MORGAN, LEWIS & BOCKIUS LLP
James L. Garrity, Jr., Esq.
101 Park Avenue
New York, New York 10178-0600
Telephone: (212) 309-6000
Facsimile: (212) 309-6001

MOONEY, GREEN, SAINDON, MURPHY & WELCH, P.C.
John R. Mooney
(admitted *pro hac vice*)
Paul A. Green
(admitted *pro hac vice*)
1920 L Street, N.W., Suite 400
Washington, DC 20036
Telephone: (202) 783-0010
Facsimile: (202) 783-6088

MORGAN, LEWIS & BOCKIUS LLP
John C. Goodchild, III, Esq.
(admitted *pro hac vice*)
1701 Market Street
Philadelphia, Pennsylvania 19103
Telephone: (215) 963-5000
Facsimile: (215) 963-5001

Counsel for the United Mine Workers of America 1992 Benefit Plan, United Mine Workers of America 1993 Benefit Plan, United Mine Workers of America 1974 Pension Trust and United Mine Workers of America Combined Benefit Fund

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	**Case No. 12-12900 (SCC)**
Patriot Coal Corporation, *et al.*,	)	**Chapter 11**
Debtors.	)	**Jointly Administered**

POST-HEARING MEMORANDUM OF THE UNITED MINE WORKERS OF AMERICA 1974 PENSION TRUST, THE UNITED MINEWORKERS OF AMERICA 1992 BENEFIT PLAN, THE UNITED MINEWORKERS OF AMERICA 1993 BENEFIT PLAN, AND THE UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND IN SUPPORT OF 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 IN THE INTEREST OF JUSTICE

The UMWA 1974 Pension Trust (the "1974 Plan"), the United Mine Workers of America 1992 Benefit Plan (the "1992 Plan"), the United Mine Workers of America 1993 Benefit Plan

(the "1993 Plan"), and the United Mine Workers of America Combined Benefit Fund (the "Combined Fund") (collectively, "UMWA Health and Retirement Funds"), through their undersigned attorneys, respectfully file this post-hearing memorandum in support of *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 in the Interest of Justice* (the "Motion") [ECF No. 406].

The Debtors incorporated two subsidiaries in New York for the sole purpose of providing a predicate – that does not otherwise exist – for fixing the venue of these cases in this Court. Allowing that attempt to succeed under the facts presented would permit the Debtors to render meaningless the restrictions on venue established by 28 U.S.C. § 1408 ("Section 1408"). This Court should exercise its power, under 28 U.S.C. § 1412, to transfer this case in the interest of justice.

BACKGROUND

1. The UMWA Health and Retirement Funds are multiemployer health and retirement benefit plans to which the Debtors are obligated to contribute by contract and by statute. The 1974 Plan provides pension benefits to the Debtors' UMWA-represented retirees. The 1992 Plan and the Combined Fund were established pursuant to the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9702-9712, and provide health benefits to certain of the Debtors' UMWA-represented retirees and their spouses and dependents. The 1993 Plan provides health benefits to certain UMWA-represented retirees and their spouses and dependents.

2. The interests of the UMWA Health and Retirement Funds in this Motion to transfer venue are two-fold. First, the interests of all parties in interest are best served by ensuring that these proceedings are fair, and also appear to be fair, to those most affected by

them. The only reason for the creation of the two New York Debtors was so that they could seek relief under title 11. And the only reason they were incorporated in New York was so that they, along with the other Debtors, could file for bankruptcy in New York. Those circumstances undermine the appearance of fairness of these proceedings in the eyes of those whose livelihood and health care depend on its outcome.

3. Second, if the Debtors' attempt to establish venue in these cases succeeds, it will signal to other prospective debtors (including other contributing employers to the UMWA Health and Retirement Funds) that they can file their bankruptcy anywhere in the country that they think will give them the best opportunity to relieve themselves of their retiree pension and health care obligations.

VENUE SHOULD BE TRANSFERRED IN THE INTEREST OF JUSTICE

4. The Debtors technically satisfied the requirements for venue in the Southern District of New York because two of the Debtors, PCX Enterprises, Inc. ("PCX") and Patriot Beaver Dam Holdings, LLC ("Patriot Beaver Dam"), were domiciled in New York. The Debtors have stipulated that PCX was incorporated under the laws of the State of New York on June 1, 2012, and has virtually no assets other than a New York bank account. *Stipulation of Facts for the Purposes of a Hearing on the Motions to Transfer Venue* [ECF No. 546], at ¶ 3.a. Patriot Beaver Dam was formed two weeks later on June 14, 2012 and its principal asset is a membership certificate that is held in New York. Stip. of Facts, at ¶ 3.b. The Debtors did not conduct business through these entities, did not have any facilities in New York, and did not form the two entities to facilitate transactions in New York. See Transcript of Hearing at 53, In re Patriot Coal Corporation, et al. (12-12900) (September 11, 2012); see also Transcript of Hearing at 212–15, In re Patriot Coal Corporation, et al. (September 12, 2012).

