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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

UNITED STATES TRUSTEE'S POST-HEARING MEMORANDUM REGARDING 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 post-hearing memorandum regarding the United States Trustee's 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, to transfer venue of these cases in the interest of justice. (ECF No. 406).

PRELIMINARY STATEMENT

The United States Trustee's motion is a narrow one and raises just two discrete issues:

- Does the "interest of justice" prong of section 1412 of Title 28 give this Court the discretion to transfer these cases based solely on how the Debtors satisfied the venue requirements under section 1408?

- If so, should the Court exercise its discretion to transfer these cases, where the Debtors created venue by forming two new affiliates on the eve of bankruptcy solely to satisfy the venue requirements and for no other purpose?

Although Section 1408 grants the Debtors considerable flexibility in choosing a forum, that flexibility is not unfettered. Rather, Section 1412 limits the Debtors' venue choice when the Debtors' actions in establishing venue offend the interest of justice, an independent statutory basis for transferring venue. Thus, the Court may transfer venue regardless of whether the Debtors had a good faith motive for filing their cases in New York and regardless of whether this or another district would be the most convenient forum.

None of the facts upon which the United States Trustee relies are in dispute. It is undisputed that the Debtors have no employees in New York, no offices in New York, no operations in New York, and only one bank account in New York. Notably, they concede that venue in this District lies only because of the existence of two non-operating affiliates that they formed under New York law on the eve of bankruptcy to establish venue. Indeed, the Debtors stipulate that they created those companies to satisfy the statutory venue test and for no other reason.

Although the Debtors satisfied the requirements of Section 1408, their actions simply go too far. Sanctioning the Debtors' tactics to establish venue in this District would permit virtually any business debtor to pay a corporate filing fee to the secretary of state of its choice and then immediately file its petition in any bankruptcy court in that state without having any other connection to the forum. To condone the Debtors' conduct would render the venue statute meaningless. The Court need not adopt a per se rule that a recently formed company cannot properly sustain venue—and the United States Trustee does not urge one. But here, on these undisputed and stipulated facts, the Court should exercise its discretion afforded by Section 1412 to transfer the bankruptcy cases based on the interest of justice. The public interest in systemic integrity weighs decisively in favor of transfer.

ARGUMENT

1. The United States Trustee Has Met Her Burden of Proof.

The United States Trustee's motion is based on a limited set of facts regarding how (not whether) the Debtors satisfied the venue requirements of Section 1408 of Title 28 to commence their cases in this District. After the completion of pre-trial briefing, the Debtors stipulated to the principal facts upon which the United States Trustee relies. (ECF No. 546). As discussed below, the stipulated and uncontested facts contained in the United States Trustee's proposed factual findings are sufficient to sustain the United States Trustee's burden of proof, which is "a preponderance of the evidence" and not the more exacting "clear and convincing" standard. See Gulf States Exploration Co. v. Manville Forest Prods. Corp. (In re Manville Forest Prods. Corp.), 894 F.2d 1384, 1390-91 (2d Cir. 1990) (citations omitted). Thus, the Court should grant the Motion.

2. Granting The Motion Does Not Require The Court to Adopt a Per Se Rule.

The Debtors mischaracterize the United States Trustee's position as seeking to impose a per se rule under which these cases and any others like them must be automatically transferred. See, e.g., Venue Hr'g Tr. vol. 2, 71 and 78, Sept. 12, 2012 (MR. HUEBNER: "What they're asking for is exactly a per se rule . . . What the U.S. Trustee is saying is anytime that one fact exists, irrespective of all other facts, you must transfer"). The power to transfer cases under Section 1412, by its plain terms, is discretionary, and the United States Trustee has not argued otherwise. See 28 U.S.C. § 1412 (providing that court "may transfer" case or proceeding in the interest of justice).

The United States Trustee's argument is more circumscribed: the impact of the stipulated and undisputed facts is not that transfer should be automatic but rather that there is a sufficient evidentiary basis for the Court to exercise its discretion to transfer. For the reasons set forth below and included in the United States Trustee's previously filed memoranda, there are compelling reasons for this Court to transfer venue. That decision, however, is one that ultimately is committed to this Court's sound discretion, which here, counsels a transfer of these cases to satisfy the interest of justice.

