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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

DEBTORS' POST-HEARING MEMORANDUM IN FURTHER SUPPORT OF THEIR OBJECTION TO THE MOTIONS TO TRANSFER VENUE

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The Movants[1] filed motions seeking extraordinary relief under which, as they freely admit, they bore the sole and a heavy burden of proof. Despite this burden, the Movants chose: (1) to present virtually no relevant evidence; (2) not to challenge the Debtors' substantial evidence of, among other things, (i) the Debtors' and their creditors' extensive ties to New York, (ii) the Debtors' good-faith, fiduciary motives in filing these cases in New York, and (iii) the national and international nature and location of the Debtors' many counterparties; and (3) to rest their case on a few stipulated facts. That makes the contested matter at bar almost without precedent.

It is undisputed that:

- these cases were properly commenced in this district pursuant to 28 U.S.C. § 1408;
- the movants bear the burden of proof under 28 U.S.C. § 1412;

[1] Capitalized terms not defined herein have the meaning ascribed to them in the Debtors' Objection or in the Debtors' Proposed Findings of Fact, dated October 5, 2012 (the "**Proposed Findings**"). In addition, the Debtors refer to the Union's corrected opening memorandum [Dkt. No. 127] as "Union Mem.," the Union's reply memorandum [Dkt. No. 506] as "Union Reply Mem.," the Sureties' opening memorandum [Dkt. No. 287] as "Sureties' Mem.," the Sureties' reply memorandum [Dkt. No. 502] as "Sureties' Reply Mem.," the U.S. Trustee's opening brief [Dkt. No. 406] as "U.S. Trustee Mem.," and the U.S. Trustee's reply memorandum [Dkt. No. 509] as "U.S. Trustee Reply Mem."

- the Debtors determined that commencing these cases in this district was in the best interests of the Debtors, their creditors and other stakeholders;
- the Debtors believed that, if these cases were commenced in another jurisdiction, most of the Debtors' domestic and foreign creditors would have been inconvenienced and the costs and inefficiency of administration of the estates would have materially increased;
- the parties in interest are widely dispersed – in no fewer than 49 states and 15 countries;
- ninety-eight percent of the claims of the Debtors' top-fifty unsecured creditors are held by creditors that are not located in West Virginia;
- not one of the Debtors' top five secured creditors is in West Virginia;
- the Debtors have deep and broad ties to New York, including hundreds of mullions of dollars of creditors and customers in New York, and almost two-thirds of their sales contracts and more than $1.25 billion of debt instruments that are governed by New York law or include New York forum selection clauses;
- the majority of the Debtors' retirees are not located in West Virginia; and
- the Debtors commenced these cases in this district in good faith.

This dispute is also unique because of the lineup of entities that support and oppose the Motions. The few entities that support transfer are the Union, the Sureties, three utilities, two state government entities and the U.S. Trustee. Almost none of these entities are from West Virginia – the Union is based in Washington, D.C. and has offices nationwide and in Canada; the Sureties are from Pennsylvania, Tennessee, and Texas; the two utilities with the largest claims, American Electric Power and Monongahela Power Company, are from Ohio and Pennsylvania, and the other utility – which is from West Virginia – is not among the Debtors' top-fifty creditors.

By contrast, the Motions are opposed by dozens of stakeholders – large and small, holding secured claims and unsecured claims in excess of $1.2 billion, from West Virginia and

from 16 other states. Among the supporters of the Debtors' position are: the Creditors' Committee; Wilmington Trust Company, the indenture trustee of $250 million of Senior Bonds issued by Patriot; an ad hoc committee of bondholders from New York, Michigan, Wisconsin, Texas, and Minnesota that collectively hold more than $100 million of the Senior Bonds; Caterpillar Inc. and certain of its affiliates, which are among the Debtors' largest secured and unsecured creditors; Raleigh Mine & Industrial Supply, Inc., a top-fifty creditor, located in Mount Hope, West Virginia; Logan Corporation, a top-fifty creditor, located in Clarksburg, West Virginia; Petroleum Products, a top-fifty creditor, located in Belle, West Virginia; Citibank, N.A., the DIP Agent for the First Out DIP Facility; and Bank of America, N.A., the DIP Agent for the Second Out DIP Facility, whose lenders have an $802 million credit facility with the Debtors. Indeed, without even counting the late filed-joinders or written representations (which include that of the second indenture trustee, a $200 million claimant), no fewer than 51 parties from all over the country oppose the Motions – representing a majority of the Top 50 unsecured creditors. [2]

Because of the nature of this dispute and of these Debtors, denying the Motions will neither open the proverbial floodgates to S.D.N.Y. filings by debtors with no connection to this

[2] In total, two stakeholders timely filed objections, thirty-five filed timely joinders to the objections, and fourteen creditors or groups of creditors transmitted timely correspondence authorizing the Debtors to represent to this Court their opposition to the Motions. In sum, (i) twenty of the fifty largest unsecured creditors timely filed joinders in support of the Debtors' Objection, including six of the ten Top 50 creditors from West Virginia; (ii) five of the remaining Top 50 creditors timely submitted letters or e-mails to the Debtors in support of the Debtors' Objection, including two from West Virginia; and (iii) two of the Top 5 secured creditors filed joinders in support of the Debtors' Objection. (Proposed Findings at ¶¶ 134-135, 138.) The Debtors received additional creditor support after August 31, 2012, including: (i) two joinders, including one from a Top 50 creditor; and (ii) an e-mail from the indenture trustee for Patriot's $200 million of Convertible Bonds. (Proposed Findings at ¶¶ 134, 138.) By contrast, the two utilities are the only Top 50 creditors that have filed a joinder to the Motions. (Proposed Findings at ¶¶ 123-128.) Not one of the remaining three secured creditors on the Top 5 List joined the Motions; one of the remaining three, Bank of America, N.A., was listed on the Top 5 List in its capacities as a swingline lender and agent under the pre-petition Credit Facility, which was subsequently refinanced pursuant to the DIP Facilities. Bank of America, N.A. filed a joinder in its capacity as Second Out DIP Agent. (Proposed Findings at ¶ 135.)