5. The Debtors have stipulated that PCX and Patriot Beaver Dam were formed for no other purpose than to satisfy the requirements of Section 1408. Stip. of Facts, at ¶ 3.d. Put differently: these two Debtors exist only for the purpose of seeking relief under the Bankruptcy Code, and exist in New York only so that these cases can be heard in this district.

6. On the day that the Debtors first decided they would file for bankruptcy, they had at least ten choices of venue other than New York under Section 1408 based on where their then-existing subsidiaries and affiliates were domiciled. Transcript of Hearing at 14, In re Patriot Coal Corporation, et al. (September 12, 2012). Nonetheless, the Debtors took the extraordinary step of forming new companies for no other reason than to permit them to seek bankruptcy relief in New York. Stip. of Facts, at ¶ 3.d. While the UMWA Health and Retirement Funds have joined only the motion of the United States Trustee, other creditors have articulated compelling reasons for transfer to the Southern District of West Virginia.

7. The Debtors have never said why the numerous legitimate venue choices they had were not acceptable, but their conduct suggests that they believe New York offers some kind of advantage in this proceeding. Indeed, the appearance that the Debtors are trying to gain an advantage by rejecting all of their legitimate venue choices and instead attempting to create venue in New York is only strengthened by the obviously pretextual argument in the Debtors' Objection [ECF No. 425] that "ties" to New York make it the best choice for venue. The Debtors do not even attempt to argue that those ties, standing on their own, are enough to make New York a legitimate choice for venue of these cases. The Debtors offer that their legal and financial advisors, and some of the arrangers under the DIP financing facilities, are located in New York. Schroeder Decl., at ¶ 43. But the Debtors' own choices, made in connection with the bankruptcy case, created those connections; they can hardly be used in a circular way to

justify New York as a venue for the bankruptcy case. The Debtors also point to New York choice of law provisions in several agreements, but New York choice of law clauses are so common that they are of no moment in the venue calculus.

8. The Debtors' actions might allow them to say they "complied" with the words of Section 1408, but they circumvented the purposes of the statute. The purpose of the bankruptcy venue system is to meet the "legitimate needs" of the parties, and not to give the debtor free reign on where the case proceeds. See In re Pinehaven Assocs., 132 B.R. 982, 987 (Bankr. E.D.N.Y. 1991). As noted by the Supreme Court, it is "absolutely clear" that Congress did not intend for the venue system to provide a party with "an unfettered choice among a host of different districts." Leroy v. Great West. United Corp., 443 U.S. 173, 185 (1979). Venue statutes in general are in place to protect a party brought into an action, and not the party that initiated the proceeding, from an "unfair or inconvenient" forum. Leroy, 443 U.S. at 184. In addition, the Second Circuit has recognized that location is a factor in determining fairness, and venue requirements were adopted to protect a party from geographical unfairness that may result from forum selection. See United States v. Davis, 689 F.3d 179, 185 (2d. Cir. 2012).

9. If this Court ratifies the actions of the Debtors, then what would prevent any prospective debtor – the party planning to use the power of title 11 to adjust its relationships with creditors and other parties in interest – from choosing its favorite court from among the 94 federal judicial districts, setting up a corporation there, and then enjoying the privilege of bankruptcy proceedings in its chosen forum?

10. It is of course not the role of the Court to amend Section 1408, nor does granting the Motion require the Court to do that. The Debtors cite to several cases, including the Supreme Court's decision Microsoft Corp. v. AT&T Corp., 5050 U.S. 437 (2007), for the proposition that

the Court cannot transfer the Debtors' cases because to do so would be an act of judicial legislation. This case differs from Microsoft because the Bankruptcy Code contains a specific section that expressly permits the Court to transfer venue notwithstanding the satisfaction of the technical requirements of the statute. Congress was aware of the potential abuse which could occur under Section 1408, and set forth to address the need to "curb misuse or misapplication of broad federal venue provisions." See In re Pinehaven, 132 B.R. at 987. Under 28 U.S.C. § 1412 ("Section 1412"), the 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." It is therefore clear that Congress not only anticipated circumstances in which courts may wish to override the permissive requirements of Section 1408, but expressly granted courts the authority to do so. To grant the Motion, the Court need not amend Section 1408; it simply needs to follow Section 1412 and exercise its discretion to transfer the case.

11. Furthermore, it is Debtors who, in truth, ask the Court to amend the venue statutes. If the mere demonstration of compliance with the requirements of Section 1408 were the exclusive inquiry in determining the appropriateness of Debtors' venue choice, Congress' enactment of Section 1412 would be rendered a nullity.