3. The Debtors' Compliance With Section 1408 Does Not Preclude The Court From Exercising Its Discretion To Transfer.

The Debtors' continued insistence that the United States Trustee's position advocates a per se rule is especially puzzling because it is the Debtors themselves that actually seek such a rule. The Debtors suggest that, because they satisfied Section 1408 by forming companies to create venue, the Court would exceed its authority if it used its discretion to disapprove of this conduct and transfer venue under Section 1412. See

Venue Hr'g Tr. vol. 2, 84 (MR. HUEBNER: "if a judge finds what they believe is a loophole in a statute, that's not for judges to fix").[1] But this argument creates its own per se rule, which would make every debtor's satisfaction of Section 1408 conclusive and deprive the court of its statutorily authorized discretion to counteract abuse.

The Debtors' argument ignores that Congress already has provided this Court with a statutory mechanism to transfer venue when a debtor simultaneously satisfies and abuses Section 1408—Section 1412. See In re EB Capital Mgmt. LLC, No. 11-12646 (MG), 2011 WL 2838115, *3 (Bankr. S.D.N.Y. July 14, 2011) ("Finding venue proper under section 1408, consideration of the transfer venue motion must then turn to the discretionary power granted courts pursuant to 28 U.S.C. § 1412"). For this reason, the Debtors' citations to United States v. Noland, 517 U.S. 535 (1996), and United States v. Reorganized CF&I Fabricators of Utah, 518 U.S. 213 (1996), are misplaced. The United States Trustee is not advocating a new equitable exception to, or seeking to close an alleged "loophole" in, Section 1408. The United States Trustee is, however, requesting that the Court apply a statutory remedy that Congress specifically provided. As a result, this Court has the authority to transfer the Debtors' cases in order to protect the systemic integrity of the bankruptcy system, and doing so neither usurps the role of Congress nor closes an alleged "loophole." Not only does the Court have the authority to transfer venue, a failure to transfer here would render ineffective the statutory constraints on venue imposed by Congress.

[1] The United States Trustee concurs with the Debtors that so-called statutory loopholes are not the province of the judiciary to remedy. But the Court need not address that issue because there is no "loophole" here. Congress enacted Section 1412 to counteract any abuse even when Section 1408 is satisfied. Granting transfer would not close a statutory loophole. Rather, it would enforce the venue statute as written. Denying the motions to transfer venue filed in these cases, however, would create a loophole, permitting debtors to establish venue without regard to Section 1412's limits.

4. The Court Can Grant The United States Trustee Relief Regardless Of Its Determination Of The Convenience Of The Parties.

Because the United States Trustee bases the Motion on the interest of justice prong of Section 1412 only, the United States Trustee does not take a position on whether transfer also is warranted for the convenience of the parties, and it is not necessary for the Court to reach that issue to resolve the United States Trustee's motion. In enacting Section 1412, Congress deliberately made the "interest of justice" and "convenience of the parties" tests independent of one another. See In re Asset Resolution LLC, No. 09-16142 (AJG), 2009 WL 4505944, at *2 (Bankr. S.D.N.Y. Nov. 24, 2009); In re Portjeff Dev. Corp., 118 B.R. 184, 192 (Bankr. E.D.N.Y 1990). For this reason, any arguments about the relative convenience of various forums, to the extent they are directed to the United States Trustee's motion, are inapposite. This Court must consider the interest of justice and convenience of the parties separately, and it has discretion to transfer these cases in the interest of justice even if it concludes that the convenience of the parties weighs in favor of retaining the cases. See, e.g., Portjeff, 118 B.R. at 192; In re Winn-Dixie Stores, Inc., No. 05-11003 (Bankr. S.D.N.Y. Apr. 12, 2005).

5. The Court Should Exercise Its Discretion To Transfer These Cases In Order To Protect The Integrity Of Congress's Venue System.

The interest of justice standard of Section 1412 is "broad and flexible." In re Dunmore Homes, Inc., 380 B.R. 663, 671 (Bankr. S.D.N.Y. 2008). As the Supreme Court stated in its discussion of a nearly identical venue provision, the interest of justice can be equated to "public-interest factors of systemic integrity and fairness," in contrast to the private interests that are balanced under the convenience of the parties test. Stewart Org., Inc., v. Ricoh Corp., 487 U.S. 22, 30 (1988) (discussing 28 U.S.C. §

1404(a)).[2] In this case, the public interest in systemic integrity weighs decisively in favor of transfer.