district, nor will it undermine Section 1412. Rather, Section 1412 will continue to have the very breadth, depth and vitality it has always had. It should and will continue to result in the transfer of many cases – where, for example, unlike here: (i) a debtor and its stakeholders have few connections to a district; (ii) a debtor commenced a chapter 11 case in a district to avoid pending litigation in another; (iii) a debtor commenced a chapter 11 case here to seek better results than it had achieved in a prior (or related) bankruptcy case elsewhere; (iv) a debtor commenced a chapter 11 case to harm or try to evade another party in interest; or (v) the chosen jurisdiction is not, in fact, more convenient or efficient for the debtor and its stakeholders.

The Debtors have the utmost respect for the State of West Virginia and the Southern District of West Virginia, for the city of St. Louis, Missouri and for the Eastern District of Missouri, and for the eight other jurisdictions where these cases could have been filed. The Debtors understand that their employees and retirees located around the country are concerned about their jobs, their benefits and the well-being of their families. The Debtors share these concerns. However, as discussed in detail in the Debtors' Objection and at the Hearing, these concerns are precisely why the Debtors filed these cases here. The Debtors – consistent with their fiduciary duties and as conceded by all parties – concluded that commencing their cases in this district represented the best opportunity and the most cost-effective and efficient forum to save these companies and to maximize value for all stakeholders. This judgment is entitled to substantial weight, and the Movants have offered no evidence or case law that supports upsetting it.

ARGUMENT

POINT I.

THE MOVANTS FAILED TO SATISFY THEIR BURDEN OF PROVING THAT TRANSFER IS WARRANTED UNDER SECTION 1412

All agree that (i) the Movants bear the burden of proving, by a preponderance of the evidence, that the Court should transfer these cases under Section 1412, and (ii) the Debtors bear no burden of proof. See, e.g., Gulf States Exploration Co. v. Manville Forest Prods. Corp. (In re Manville Forest Prods. Corp.), 896 F.2d 1384, 1390-91 (2d Cir. 1990); Debtors' Objection at 12.[3] The Movants have failed to satisfy their burden of proving that transfer is "for the convenience of the parties" or "in the interest of justice." 28 U.S.C. § 1412.[4]

A. The Movants Failed To Prove that West Virginia Is More Convenient for the Parties

Both the Union and the Sureties moved to transfer to the Southern District of West Virginia based on the alleged convenience of the parties, but neither presented evidence nor established that West Virginia is more convenient to the parties in interest.[5] Indeed, the Movants' only evidence on any of the six convenience factors is that many of the Debtors' mining complexes are in West Virginia, that the Debtors hold mining permits that enable them to

[3] See also Hearing Tr. Day 1 at 54:22-24 ("[Ms. Jennik, for the Union]: The burden is, of course, on the movants to show by a preponderance of the evidence that the case should be transferred to another district."); Hearing Tr. Day 1 at 106:15-16 ("[Ms. Schwartz, for the U.S. Trustee]: Your Honor, the burden of proof is preponderance of the evidence."); Hearing Tr. Day 2 at 439:7-8 ("[Ms. Schwartz]: . . . yes, it's my burden of proof."); Hearing Tr. Day 2 at 42:5-7 ("[The Court]: Well, then you have the burden. [Mr. Meldrum, for the Sureties]: Right, I understand.").

[4] Recognizing that the Debtors have satisfied Section 1408, none of the Movants seek relief thereunder. See, e.g., Union Mem. (moving to transfer under Section 1412 only); Sureties' Mem. (same); U.S. Trustee Mem. (same); Hearing Tr. Day 2 at 427:1-2 ("[Ms. Schwartz]: We've made it pretty clear, Your Honor, that we didn't dispute that the debtors met the requirements of 1408.").

[5] The convenience analysis takes into consideration the following six factors: (1) the proximity of creditors of every kind to the court; (2) the proximity of the bankrupt (debtor) to the court; (3) the proximity of witnesses necessary to administration of the estate; (4) the location of the assets; (5) the economic administration of the estate; [and] (6) the necessity for ancillary administration . . . ." See Debtors' Objection at 15-16.

operate their West Virginia mines, and that many active Union employees and a minority of retirees reside in West Virginia. (Proposed Findings at ¶¶ 65-68.) However, the law is clear and consistent – the location of physical assets and of rank and file employees are given exceedingly little weight in venue transfer decisions. See, e.g., In re Commonwealth Oil Refining Co., 596 F.2d 1239, 1248 (5th Cir. 1979) ("CORCO") (location of assets), cert. denied, 444 U.S. 1045 (1980); In re Int'l Filter Corp., 33 B.R. 952, 956 (Bankr. S.D.N.Y. 1983) (same); In re Enron Corp., 284 B.R. 376, 392-93 (Bankr. S.D.N.Y. 2002) ("Enron II") (employees); In re Winn-Dixie Stores, Inc., No. 05-11063-rdd, Slip Op. at 92-96 (Bankr. S.D.N.Y. Apr. 12, 2005) (same); In re Safety-Kleen Corp., No. 00-2303 (PJW), Slip Op. at 48 (Bankr. D. Del. July 11, 2000) (same); see also Debtors' Objection at 24-33.

