KENNEDY, JENNIK & MURRAY, P.C.
113 University Place, 7th floor
New York, NY 10003
Tel. (212) 358-1500
Fax: (212) 358-0207
Susan M. Jennik
Serge Ambroise
Counsel for the United Mine Workers of America

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

THE POST-HEARING MEMORANDUM OF LAW OF THE UNITED MINE WORKERS OF AMERICA IN SUPPORT OF ITS MOTION PURSUANT TO 28 U.S.C. § 1412 AND RULE 1014, FED. R. BANKR. PROC., TO TRANSFER THE CASE TO THE SOUTHERN DISTRICT OF WEST VIRGINIA

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

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PRELIMINARY STATEMENT

In the wake of numerous and voluminous submissions and thorough hearings before this Court, it has become clear that this case boils down to a few simple facts and a single overarching principle of law. It all began with one problem: Debtors wanted to file their bankruptcies in this Court, but, as the day of their filings drew near, they could not meet the minimal statutory requirements for venue under 28 U.S.C. § 1408. As late as June 1, 2012, not a single one of their 99 affiliated companies had its "domicile, residence, principal place of business . . . or principal assets" in this District.

Undeterred by these statutory obstacles, Debtors simply created two new entities in New York: PCX Enterprises, Inc. ("PCX"), created June 1, 2012; and Patriot Beaver Dam Holdings, LLC ("Patriot Beaver Dam"), created June 14, 2012. (UMWA Proposed Findings of Fact ("PFF"), ¶¶ 40, 42.) Debtors then transferred assets to these newly-formed entities, and saddled them with liabilities. In the case of PCX, the sole asset was a *de minimis* amount of cash, which was deposited in a New York bank, and for Patriot Beaver Dam, it was membership in an out-of-state LLC. Both entities were then named as guarantors of Patriot Coal's obligations under an Amended and Restated Credit Agreement, which obligation is currently valued at $427 million. (PFF, ¶¶ 41, 43.)

Debtors have stipulated that they "formed both PCX and Patriot Beaver Dam to ensure that the provisions of 28 U.S.C. § 1408(1) were satisfied, and for no other purpose." (PFF, ¶ 44.) However, technical satisfaction of the minimal venue requirements is not enough. Under 28 U.S.C. § 1412, even when the requirements of § 1408 are satisfied, a case may nevertheless be transferred in the interest of justice or for the convenience of the parties.

This overarching principle of law was succinctly explained best by Judge Friendly nearly a half-century ago: "The conduct of bankruptcy proceedings not only should be right but must seem right." *In re Ira Haupt & Co.*, 361 F.2d 164, 168 (2d Cir. 1966). It is not enough to satisfy the bare requirements of the law – in this case to establish venue. The perception of justice and fairness is just as important as technical "compliance." Debtors created two corporations for the sole purpose of satisfying the minimum requirements of the venue statute. In the words of Judge Friendly, tolerance for this sort of tactical maneuvering in the judicial process does not "seem right," particularly to the workers and the communities in West Virginia for whom Debtors' actions could have devastating effects.

Debtors have made clear that the primary targets of their reorganization plan are their legacy costs, particularly their labor and environmental costs. (PFF, ¶¶ 99-105, 126-132.) In particular, Debtors have highlighted the cost of retiree healthcare as one of their principal "substantial and unsustainable legacy costs." (PFF, ¶ 126.) These issues are critical to the thousands of interested persons in West Virginia, and to the state of West Virginia, and it does not "seem right" to them that issues so important to their lives and to the state's economy will be resolved far away in lower Manhattan.

Moreover, Debtors' argument effectively designates the Southern District of New York the "super" bankruptcy court—the one bankruptcy court in the nation that can hear virtually all cases, regardless of how tenuous the connection of the debtor to this District. There is no question about this Court's competence and ability to consider and resolve large and complicated cases. And the presence of many large corporations in New York ensures that this Court remains one of the most important in the federal bankruptcy system. However, New York's role simply cannot transcend statutorily prescribed limits on venue pursuant to §§ 1408 and 1412, which

together make plain that Congress contemplated some real connection between a debtor's geographic identity and the venue for its bankruptcy.