The Court should not blind itself to the consequences of the Debtors' argument that venue of these cases should be retained by this Court. If it would be permissible for the Debtors to establish venue in this District through the eleventh-hour creation of an affiliate for that purpose alone, it would be equally permissible for any other debtor, in any other district, to employ the same measures. This would transform the venue system enacted by Congress into a very different system, one in which every debtor would enjoy a national choice of venue, subject to transfer only under a convenience-of-the-parties standard.

Regardless of whether such an outcome would be desirable as a matter of policy, it is not the system that Congress enacted. For the objective venue test of Section 1408 to have any meaning at all, Section 1412 must be construed to limit a debtor's ability to satisfy that test through abusive methods. Regardless of where the line of abuse should be drawn in other cases, the Debtors' actions in these cases, as in Winn-Dixie, simply go too far. Venue here hinges entirely on two companies whose very existence—and, consequently, whose need for reorganization, if any—was entirely driven by the Debtors' desire to create venue under Section 1408 that they did not otherwise have. Of the 97 affiliated debtors that presumably owe their existence to some actual business purpose and not bankruptcy litigation, not a single one had contacts with this forum sufficient for the Debtors to assert an independent basis for venue. In short, if venue is appropriate

[2] Section 1404(a) of Title 28 is the non-bankruptcy counterpart to Section 1412. Because both provisions contain "interest of justice" language, case law under section 1404(a) has often provided interpretive guidance in motions under Section 1412. See, e.g., In re HealthTrio, Inc., 653 F.3d 1154, 1161 (10th Cir. 2011).

here, it is difficult to imagine any circumstance in which artificially created venue would ever be ruled inappropriate.

Although the arguments by the Debtors and others made at the hearing offer several rationales for why this Court should retain venue over these cases, none are persuasive or responsive to the United States Trustee's interest of justice argument. For example, the Debtors place great weight on the allegedly "massive New York ties" of the Debtors other than PCX and Patriot Beaver. Venue Hr'g Tr. vol. 2, 83. The Debtors' characterization of these ties as "massive" is belied by the fact they consist nearly entirely of contractual choice of law provisions. Venue Hr'g Tr. vol. 2, 41-42. Even if true, the existence of such ties is not relevant to a venue analysis. The Debtors did not and could not assert venue here based on the contacts of their operating companies. To the extent that the Debtors imply that they could have rewritten their petitions and filed for bankruptcy in this District without relying on PCX and Patriot Beaver, they are incorrect. Venue under Section 1408(1) can only be based on the location of a debtor's domicile, residence, principal business, or principal assets—and is not established by choice of law provisions in contracts or the location of a company's creditors or its professionals.

Further, the issue of whether the Debtors had good faith business reasons for seeking to file their bankruptcy cases, see Venue Hr'g Tr. vol. 2, 90, also is not relevant to the United States Trustee's motion. The United States Trustee does not allege bad faith. Rather, it is the United States Trustee's position that the Debtors' creation of venue under Section 1408 without regard to the limits of Section 1412, if upheld, would thwart the venue system enacted by Congress. This concern exists regardless of the

propriety of Debtors' motives. Similarly, the questions of whether this District is the most cost-effective possible for these bankruptcy cases, whether the law may be more favorable in this District, and whether the majority of creditors oppose or support transfer are at most relevant to a "convenience of the parties" analysis.[3] See, e.g., Piper Aircraft v. Reyno, 454 U.S. 235, 255 (1981) (in a forum non conveniens inquiry, the possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight). As noted above, the United States Trustee seeks relief solely based upon the interest of justice prong of Section 1412, which provides the Court with a separate and distinct statutory basis upon which to transfer the venue of these cases. The Court should exercise its discretion to transfer these cases to uphold the interest of justice.

[3]Given the questionable genesis of the approximate 30 identical joinders filed in support of the Debtors' opposition, the Court should give little, if any weight, to them in determining the Motion notwithstanding the unexamined statements contained in the Declaration of Jacquelyn A. Jones in Response to Court's Request.

CONCLUSION

For the foregoing reasons, the Court, in the interest of justice and pursuant to Section 1412 of Title 28, should grant the Motion and transfer these cases to another district where venue is proper and grant such other relief as is just.

Dated: New York, New York
October 5, 2012

Respectfully submitted,

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