In contrast, the Debtors' arguments and extensive evidence overwhelmingly support denial of the Motions. These include:

- The Movants have not even established that West Virginia is more convenient for the few entities seeking transfer. Indeed, the fact that not one of the Movants is actually from West Virginia is arguably dispositive all by itself.[6] (Hearing Tr. Day 2 at 132:24-133:22; Proposed Findings at ¶¶ 111-118.)

- The Union may never need to litigate matters in these cases because the pertinent issues could be resolved consensually. (Hearing Tr. Day 2 at 173:6-12.)

- The Sureties may never need to litigate – or be creditors – because no surety bond has ever been called in Patriot's history and the Sureties' contingent exposure is backed by letters of credit issued by the DIP lenders, which cut their contingent exposure in half.[7] (Proposed Findings at ¶¶ 117-18.)

[6] As Judge Gonzalez reasoned in Enron II, convenience focuses on where a movant is located, not where it desires to litigate. See 284 B.R. at 400 ("The governing standard is the proximity of the creditors to the court, not the creditors' choice of forum.") (emphasis added); see also In re DBSI, Inc., No. 08-12687 (PJW), 2012 Bankr. LEXIS 3769, at *8-9 (Bankr. D. Del. Aug. 14, 2012) (denying motion to transfer venue from Delaware to Idaho because, among other things, several of the movants were not located in Idaho).

[7] As discussed in further detail in Bank of America, N.A.'s post-Hearing memorandum, the Sureties' potential West Virginia-related exposure is at most $25.4 million. (Proposed Findings at ¶¶ 87, 118.)

- Neither the Union nor the Sureties presented any evidence that West Virginia is more convenient to the Debtors themselves or to the thousands of other parties in interest. (Debtors' Objection at 15-42.)

- Because the Debtors' corporate headquarters and executive offices are located in St. Louis, Missouri, West Virginia would be both inconvenient and inefficient for the Debtors. Many of the Debtors' key corporate functions, including those most related to the Debtors' bankruptcy proceedings, are based in St. Louis. These include the following departments: Accounting, Accounts Payable, Accounts Receivable, Financial Reporting, Treasury, Tax, Internal Audit, Legal, Sales and Market Research, Contract Management, Payroll, Corporate Development, Planning, Information Services, Human Resources, and Benefits. (Proposed Findings at ¶ 37.)

- Twenty-one of the fifty largest unsecured creditors filed joinders in support of the Debtors' Objection, including six of the ten Top 50 creditors that are from West Virginia. In addition, six of the remaining Top 50 creditors, including two from West Virginia, sent letters or e-mails to the Debtors, requesting that the Debtors represent to the Court that they oppose the Motions and support these cases remaining in the Southern District of New York.[8] (Proposed Findings at ¶¶ 133-134, 138-39.)

- Not one of the Debtors' Top 5 secured creditors is located in West Virginia. Two of the Top 5 creditors joined the Debtors' Objection and not one has supported the Motions. (Proposed Findings at ¶¶ 70, 135.)

- No member of the Creditors' Committee appointed by the U.S. Trustee is located in West Virginia. (Proposed Findings at ¶¶ 71-72.)

- The Debtors have creditors in at least 49 states, counterparties in at least 16 countries, and hundreds of millions of dollars of creditors in New York. (Proposed Findings at ¶¶ 62, 80.)

[8] At the Hearing, counsel for the Union asserted that the "UMWA actually is the largest creditor by far" and that the Debtors' projected labor liability "is by far the largest liability for any party . . . and far exceeds the other top fifty creditors in this case." See Hearing Tr. Day 1 at 51:23-52:12. However, as counsel for the Union conceded, it premature at this stage of the case to speculate about claims that may ultimately be held by the Union. See Hearing Tr. Day 1 at 52:2-7 ("[Ms Jennik]: [T]he liabilities that the debtors project exceed 1.3 billion dollars for the labor-related legacy liabilities. And although certainly we don't expect that that amount would end up being a claim here, as the case stands today, that is by far the largest liability for any party . . .").

- With respect to the "most important" convenience factor, whether the transfer will promote the "economic and efficient administration" of the estate, the Movants submitted no evidence at all in support of their arguments.[9]

Though the Debtors bear no burden, they have submitted voluminous evidence that the S.D.N.Y. is a more convenient venue for the parties. This evidence shows that: New York is more convenient for the Debtors themselves; their customers, creditors, and lessors are dispersed nationally and internationally; their retirees are dispersed broadly; and there is a substantial concentration of creditors in New York. See infra at Section II-A.