Indeed, "venue is primarily an issue of geography" and geographic limitations are at the heart of the rules governing jurisdiction and venue through which Congress created the foundational framework of the federal judiciary. *See Oubre v. Clinical Supplies Management, Inc.*, No. 05 Civ. 2062 (LLS), 2005 WL 3077654, *6 (S.D.N.Y. Nov. 17, 2005) (*quoting Innovations Enter. Ltd. v. Haas-Jordan Co., Inc.*, No. 99 Civ. 1681 (EHN), 2000 WL 263745, *2 (E.D.N.Y. Jan. 4, 2000). The notion of "domicile," relied upon by Debtors in this case,[1] has been aptly and eloquently described by the Supreme Court: "Domicil [sic] implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance." *Williams v. North Carolina*, 325 U.S. 226 (1945) (emphasis added). There is no such nexus and no such relationship in this case.

Application of the venue rules marginalizing geography to other considerations undermines the integrity of the framework erected by Congress. The integrity of the federal bankruptcy system requires respect for the territorial limitations imposed on the judicial system charged with its just administration.

Debtors' creation of venue on the eve of filing in a district geographically remote from the coal mining operations at the core of its business threatens to compromise the integrity of the federal bankruptcy system. To the West Virginians with a real interest in this case – the people whose hands mine Debtors' coal and the citizens of West Virginia counting on Debtors to honor their environmental and other responsibilities – that does not seem right.

[1] Debtors assert in their Objection that the two New York Debtors in this case—PCX Enterprises, Inc. and Patriot Beaver Dam Holdings, LLC—"are New York domiciliaries." (Debtors' Objection to (i) Motion of the United Mine Workers of America to Transfer the Case to the Southern District of West Virginia, (ii) Sureties' Motion to Transfer Jointly Administered Cases to Southern District of West Virginia, and (iii) Motion of the United States Trustee to Transfer in the Interest of Justice ("Debtors' Obj.") at 10 (Dkt. No. 425).)

ARGUMENT

I. STANDARDS FOR VENUE TRANSFER

Change of venue of a case or proceeding under title 11 of the Bankruptcy Code is governed by 28 U.S.C. § 1412, which 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." According to the Second Circuit:

> The "interest of justice" component of § 1412 is 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 …

Gulf States Exploration Co. v. Manville Forest Prod. Corp. (In re Manville Forest Prod. Corp., 896 F.2d 1384, 1391 (2d Cir. 1990). A movant seeking transfer of a bankruptcy case to a different venue must show by a simple preponderance of the evidence that the transfer is in the interest of justice. *Id*. at 1390. Courts in the Second Circuit have applied this broad and flexible standard in various ways, some using specified factors, *In re Dunmore Homes, Inc*., 380 B.R. 663, 671-72 (Bankr. S.D.N.Y. 2008) (citing *In re Enron Corp.*, ("*Enron I*") 317 B.R. 629, 639 (Bankr. S.D.N.Y. 2004)), and some without applying a factor test, *In re Grumman Olson Industries*, 329 B.R. 411, 437 (Bankr. S.D.N.Y. 2005). In addition, and of great significance to the resolution of the pending motion, judges in this District have explicitly held that it is "appropriate to add as an additional relevant factor, though it may rarely be applicable, the integrity of the Bankruptcy Court system." *In re Eclair Bakery Ltd.*, 255 B.R. 121, 142 (Bankr. S.D.N.Y. 2000).

II. THESE CASES SHOULD BE TRANSFERRED TO THE SOUTHERN DISTRICT OF WEST VIRGINIA IN THE INTEREST OF JUSTICE

A. Fairness And The Integrity Of The Bankruptcy Court System Support Transfer Of This Case

The premise of § 1412 is that a bankruptcy court may transfer a case even if it meets the minimum legal requisites for venue under 28 U.S.C. § 1408. *See In re Dunmore Homes, Inc.*, 380 B.R. 663 (Bankr. S.D.N.Y. 2008); *In re Winn-Dixie Stores, Inc.*, No. 05-11063 (Bankr. S.D.N.Y. Apr. 12, 2005). Though Judge Friendly's maxim is simple and even straightforward when considered in the context of the facts presented by a particular case, the statutory phrase "interest of justice" has been described as "an elusive term not easily amenable to definition." *In re Pinehaven Associates*, 132 B.R. 982, 990 (Bankr. E.D.N.Y. 1991). Debtors' Objection to this motion asks the Court to focus on the relative convenience of New York City to the professionals retained in this case and to disregard the chief proposition of law advanced in *In re Winn-Dixie Stores, Inc.*, Case No. 05-11063-rdd (Bankr. S.D.N.Y.): permitting an eleventh-hour corporate creation of venue is not in the interest of justice. (*See* Debtors' Obj. at 16-18; *see also* Transcript of Court Hearing held on April 12, 2005 ("4/12/2005 Tr."), UMWA Omnibus Reply, Ex. H.)

