nevertheless ordered the cases transferred under the "interest of justice" prong of Section 1412, reasoning that it was important to close a "loophole" in the statute that would otherwise have permitted a corporation to establish venue solely through the eve-of-bankruptcy creation of a subsidiary. The court found that this practice improperly "creat[ed] the facts to fit the statute." Id., Tr. at 167-69.

10. Similarly, in Dunmore Homes, the court ruled that "[t]he interests of justice prong" is "a broad and flexible standard." In re Dunmore Homes, Inc., 380 B.R. 663, 671 (Bankr. S.D.N.Y. 2008) (citations omitted). There, the court ultimately granted the motion to transfer venue, finding relevant the fact that the debtors' sole New York-based affiliate had been created on the eve of bankruptcy – just 59 days before the petition date. Id. at 673.

11. Unless PDX and Patriot Beaver Dam were created for a purpose other than solely to establish bankruptcy venue,[5] the court's rationale in Winn-Dixie in transferring

[4] A copy of the transcript wherein the court granted the motion to transfer venue in Winn-Dixie is annexed to the Schwartz Declaration as **Exhibit 3**.

[5] Given that the pleadings do not contain all of the information relevant to a venue analysis, the United States Trustee, through counsel, communicated with Debtors'

the cases in the interest of justice, applies with equal force in these cases. Indeed, a contrary decision would raise serious questions about the efficacy of Congress's bankruptcy venue system as a whole. In addition, although Congress granted companies in bankruptcy cases greater venue options under Section 1408 than it has for civil litigants in other matters, see, e.g., 28 U.S.C. § 1391, Congress did not make these venue alternatives unbridled. Were the manipulation of the venue statute that occurred in Winn-Dixie and here to be upheld, any debtor, in any set of circumstances, could file for bankruptcy in any district in the country simply through the expedient of incorporating a shell affiliate and hiring professionals in that district on the eve of bankruptcy. This would defeat the entire purpose of providing specific requirements for venue under Section 1408 of Title 29. It is doubtful that Congress, which carefully crafted this test, could have intended for its rules to be so easily circumvented.

12. For these reasons, the interest of justice favors transferring these cases to a district where venue is proper.

---

counsel. Some information was obtained informally. Information, including the following, however, is not a part of the Court's record in these cases: (1) the purpose for which PCX and Patriot Beaver Dam were created; (2) their current business operations, if any; (3) the nature and amount of their assets, and how those assets were acquired; (4) whether they have creditors; (5) their need, if any, for reorganization relief; (6) whether they have separate management or employees; and (7) whether they were created before or after the other Debtors began to contemplate bankruptcy.

WHEREFORE, the United States Trustee respectfully requests that this Court (i) grant the Motion, (ii) transfer the cases in the interest of justice to a district where venue is proper and (iii) grant such other relief as is just.

Dated: New York, New York
August 22, 2012

Respectfully submitted,

TRACY HOPE DAVIS
UNITED STATES TRUSTEE

By */s/ Andrea B. Schwartz*
Andrea B. Schwartz
Trial Attorney
33 Whitehall Street, 21st Floor
New York, New York 10004
Tel. No. (212) 510-0500
Fax No. (212) 668-2255