B. The Movants Failed To Prove that Transfer Is In the Interest of Justice

The Movants have also failed to demonstrate that these cases should be transferred in the "interest of justice." The "interest of justice" standard has been defined and applied by the Second Circuit and numerous courts in this district. Specifically, under this prong of Section 1412, courts must consider what will "***promote the efficient administration of the bankruptcy estate, judicial economy, timeliness, and fairness***." Manville, 896 F.2d at 1391 (emphasis added). Courts in this district repeatedly emphasize that the touchstone of this standard is "the efficient administration of the bankruptcy estate," with the goal of preserving value for all its stakeholders. See Debtors' Objection at 51-52; Hearing Tr. Day 2 at 203:15-207:2.[10]

[9] See Hearing Tr. Day 1 at 87:7-15 ("[Ms. Jennik]: [N]o one has done an analysis to say, well, there will be so many hours spent on this case, and if it's in New York, it will cost X amount of dollars, and if it's in West Virginia, it will cost Y dollars. . . .").

[10] See also Grumman Olson Indus. Inc. v. McConnell (In re Grumman Olson Indus., Inc.), 329 B.R. 411, 437 (Bankr. S.D.N.Y. 2005) ("The interest of justice requires a broad and flexible standard which must be applied on a case-by-case basis. ***It contemplates a consideration of whether transferring venue would promote the efficient administration of the bankruptcy estate, judicial economy, timeliness, and fairness***.") (internal citations and quotations omitted; emphasis added); Enron II, 284 B.R. at 387 (same); In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey, 149 B.R. 365, 368 (Bankr. S.D.N.Y. 1993) (same); Int'l Filter, 33 B.R. at 956 ("***The 'interests of justice' side of the equation concerns the interests of the Debtor in rehabilitating itself, the interests of the creditors in receiving a fair and equitable return, the interests of the public and whether the pendency of the proceeding in the wrongful district advances or retards those interests***. . . . But, in almost every operating Chapter 11 case, a principal concern, whether the test be phrased in terms of the interests of justice or

The Movants have introduced no evidence that a transfer would promote the efficient administration of the estate, judicial economy, or timeliness. Indeed, the only evidence – and there is a very great deal of it – is emphatically to the contrary. And, notwithstanding the Movants' repeated arguments that maintaining venue in New York would be "unfair," the Movants never explain to whom it would be unfair.[11] Denying the Motions would not be unfair to the creditors and stakeholders as a whole, because it is undisputed that the Debtors selected this venue because of their determination that is in the best interest of, and more convenient for, the Debtors, the Debtors' creditors, other stakeholders and the estates. (Proposed Findings at ¶ 27.) It would not be unfair to the Debtors' unsecured creditors because the Creditors' Committee, which serves as a fiduciary to all unsecured creditors, and dozens of individual creditors oppose the Motions. It would not be unfair to secured creditors, because each of the secured creditors that has weighed in sides with the Debtors. It would not be unfair to the Union, which is based in Washington, D.C., has a nationwide presence, and has New York-based professionals.[12] It would not be unfair to the Sureties, which are based in Pennsylvania,

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convenience, is the economic administration of the estate. ***In practical terms, that concern translates into inquiry of the need for post-petition financing pursuant to [Section] 364 of the Code, the need to obtain financing to fund a plan of arrangement and the location of the sources of that financing and the management personnel in charge of obtaining it***.") (emphasis added).

[11] See, e.g., Hearing Tr. Day 2 at 407:1-6 ("[THE COURT]: [H]ow could it be said to be unfair that they did that when the uncontroverted record is that they did it to try to keep this company going, and by implication, to keep as many employees employed as possible . . . that sounds laudable. That sounds like debtors discharging their fiduciary duty. How can that be unfair?"); Hearing Tr. Day 2 at 432:2-13 ("THE COURT: And [the Debtors] said that the reason that they did that [created entities to ensure compliance with 1408] was because they determined that their stakeholders to whom they owe a fiduciary duty would fair better here, that a proceeding here would be better for them. . . . [Ms. Schwartz]: Well, because, Your Honor, it's not right. The upshot here is it's not right . . . .").

[12] The Union repeatedly has argued that these cases should be transferred to a venue that possesses expertise relating to the coal industry. See, e.g., Union Mem. at ¶ 30; Hearing Tr. Day 1 at 41:10-43:9. The Union's argument is entitled to little weight for two reasons. First, this Court – like any bankruptcy court – has the demonstrated capacity to learn about a new industry. Second, the case law upon which the Union relies does not support its position here. See Union Mem. at ¶ 30 (citing In re B.L. of Miami, Inc., 294 B.R. 325, 331-32 (Bankr. D. Nev. 2003) (granting motion to transfer case to Florida, where the primary asset of the debtor, a nightclub, was located, but not concluding that the Florida courts had greater familiarity with the nightclub industry); In re Abacus

Tennessee, and Texas, and three of which are authorized to do business in New York. And the U.S. Trustee's argument the Debtors' choice of venue was somehow inherently unfair is both unsupported by law and incorrect because Debtors, who have extensive prior ties to New York and are a large global concern, filed here to best try to reorganize the company, preserve jobs, and maximize value for all stakeholders – the prime directive of chapter 11.[13]

POINT II.