In *Winn-Dixie*, Judge Drain held, based on the plain language of § 1412 and clear precedent, "that the statute is phrased in the disjunctive and that the interests of justice prong of it will not always serve the convenience of the parties . . . ." *Id.* at 166 (*citing Portjeff Dev. Corp.*, 118 B.R. 184, 192 (Bankr. E.D.N.Y. 1990). The *Portjeff* court's discussion regarding the "interest of justice" is instructive, citing no less an authority than Wright, Miller & Cooper, which in turn quoted from a Judge Friendly decision (*New York Central Railroad Co. v. U.S.*, 200 F.Supp. 944 (S.D.N.Y. 1961), noting:

> Although, as Judge Friendly has pointed out, 'the letter of [28 U.S.C. § 1404(a)] might suggest otherwise,' it is well established that the interest of justice is a factor to be considered on its own and an important one, and that the interest of justice may be decisive in ruling on a transfer motion even though the convenience of the parties and witnesses point in a different direction.[2]

[2] The apparently updated passage quoted in the *Portjeff* decision in the current Third Edition of Wright, Miller & Cooper's authoritative treatise states:

Portjeff, 118 B.R. at 192 (*citing* 15 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction, § 3854, pp. 279-280 (1976) and *New York Central Railroad*, 200 F.Supp. at 946-947). In *Winn-Dixie*, Judge Drain unambiguously found that because debtors' New York subsidiary:

> was formed solely to establish venue in New York, I conclude that the transfer of venue here would be in the interests of justice under Section 1412 … I do not believe it is an unacceptable judicial intrusion on the statute, on Section 1408, to find that the interests of justice require transfer here and to close a loophole in the statute that would otherwise, according to the statute's plain terms, permit venue to be properly established here on the eve of filing … I do this, again, <u>not because venue was established here in bad faith or wrongfully, but simply because I don't believe it is just to exploit the loophole of the statute to obtain venue here.</u>

4/12/2005 Tr. at 166-167 (emphasis added).

Judge Drain's holding in *Winn-Dixie* fits squarely with the facts of this case, where a corporation concentrated in West Virginia with no domicile or substantial assets in New York before the eve of the bankruptcy filings created two subsidiaries to establish venue. Debtors' Objection attempts to make factual distinctions between this and the *Winn-Dixie* case by noting that "the *Winn-Dixie* debtors' operations were located entirely in the Southeast United States and were concentrated in Florida." (Debtors' Obj. at 46). The geographical facts in this case are actually analogous to those in *Winn-Dixie*, with Debtors' mining operations located entirely in adjacent states' coalfields and highly concentrated in West Virginia. Debtors' "operations"—in

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> Although, as Judge Friendly has pointed out … "the letter of the section might suggest otherwise," it is well established that the interest of justice is a factor (albeit an extremely amorphous and somewhat subjective one) to be considered on its own and is an extremely important one. Indeed, a number of federal courts have considered this factor decisive—<u>outweighing the other statutory factors</u>—in ruling on a change of venue motion even though the convenience of the parties and witnesses pointed in a different direction.

15 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction and Related Matters, § 3854 (emphasis added).

any meaningful sense of the word—are really not, as Debtors claim, "national and international in scope." (Debtors' Obj. at 46-47.)[3]

Judge Drain's determination in the *Winn-Dixie* case is not an anomaly. Six years prior to his ruling, a Delaware bankruptcy judge deciding a venue transfer motion in the *In re Jitney Jungle* case, Case No. 99-3602 (MFW), U.S. Bankruptcy Court for the District of Delaware (Dec. 7, 1999), came to remarkably similar conclusions. In that case, Judge Mary Walrath, faced with a set of circumstances similar to those at issue here, noted that while "finding that [venue in Delaware] is not illegal does not establish that it is fair, and this type of a tactic I think not only hurts the reputation of counsel but hurts the reputation of the court. For that reason I find it fails the 1412 interest of justice prong." *In re Jitney Jungle,* Transcript of Court Hearing held on December 7, 1999 ("Jitney Jungle Tr.") at 168:20-23 (emphasis added). Deciding the issue years before Judge Drain, Judge Walrath announced: "I think that it is an extremely dangerous precedent to allow counsel to incorporate a company in Delaware solely to get venue here for bankruptcy proceeding." Jitney Jungle Tr. at 169:4-7. Judge Walrath further found that:

> [A]ll of the factors that the Courts look to regarding the convenience of factors seem to weigh in favor of transfer … with the exception of the location of the professionals and the largest creditors, both the DIP lenders and the bondholders, but for the same reason I stated in TransTexas, I believe that the convenience factor has to be determined with an eye towards permitting representation of bankruptcy cases by all entities.
>
> The largest creditors in this case and the debtor itself has [sic] national bankruptcy counsel, who are very familiar and able to travel nationally and represent their clients wherever the bankruptcy case may be filed.
>
> The small creditors in this case do not have that capability. Both the size of their claim, the nature of their claim and their interest in this bankruptcy case I think transcends the debtors' argument that they are simply a small creditor who won't participate in the bankruptcy.

[3] Indeed, Patriot's SEC filings state that it was created by Peabody through the 2007 spinoff in order to centralize Patriot's Appalachian holdings as Peabody pursued international growth. (PFF, ¶ 4, 5.) Patriot's presence in Appalachia quickly grew with its acquisition of Magnum Coal's West Virginia operations. (PFF, ¶ 130.)

> The Mississippi and southeast United States creditors consist of landlords, equipment lessors, employees, local trade vendors, none of whom, if the case remains here, will have a voice in this bankruptcy proceeding. …
>
> With respect to the other factors, virtually all of the debtors' assets are located in the southeast, all the business operations are in the southeast, all the employees are in the southeast, all of their physical assets, their books and records, witnesses and documents are located closer to Mississippi than to here. …
>
> With respect to the arguments that the debtor is a national company, this is a national case, I don't give it much weight. Again, in considering the convenience of the parties, I think it is important in any bankruptcy case that all parties have a voice in the bankruptcy and, therefore, I am persuaded to go with the small creditors' rights to assure that not only they are adequately represented but that this Court is not besmirched by accepting every case that gets filed here if it is not appropriate.

Jitney Jungle Tr. at 170:6 to 171:15, 172:16 to 173:1. References to the *Jitney Jungle* case, including citations to the language above from the hearing transcript, was in the record in the *Winn-Dixie* case. (A copy of the cited pages from the transcript, docketed in the *Winn-Dixie* case as Docket No. 690, is attached hereto as Exhibit A.) Thus, Judge Drain's ruling in the *Winn-Dixie* case is not a lone decision without precedent, but is in keeping with the bankruptcy courts' concern with the integrity of the system.

Furthermore, Debtors' conduct is not countenanced in any way by the Second Circuit's holding in *Capitol Motors v. Leblanc Corp.*, 201 F.2d 356 (2d Cir. 1952). There, the New York entity that served as the basis for venue "although recently formed, had a separate and valid reason for existing … [with] real buyers, different owners…" (4/12/2005 Tr. at 168, Judge Drain distinguishing *Capitol Motors v. Leblanc*). In this case, the Debtors readily admit that the newly created New York subsidiaries were established on the eve of filing to obtain venue in this District. Through the last-minute formation of the two New York entities and attempt to bootstrap the other 97 entities into this Court, Debtors have run afoul of Judge Drain's holding that venue is not appropriate where one is "building the shop that you choose to act in as opposed to going to it." (4/12/2005 Tr. at 170.)

Amidst much immaterial second-guessing of Judge Drain's understanding of the fact pattern in the *Capitol Motors* case, Debtors reference the Second Circuit's affirmation of the District Court's denial of discretionary transfer in that case as justified in part "because the troubles of the business were not manufacturing but financial, and the heart—and also body—of that was in New York." (Debtors' Obj. at 50 (citing *Capitol Motors*, 201 F.3d at 358)). The significance of this distinction between bankruptcies rooted in operational as opposed to financial problems was also noted in this Court's opinion in *In re Dunmore Homes, Inc.*, 380 B.R. at 673 (Distinguishing *In re Enron*, ("*Enron II*") 284 B.R. 376 (Bankr. S.D.N.Y. 2002): "In *Enron*, the court faced the reorganization of a complex global energy conglomerate, and the sophistication of the financial markets was an essential factor in the successful financing and reorganization of the company.")