12. Moreover, granting the Motion and transferring the case would not, as the Debtors suggest, establish a per se rule that whenever a debtor creates an entity within a certain number of days before filing for bankruptcy, the result must be a mandatory transfer. Rather, this case presents a crisp and extreme set of facts: the fledgling New York Debtors were admittedly created for no purpose other than to file for bankruptcy, and were admittedly created in New York only so that the Debtors could file for bankruptcy in New York. A decision to grant the Motion, therefore, could be limited by the extreme nature of the circumstances. By contrast,

however, it is difficult to imagine how denying the Motion would not establish precedent that even when a debtor admits that it created a subsidiary for no other purpose than to seek bankruptcy relief, and further admits that it formed the subsidiary in a particular place for the sole purpose of establishing venue for a bankruptcy case in a particular district, a court is powerless to address this perversion of the U.S. Code.

SECOND CIRCUIT CASE LAW SUPPORTS THE TRANSFER OF THESE CASES

13. As noted above, Section 1412 permits a court to transfer a case for the convenience of the parties or in the interest of justice. There is no concrete formulation for what constitutes the interest of justice, with courts noting that "[t]he interest of justice prong is a broad and flexible standard," and the Court should look at the facts and circumstances of the Debtors cases. See In re Enron Corp., 284 B.R. 376, 403 (Bankr. S.D.N.Y. 2002) (citing Gulf States Exploration Co. v. Manville Forest Prods. Corp. (In re Manville Forest Prods. Corp.), 896 F.2d 1384, 1391 (2d. Cir. 1990)). Section 1412 is drafted in the disjunctive, and it is clear that even if factors relating to the convenience of the parties support the debtor's choice of venue, a court may nonetheless transfer the case to a different district in the interest of justice. See, e.g., In re Winn-Dixie Stores, Inc., No. 05-11062 (RDD) (Bankr. S.D.N.Y. Apr. 12, 2005), Tr. 166–67 (noting the convenience of the parties prong of Section 1412 was satisfied, but still held that a transfer was warranted in the interest of justice). In addition, it has been repeatedly emphasized that there is no set rule mandating, or preventing, a venue transfer, and a court should base its analysis on the facts underlying each case. See, e.g., Capmark Fin. Group Inc. v. Goldman Sachs Credit Partners L.P., No. 11-7511, 2012 WL 698134, at *2 (S.D.N.Y. Mar. 5, 2012); see also In re EB Capital Mgmt. LLC, No. 11-12646, 2011 WL 2838115, at *3 (MG) (Bankr. S.D.N.Y. Jul. 14, 2011).

14. To analyze the interest of justice prong of Section 1412, courts have considered a multitude of factors, with no one factor controlling. Indeed, it is evident that a factor-based test is not necessary or required: some courts have used different factors in determining the interest of justice, while other courts will evaluate the interest of justice without applying a factor-based test. See, e.g., In re Dunmore Homes, Inc., 380 B.R. 663, 672 (MG) (Bankr. S.D.N.Y. 2008) (noting courts will apply various factors to determine whether a transfer of venue is in the interests of justice); see also In re Grumman Olson Indus., 329 B.R. 411, 437 (SMB) (Bankr. S.D.N.Y. 2005) (evaluating motion to transfer venue in the interest of justice without applying a factor test.). While a factor-based test may be most convenient for evaluating an elusive a concept as the interest of justice, it is certainly not required.

15. The interest of justice analysis and application most relevant to this case is that applied by the Honorable Robert Drain in In re Winn-Dixie Stores, Inc. There, the Court directed that the debtors' cases be transferred in the "interests of justice," notwithstanding significant resistance, including an objection by the Official Committee of Unsecured Creditors. Winn-Dixie does not provide a hard-line rule on transferring venue. Instead, the court looked at the actions of the debtors, which were deemed to not be in bad faith, and provided guidance for evaluating the interest of justice with regard to venue transfer going forward. Specifically, the court in Winn-Dixie found justice was not served when the debtors manufactured venue by creating New York entities. Winn-Dixie, Tr. at 168. The court in Winn-Dixie stated that it would not reward the artificial creation of venue. Id., Tr. at 167. The court in Winn-Dixie noted that when it is clear a debtor has artificially created connections to a forum, such as New York subsidiary, "the interests of justice require transfer of venue where, again, the facts were created to fit the statute." Id., Tr. at 170 (emphasis added). Winn-Dixie makes clear the interest of

justice is not served when only the letter, but not the spirit, of the venue statute is satisfied. This summation appears to be the goal of various courts in analyzing the interest of justice prong of Section 1412: if Section 1408 is technically satisfied, but is done in such a way that the meaning of the statute is disregarded, then a court should transfer the cases pursuant to Section 1412.