NONE OF THE ARGUMENTS ADVANCED BY THE MOVANTS ALTER THE CONCLUSION THAT THE MOVANTS FAILED TO CARRY THEIR BURDEN

A. There is No Support for the Contention that the Debtors Had No Pre-Petition Nexus to New York

The Movants assert that the Debtors have no "contacts" or "nexus" to New York other than PCX and Patriot Beaver Dam.[14] These untrue assertions have no basis in the record. In fact, the extensive record evidence demonstrates that the Debtors have material, varied, and longstanding ties to New York. These ties include the following – all undisputed:

- New York entities hold – by a wide margin – the largest amount of Patriot's Senior Bonds and Convertible Bonds. Notably, New York entities hold $48.4

Broad. Corp., 154 B.R. 682, 683 (Bankr. W.D. Tex. 1993) (granting motion to transfer case to Utah where the primary assets of the debtor, certain radio stations, were located, but not concluding that the Utah courts had greater familiarity with radio or broadcast media generally); Enron Corp. v. Arora (In re Enron Corp.), 317 B.R. 629, 638-41 (Bankr. S.D.N.Y. 2004) (denying motion to transfer case to Texas and not addressing whether alternate forum has greater familiarity with the debtors' industry)).

[13] At the Hearing, the Court referenced In re Ira Haupt & Co., 361 F.2d 164 (2d Cir. 1966). See Hearing Tr. Day 2 at 306:7-13. In that case, Judge Friendly stated that: "[t]he conduct of bankruptcy proceedings not only should be right but must seem right." Ira Haupt, 361 F.2d at 168. For the reasons discussed herein, maintaining venue in New York both is appropriate and should be viewed as appropriate. In addition, Ira Haupt involved a potential conflict of interest stemming from the trustee appointing his own law firm (where he was a partner) to participate in a bankruptcy proceeding that he oversaw. This case involves no alleged or actual impropriety or self interest.

[14] See, e.g., Hearing Tr. Day 1 at 116:3-7 ("[Ms. Schwartz]: . . . you've got a one hundred affiliated global enterprise that prior to the eve of bankruptcy had no contacts with this district . . ."); Sureties' Mem. at 2 ("The Debtors have no nexus whatsoever with SDNY except for the recent filing of the corporate charters of [Patriot Beaver Dam] and [PCX], just two of the ninety-nine Debtor entities."); U.S. Trustee Mem. at 3 ("[T]he Debtors base venue of nearly 100 companies with little to no ties to this district solely upon these newly created companies.").

million of the Senior Bonds and $49.9 million of the Convertible Bonds. West Virginia entities hold $69,000 of the Senior Bonds and $104,000 of the Convertible Bonds. (Proposed Findings at ¶¶ 99.)

- Virtually all of the Debtors' pre-petition debt instruments, and both of their DIP agreements, which collectively total over $1.25 billion, are governed by New York law or contain a New York forum selection clause. (Proposed Findings at ¶¶ 100.)

- New York law governs forty-one of the Debtors' sixty-five sales contracts – almost two-thirds of the total. By contrast, only two of the Debtors' sales contracts are governed by West Virginia law. (Proposed Findings at ¶ 101.)

- The Debtors entered into master equipment leases with each of their twenty equipment lessors. Of the twenty master leases, four are governed by New York law. Not one master lease is governed by West Virginia law. (Proposed Findings at ¶ 102.)

- In 2011, the Debtors sold a total of 31.1 million tons of coal. Roughly one million tons of coal – or approximately three percent of total sales volume – was sold to customers in New York. Nearly ninety-five percent of the coal was sold to customers outside of West Virginia. (Proposed Findings at ¶ 103.)

- The twenty top vendors of the Debtors for the first six months of 2012 have headquarters in twelve different states, with two located in New York and five located in West Virginia. Of the five vendors located in West Virginia, two have filed joinders in support of the Debtors' Objection. None support the Movants. (Proposed Findings at ¶ 104.)

- The key business information of Patriot and its subsidiaries has been hosted at a data center in Rochester, New York since shortly after Patriot's spin-off from Peabody. Patriot owns servers at that New York location and contracts for related information technology services. (Proposed Findings at ¶ 105.)

The U.S. Trustee argued at the Hearing – without any legal or factual support – that the New York choice of law provisions in a very great number of the Debtors' material contracts have no relevance to the Motions or to establishing a New York nexus.[15] The U.S. Trustee's position is wrong for two reasons. First, courts have repeatedly considered the governing law of underlying

[15] See Hearing Tr. Day 2 at 432:19-22 ("[Ms. Schwartz]: But the contacts, Your Honor, are choice-of-law provisions in contracts. That's not what Congress envisioned as a contact to the forum state. That's not the nexus.").

agreements when analyzing motions to transfer venue, and repeatedly concluded that motions to transfer should be denied where relevant contracts are governed by the laws of the state in which the court sits.[16] Second, Section 1408 itself provides that venue is proper in the district in which a debtor is domiciled, 28 U.S.C. § 1408(1), and domicile is – at its core – a choice of law concept that has nothing to do with physical location. It means no more than an entity was formed in a state and has agreed to be governed by the laws of that state.

B. This Court Should Reject the Movants' Argument that Denying the Motions Will Enable Every Debtor to File in This District

The Movants have contended that if these cases are not transferred in the interest of justice, any entity that wants to file for bankruptcy in any jurisdiction – be it Alaska, Hawaii or New York – will, regardless of its motivation or the geographic location of, or convenience to, its stakeholders, be able to do so merely by incorporating an affiliate there just prior to bankruptcy.[17] This gossamer spectre does not survive even cursory examination.