Here, Debtors' problems are not primarily about their financial arrangements, but are akin to the hypothetical manufacturing troubles referenced by the Second Circuit in *Capitol Motors.* Debtors concede that the troubles that led to their bankruptcy were "the costs that we incur in mining the coal." (PFF, ¶ 123.) Debtors' filings indicate that their largest liabilities are amounts they promised workers to mine coal, and the amounts needed for environmental remediation. (PFF, ¶¶ 102, 126, 132.) These debts—Debtors' largest—accrued in or near West Virginia and must paid in and near West Virginia. (PFF ¶¶ 76, 77, 102, 104, 105, 109, 110, 111.) Debtors' efforts to secure financing in New York will not be as significant in this case—in terms of prospects for successful reorganization and the real-world impact on individual lives—as Debtors' anticipated efforts to evade its labor and environmental obligations to workers, retirees and other citizens of Appalachia.

B. Fairness Supports Transfer of the Case Where West Virginia Has an Interest in Having the Controversy Decided Within Its Borders, While New York Has No Such Interest

The Debtors' mines and most of its employees are located in West Virginia and nearby Kentucky. (PFF, ¶ 11, 12.) Nobody mines coal in New York. (PFF, ¶ 58.) This Court, like many other bankruptcy courts, considers in its application of the § 1412 "interest of justice" prong whether "either forum has an interest in having the controversy decided within its borders." *In re Dunmore Homes, Inc.*, 380 B.R. 663, 671-72 (Bankr. S.D.N.Y. 2008); *In re Onco Invest. Co.*, 320 B.R. 577 (Bankr. D. Del. 2005); *In re Condor Exploration, LLC*, 294 B.R. 370 (Bankr. D. Colo. 2003); *see also Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879-80 (1995) (recognizing a "local interest in deciding local controversies at home"). For decades, this Court has given deference to a state's interest in having essentially local disputes resolved within the state's borders. *See, e.g. Matter of Landmark Capital Co.*, 19 B.R. 342, 348 (Bankr. S.D.N.Y. 1982) ("[T]here is a local interest in having localized controversies decided at home.") "In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947).

The coal mining industry is essential to the economy of West Virginia but has little or no impact on the economy of New York. (PFF, ¶¶ 58-80.) The people of West Virginia are familiar with and dependent on the coal mining industry. Significant issues in this case—whether mines are shut, whether employee wages and benefits are reduced, whether environmental issues are properly resolved, whether pension and retiree health benefits are cut—will all directly affect the West Virginia economy and environment while having no such effect in New York.

The decisions of the Attorney General of West Virginia and the Commonwealth of Kentucky, Energy Cabinet, Department for Natural Resources to join the UMWA's motion underscores the clear import of the interest of justice analysis. The Attorney General, acting in his capacity as the state of West Virginia's chief legal officer, writes that "[t]he State of West Virginia and her citizens have a significant interest in the resolution of the matters that will arise in these consolidated cases, and I therefore respectfully request that they be decided within her borders." (PFF, ¶ 62.) Among these significant interests are the integrity of the regulatory framework that ensures the continued viability of environmentally responsible coal extraction, the public health of the state's citizens protected by that framework, and the potential for "adverse economic repercussions" for the state that could result from Debtors' breach of its commitment to provide healthcare benefits earned by its active and retired employees.[4] (PFF, ¶¶ 58-94.) As significant as the stated interests of West Virginia to have these matters decided within its borders is the request by Kentucky to at least have this case resolved near its coalfields. (*See* Notice of the Commonwealth of Kentucky, Energy and Environment Cabinet, Department for Natural Resources (Dkt. No. 392).)

Transfer of this matter to the Southern District of West Virginia is consistent with the express policy, in the cases cited above, of deference to a state's demonstrated interest in having important questions which are vital to the local community and the state's economy resolved within its borders. (See PFF ¶¶ 58-94.)

C. Judicial Economy Would Be Served By Transferring the Case to the Southern District of West Virginia

[4] Such repercussions could include the direct economic impact of a reduction or cessation of benefits promised active and retired employees in exchange for their labor, the indirect economic impact on the economy of the state that would follow such reduction or cessation, or the economic repercussions of a prolonged work stoppage.

An element of judicial economy is whether either court has an advantage on the "learning curve" relevant to the case. *Enron I,* 317 B.R. at 638-39. As this case is in its earliest stages, this Court has not had the opportunity to develop a substantial learning curve. Therefore, transfer of the case to the Southern District of West Virginia at this early point in the case will not be disruptive or delay the proceedings.