16. The Debtors efforts to limit Winn-Dixie are unavailing. First, contrary to the Debtors' assertion, this case is not factually distinguishable. See Debt. Objection at 45-47. Although no two cases are identical, the Debtors here and in Winn-Dixie have several crucial factual similarities. Like the debtors in Winn-Dixie, the Debtors have no other entities, beyond those created solely for the purpose of establishing venue, that are incorporated in New York. Like the Winn-Dixie debtors, the Debtors have operations, management and corporate offices all located outside of New York. See id. at 47. And like the Winn-Dixie debtors, the Debtors formed New York subsidiaries, notwithstanding the lack of any significant ties to the forum, for the sole purpose of establishing venue. The Winn-Dixie court emphasized that this final fact, the pure manufacturing of facts to fit the statute, violated principles of justice and moved the court to transfer venue. Winn-Dixie, Tr. at 165–66.

17. Second, the Debtors err in contending that the Winn-Dixie court engaged in judicial activism in interpreting Section 1408. Debt. Objection at 47. That argument misinterprets the Winn-Dixie decision for two reasons. First, as discussed above, Section 1412 expressly authorizes a court to transfer a case notwithstanding the satisfaction of Section 1408. Under the Debtors' interpretation, any transfer of venue would be improper so long as Section 1408 is satisfied, but that would write Section 1412 out of the law. Second, in Winn-Dixie, the court avoided creating a per se rule regarding transferring a case in the interest of justice. The Winn-Dixie court acknowledged as much, being careful to limit its ruling so that it would not be

"an unacceptable intrusion on the statute, on Section 1408, to require transfer" of the debtors' cases. Winn-Dixie, Tr. at 167. The Court in Winn-Dixie was aware, however, of the potential ramifications of rewarding the manufacturing of venue, and expressed its concerns, asking "what is to keep any debtor in the future from doing this and basically loading down one or two corporations with every case?" Id., Tr. at 126.

18. The court in Winn-Dixie: (i) analyzed the facts of the case and came to a conclusion that transfer of venue was warranted, id., Tr. at 166; (ii) explicitly stated that the interest of justice standard "must be applied on a case-by-case basis," id., Tr. at 166; and (iii) was careful to ensure that its ruling did not intrude on the Section 1408. Id., Tr. at 166. In no way did the court create an absolute standard that overrides the requirements of Section 1408. That the Debtors' cases share many of the same critical facts which led to a venue transfer in Winn-Dixie is not indicative of a per se rule or judicial legislation, but do suggest that the Court should transfer the Debtors' cases.

19. Finally, the Debtors incorrectly criticize the Winn-Dixie court's legal analysis. Debt. Objection at 47–48. The Debtors state that the Court should have applied a factor-based test to analyze the interest of justice, and the failure to do so ignored precedent. The Debtors are wrong. As explained above, the interest of justice is analyzed under a holistic approach and is not limited to a factor test; a factor-based test is simply one method that some courts have used to conduct that analysis. The court in Winn-Dixie acknowledged as much, noting "the interpretation of the phrase 'in the interests of justice' as applied by the courts is . . . applied very broadly." Winn-Dixie, Tr. at 166.

20. Rather than disregard the decision in Winn-Dixie, as the Debtors suggest, this Court should give serious consideration to that ruling. The Second Circuit has made clear that in

the absence of "clear error," the decisions of other bankruptcy judges should govern. See In re Adelphia Comm. Corp., 359 B.R. 65, 72 n. 13 (REG) (Bankr. S.D.N.Y. 2007). The court's analysis in Winn-Dixie is sound, and the facts of the Debtors' cases are similar on critical points to such an extent that the Court should reach a similar conclusion and transfer the cases.

CONCLUSION

WHEREFORE, for the foregoing reasons, the UMWA Health and Retirement Funds respectfully request that the Court enter an order (i) granting the relief requested in the Motion and (ii) providing such other and further relief as the Court deems just and appropriate.

Dated: October 5, 2012

Respectfully submitted

By: /s/ James L. Garrity, Jr.

James L. Garrity, Jr., Esq.
MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, New York 10178-0600
Telephone: (212) 309-6000
Facsimile: (212) 309-6001

John C. Goodchild, III, Esq.
(admitted *pro hac vice*)
1701 Market Street
Philadelphia, Pennsylvania 19103
Telephone: (215) 963-5000
Facsimile: (215) 963-5001

John R. Mooney, Esq.
(admitted *pro hac vice*)
Paul A. Green, Esq.
(admitted *pro hac vice*)
MOONEY, GREEN, SAINDON, MURPHY & WELCH, P.C.
1920 L Street, N.W., Suite 400
Washington, DC 20036
Telephone: (202) 783-0010
Facsimile: (202) 783-6088

Counsel for the United Mine Workers of America 1992 Benefit Plan, United Mine Workers of America 1993 Benefit Plan, United Mine Workers of America 1974 Pension Trust and United Mine Workers of America Combined Benefit Fund