First, the actual facts at bar bear no relationship to this spectre. The uncontroverted evidence demonstrates that: (1) the Debtors have deep, wide, and extensive ties to, and massive

[16] See, e.g., In re Thomson McKinnon Sec. Inc., 126 B.R. 833, 836 (Bankr. S.D.N.Y. 1991) (denying motion to transfer an adversary proceeding under Section 1412 because the contract at issue included a New York choice of law provision and "it would promote the interest of judicial economy to have a bankruptcy court sitting in New York . . . hear this case and other similar promissory note cases which are governed by New York law"); cf. Vornado Realty Trust v. Marubeni Sustainable Energy, LLC, No. 08 Civ. 4823 (DLI) (JO), 2009 U.S. Dist. LEXIS 104873, at *14 (E.D.N.Y. Nov. 4, 2009) (denying motion to transfer under Section 1404 where New York law governed the dispute); Chase Manhattan Bank, N.A. v. Francini, No. 91 Civ. 2515 (MBM), 1991 U.S. Dist. LEXIS 11381, at *15-16 (S.D.N.Y. Aug. 16, 1991) (denying motion to transfer under Section 1404 and "accord[ing] weight to the fact that the guaranty contains a New York choice of law provision").

[17] See, e.g., Hearing Tr. Day 2 at 438:24-439:5 ("[Ms. Schwartz]: [I]n my view, you're opening the flood gates to every single case getting filed in New York by . . . opening up an LLC, putting five dollars in the bank account, paying 175 dollars to the Secretary of State, and bingo, you put in your 1007 affidavit, you copy the paragraph 33 [sic] from Mr. Schroeder's declaration, and you're in."); Hearing Tr. Day 2 at 444:12-16 ("[Ms. Schwartz]: [I]f Your Honor were to permit big corporate enterprises to be able to satisfy 1408 by the simple setting up an affiliate, . . . funding it with little teeny assets, no employees, et cetera, then that would render the venue statute meaningless . . .").

creditors in, New York; (2) the parties in interest are widely dispersed all over the country and world and New York is convenient for them; (3) the Debtors filed in New York to promote the best interests of all stakeholders; (4) the Movants have neither introduced relevant evidence nor have they contested the Debtors' evidence; and (5) there is overwhelming creditor support for keeping the cases in New York and exceedingly little support for moving them.

Second, there is no floodgate nor is any statute rendered meaningless. Many categories of cases can, should and will, based on their individual facts and circumstances, be subject to transfer in the interest of justice, including:

- cases where the debtor and its stakeholders have few connections to the district, see, e.g., In re Dunmore Homes, Inc., 380 B.R. 663, 667 (Bankr. S.D.N.Y. 2008); Debtors' Objection at 32-33; Hearing Tr. Day 2 at 220:11-25, 230:21-231:9;

- cases where the debtor consents to transfer, see, e.g., In re Winn-Dixie Stores, Inc., No. 05-11063-rdd, Slip Op. at 84-88 (Bankr. S.D.N.Y. Apr. 12, 2005); Debtors' Objection at 44-46; Hearing Tr. Day 2 at 254:21-25, 354:13-17;

- cases where the debtor commenced a chapter 11 case in this district to avoid pending litigation in other districts or to avoid negative press coverage, see, e.g., In re Qualteq, Inc., No. 11-12572 (KJC), 2012 Bankr. LEXIS 503, at *18-21 (Bankr. D. Del. Feb. 16, 2012); Winn-Dixie, No. 05-11063-rdd, Slip Op. at 18-19; Debtors' Objection at 59; Hearing Tr. Day 2 at 223:1-3;

- cases where the debtor commenced a chapter 11 case here to secure better results than it had achieved in a prior bankruptcy case elsewhere, see, e.g., In re EB Capital Mgmt. LLC, No. 11-12646 (MG), 2011 Bankr. LEXIS 2764, at *13-15 (Bankr. S.D.N.Y. July 14, 2011); In re Eclair Bakery Ltd., 255 B.R. 121, 138 (Bankr. S.D.N.Y. 2000); Debtors' Objection at 13, 59; Hearing Tr. Day 2 at 219:16-25, 271:10-25;

- cases where the debtor commenced a chapter 11 case to harm or try to evade another party in interest, cf. Winn-Dixie, No. 05-11063-rdd, Slip Op. at 170-71 (noting that no such evidence existed);

- cases where an affiliate of the debtor previously sought chapter 11 relief elsewhere and where economy would be furthered by transferring the case to the district in which the affiliate's case is pending, see, e.g., In re Raytech Corp., 222 B.R. 19, 21, 24-25 (Bankr. D. Conn. 1998); In re Portjeff Dev.

Corp., 118 B.R. 184, 195-97 (Bankr. E.D.N.Y. 1990); Debtors' Objection at 13-14; and

- cases where the debtors' fiduciary determination was probed by the movants and found, based on the facts presented to the court, lacking, insufficient, or not credible.

Indeed, the Movants' contention that any debtor would be able to file in any district merely by stating that they filed there in order to discharge their fiduciary duties is yet another straw man. Counterparties often probe and courts often assess whether a debtor has, in fact, satisfied its fiduciary duties. See, e.g., In re Innkeepers USA Trust, 442 B.R. 227, 234-36 (Bankr. S.D.N.Y. 2010) (Chapman, J.) (evaluating whether debtors had discharged their fiduciary duties in connection with proposed assumption of contract and concluding that they had not).[18] The Movants here chose, for their own reasons, not to so probe in this case.

In this case, the evidence is clear and uncontested: the admitted and undisputed testimony was that the "Debtors determined that the Southern District of New York [] is the optimal venue for the Debtors' chapter 11 cases and in the best interests of the Debtors, their creditors and other stakeholders and these estates," that "most of our domestic and foreign creditors would have been inconvenienced" if the cases were filed elsewhere, and that "the costs and inefficiency of administration of the estates would have materially increased if the cases were commenced in another district." (Proposed Findings at ¶ 27.) What would, in fact, be unfair and unjust is if the few Movants, acting entirely for their own purposes (and with no regard for what is best for all, or for preserving these estates), could transfer the cases of nearly 100 debtors – with combined

[18] As this Court noted in Innkeepers, "[i]n a bankruptcy case, it is 'Bankruptcy 101' that a debtor and its board of directors owe fiduciary duties to the debtor's creditors to maximize the value of the estate, and each of the estates in a multi-debtor case." 442 B.R. at 235.

assets in the billions of dollars – without barely a peppercorn of evidence in support of, or creditor support for, their request.

C. Winn-Dixie is Distinguishable and Should Not Govern the Court's Ruling Here

The Movants rely heavily on Judge Drain's decision in In re Winn-Dixie Stores, Inc., No. 05-11063-rdd (Bankr. S.D.N.Y. Apr. 12, 2005).[19] At the Hearing, the Debtors advanced eleven independent reasons why the very unusual facts of Winn-Dixie are distinct from those at bar and why that decision (which, ironically, upheld the Debtors' business judgment on what venue was best for its estates) does not support transfer here. See Hearing Tr. Day 2 at 254:8-279:5.[20]

D. The Court Should Reject A Per Se Rule, Which Is Incompatible With Governing Law

The Second Circuit has ruled that Section 1412 requires "***an individualized, case-by-case consideration of convenience and fairness***." Gulf States Exploration Co. v. Manville Forest Prods. Corp. (In re Manville Forest Prods. Corp.), 896 F.2d 1384, 1391 (2d Cir. 1990); see also Debtors' Objection at 43. Despite this binding precedent, however, the U.S. Trustee has advocated for a per se rule that the interest of justice requires the transfer of all cases where a debtor incorporates a subsidiary at some point prior to filing for the purpose of satisfying Section 1408.[21] The U.S. Trustee asks this Court to ignore virtually every element of the governing Second Circuit test – "individualized" and "case-by-case," and "convenience," and "fairness,"

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[19] See, e.g., U.S. Trustee Mem. at 6-8; U.S. Trustee Reply Mem. at 8-10, 13; Union Reply Mem. at 12-16, 21; Hearing Tr. Day 1 at 124:22-136:6.

[20] See Hearing Tr. Day 2 at 354:17-22 ("THE COURT: I mean, those facts [of Winn-Dixie] are so unique. They are so unique and, frankly, bizarre to have a debtor who makes a venue choice, things don't go well, it gets really ugly. They change their mind. The debtor makes a venue motion to transfer its own case, gets opposed by the creditors' committee. I mean, it's a law school hypothetical.").

[21] See, e.g., Hearing Tr. Day 1 at 124:9-11; Hearing Tr. Day 2 at 437:2-439:6.

and instead consider only one solitary fact – with no regard whatsoever for: (i) a debtor's motives; (ii) the consequences of transfer to the estate; (iii) the debtor's preexisting ties to the forum; and (iv) convenience of, and fairness to, all the parties to the case. This position contravenes Second Circuit precedent and the well-established understanding of "interest of justice" in this jurisdiction. See supra at 8-9 and note 10.

Moreover, the Supreme Court has squarely ruled that bankruptcy courts may not do what the U.S. Trustee is urging the court to do here – use equitable sections of the Bankruptcy Code to create categorical rules for its other provisions. In both United States v. Noland, 517 U.S. 535, 536-41 (1996), and United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213, 215-18, 228-29 (1996), the lower courts had held that tax penalties otherwise entitled to priority under Section 503 of the Bankruptcy Code should – as a category – be equitably subordinated under Section 510(c). The Supreme Court reversed, however, holding that equitable subordination must be tied to the facts of each case and cannot be applied to an entire category or to a single characteristic. See Noland, 517 U.S. at 543 ("[I]n the absence of a need to reconcile conflicting congressional choices, the circumstances that prompt a court to order equitable subordination must not occur at the level of policy choice at which Congress itself operated in drafting the Code.") (emphasis added); CF&I, 518 U.S. at 228-29 (holding claim subordination impermissible "when the subordination turned on nothing other than the very characteristic that entitled the Government's claim to priority") (emphasis added). In light of Noland and CF&I, this Court must reject the U.S. Trustee's policy-level argument that it is always in the interest of justice – irrespective of the facts and circumstances of each case – to transfer a case where the single "characteristic" of pre-filing incorporation is present.

The Debtors respectfully encourage the Court to consider (as required by Manville) the facts and circumstances of the case before it, which include what is undisputed: that the Debtors have extensive ties to New York; that the Debtors have very substantial creditors in New York and around the country and the world for which New York would be – and is – preferable; that the Debtors commenced these cases in New York after concluding that this venue would reduce the cost of administering the estates, would be the most convenient venue for creditors, and was in the best interests of the Debtors, their creditors and other stakeholders, and these estates; and that there is overwhelming creditor support for staying here.[22] (Proposed Findings at ¶¶ 26-27, 97-105, 129-140.)

E. There Is No Support for the Movants' Contention that the New York Subsidiaries Had No Need to Reorganize

The U.S. Trustee has argued that PCX and Patriot Beaver Dam had no need to reorganize.[23] As a threshold matter, the U.S. Trustee has conceded that Section 1408 has been satisfied. See supra note 4. Moreover, like the other ninety-seven Debtors, PCX and Patriot Beaver Dam have hundreds of millions of dollars of debt. For example, PCX and Patriot Beaver Dam were guarantors of the Patriot's $427.5 million pre-petition Credit Facility and, in connection with these secured guarantees, Bank of America, N.A., the administrative agent

[22] At the Hearing, this Court noted the principle of statutory construction – that "Courts should not interpret clear – even clear statutory provisions that lead to absurd results" – and queried whether permitting a debtor to form a corporation in a venue for the purpose of establishing venue is an "absurd" result that the Court should avoid. See Hearing Tr. Day 2 at 268:2-22. As a threshold matter, many large companies – including Lyondell Chemical Company, Boston Generating, LLC, General Motors Corp., Chrysler LLC, and Northwest Airlines – routinely reorganize in New York, even when their headquarters and assets are primarily located outside of the jurisdiction. (Debtors' Objection at 8, 59.) The Debtors respectfully suggest that these filings are analogous to those at bar. Additionally, Section 1412 stands ready to transfer cases where to do otherwise would be unfair or absurd. See infra at 13-15.

[23] See, e.g., Hearing Day 2 at 12:20-22 ("[Ms. Schwartz]: [I]t's also notable that there appears to be no reorganization purpose for these entities as well."); see also U.S. Trustee Mem. at ¶ 5 ("[I]t is unclear whether PCX and Patriot Beaver Dam have any employees, operations, creditors, or need for reorganization relief.").

under the Credit Facility, took first priority liens on their assets. (Proposed Findings at ¶¶ 55, 106-107.) In addition, PCX and Patriot Beaver Dam are guarantors of the Debtors' obligations with respect to the $250 million of Senior Bonds. (Proposed Findings at ¶ 108.) Finally, the DIP agents have been granted superpriority liens on the assets of PCX and Patriot Beaver Dam under and as required by the court-approved DIP facilities. (Proposed Findings at ¶¶ 109-110.)

The Movants also argue that there is something "unfair" about the fact that the New York subsidiaries have no employees.[24] However, the undisputed evidence is that 77 of the 99 Debtors, including PCX and Patriot Beaver Dam, do not have employees. (Proposed Findings at ¶¶ 29-30 & n.4; Hearing Tr. Day 2 at 256:12-25.) This feature is entirely common in complex corporate families such as the Debtors and is certainly not unfair or unjust.

F. These Cases Were Not Commenced In New York In Bad Faith

Finally, the Movants have conceded that these cases were not commenced in bad faith. In fact, several of them expressly acknowledged that the Debtors commenced these cases in New York in good faith.[25] Moreover, there is no evidence in the record – or even allegations – that

[24] See, e.g., U.S. Trustee Reply Mem. at 4-6; Union Reply Mem. at 13-16; Hearing Tr. Day 1 at 119:4-12; Hearing Tr. Day 2 at 427:16-25; Hearing Tr. Day 2 at 435:17-21.

[25] See, e.g., Hearing Tr. Day 1 at 69:3-5 ("[Ms. Jennik]: I am not aware of evidence that [the filing] was made in bad faith."); Hearing Tr. Day 2 at 12:5-6 ("[Ms. Schwartz]: The United States Trustee does not assert that there was bad faith; that wasn't part of our motion . . . ."); Hearing Tr. Day 2 at 45:12-17 ("[Mr. Meldrum]: [W]e don't – I think like everybody – doubt that the debtors attempted to do their best in selecting venue, and they obviously have a lot of considerations to balance. We don't think there was any sort of inside gaming going on for the benefit of somebody who hasn't been hurt."); Hearing Tr. Day 1 at 113:23-114:4 ("[Ms. Schwartz]: I thought I understood the Court to say, would it be a breach of that duty if they didn't try to file a case where the substantive law was better. THE COURT: Well, in good faith, in good faith, which – [Ms. Schwartz]: No one's saying other than that."); Hearing Tr. Day 2 at 119:12-14 ("[Mr. Goodchild, for UMWA Health and Retirement Funds]: I know everybody else has said that they don't challenge bad – or challenge good faith, or anything like that.")

the Debtors improperly sought to avoid another district or to hinder another party in interest.[26] To the contrary, the record includes undisputed testimony of the Debtors' appropriate fiduciary motives and consideration of creditor convenience and efficiency in filing these cases in New York.[27] (Proposed Findings at ¶ 27.)

CONCLUSION

For the foregoing reasons, and for the reasons detailed in the Debtors' Objection and at the Hearing, the Motions should be denied in all respects.

Dated: New York, New York
October 5, 2012

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[26] See, e.g., Hearing Tr. Day 2 at 406:23-407:1 ("THE COURT: . . . And there's been no evidence that [the Debtors filed in New York] to run away from some set of bad facts somewhere else or because they had a specific concern about some other Court . . .").

[27] This undisputed fact is a central reason why this dispute is distinguishable from the caselaw relating to artificial impairment. See Hearing Tr. Day 2 at 217:1-220:8. The courts that reject artificial impairment are concerned with prejudice to the rights of other creditors and with bad faith. Here, there is no evidence of either prejudice or bad faith – it is undisputed that the Debtors commenced these cases here because they concluded that it was in the best interests of all stakeholders to do so. (Proposed Findings at ¶ 27.)