A second kind of "learning curve" is the familiarity of a court with issues which will arise in the case. *In re Enron Corp.* ("*Enron III*") 274 B.R. 327, 350 (Bankr. S.D.N.Y. 2002) (familiarity of court with cross border insolvency cases weighed in favor of court retaining case). The Bankruptcy Court in the Southern District of West Virginia, located in a coal producing region, has heard numerous cases involving the coal industry, while this District has limited knowledge of that industry. Consideration of the "learning curve" does not imply that the courts in any district are not capable of learning the issues involved in any industry or will favor one side or another in the case; rather, it is a question of judicial efficiency. "It makes good sense 'to locate the bankruptcy in a venue where the judge presiding would more likely have active familiarity with the community and the milieu' in which the [Debtors operate]. Such a judge 'would be in a much better position to gauge the likelihood of an effective reorganization.'" *B.L. of Miami, Inc.*, 294 B.R. at 332 (quoting *In re Abacus Broad. Corp.*, 154 B.R. 682, 683 (Bankr., W.D. Tex. 1993). The Southern District of West Virginia has managed numerous bankruptcy and other cases involving the coal industry.[5]

[5] *See, e.g., Point Service Corp. v. Pritchard Min. Co., Inc.*, 2010 WL 1410673 (S.D.W.Va. 2010); *Caperton v. A.T. Massey Coal Co., Inc.*, 270 B.R. 654 (S.D.W.Va. 2001); *In re Lady H Coal Co., Inc.*, 199 B.R. 595 (S.D.W.Va. 1996); *UMWA 1992 Ben. Plan v. Leckie Smokeless Coal Co.*, 201 B.R. 163 (S.D.W.Va.1996); *International Union v. First Big Mountain Coal Co.*, 1993 WL 133309 (S.D.W.Va. 1993); *In re Queen*, 148 B.R. 256 (S.D.W.Va. 1992); *In re Concord Coal Corp.*, 81 B.R. 863 (S.D.W.Va. 1988); *In re Cherry Pond Coal Co.*, 21 B.R. 592 (S.D.W.Va. 1982); *Matter of Appalachian Pocahontas Coal Co., Inc.*, 31 B.R. 579 (S.D.W.Va. 1983); *In re Tom B. Coals, Inc.*, 46 B.R. 245 (S.D.W.Va. 1985); *In re Federal Coal Co.*, 335 F.Supp. 1183 (S.D.W.Va. 1971); and *In re Hawley Coal Mining Corp.*, 47 B.R. 392 (S.D.W.Va. 1984).

In particular, the Southern District of West Virginia has more experience interpreting the National Bituminous Coal Wage Agreement ("NBCWA")—which sets forth the wages, hours and working conditions of unionized miners—and the Coal Act—which protects certain retiree health benefits—and the interplay between the two. Beginning with Schroeder's first day declaration, Debtors have made clear their intention to avoid their contractual and statutory obligations to the Mine Workers, explaining that

> The Debtors have substantial and unsustainable legacy costs, primarily in the form of medical benefits and pension obligations. . . . . The [NBCWA] contains many provisions that restrict the ability of signatory employers to deploy labor and operate their mines in a flexible and cost-effective manner, which puts signatory companies at a cost disadvantage with their union-free competitors. . . . The Debtors will use the tools available to them in chapter 11 to reorganize and emerge as a viable and strong competitor in the coal industry . . . .

(PFF, ¶ 126, 99; Schroeder Decl., ¶ 41.) Among NBCWA's provisions are literally hundreds of detailed work rules governing everything from the union's jurisdiction over particular types of work to the myriad processes involved in the safe mining of coal. Some of these provisions are broadly applicable to all coal operations, some negotiated at a local level at each particular operation, and some are even job-specific.[6]

For decades, the Southern District of West Virginia has interpreted provisions of the NBCWA and their interaction with the Coal Act in a variety of cases.[7] The Southern District of

[6] The UMWA has appointed a team to engage in § 1113 negotiations, composed of representatives based in West Virginia and Kentucky, who regularly deal with the complex issues that arise in coal industry collective bargaining agreements. (PFF, ¶¶ 63-67.)

[7] This is exemplified by the following representative list of cases decided within the last ten years. *See e.g.*, *Holland v. Mate Creek Trucking, Inc.*, 2012 WL 75044 (S.D.W.Va. 2012) (No. 2:10-01412); *Dewhurst v. Century Aluminum Co.*, 731 F.Supp.2d 506 (S.D.W.Va. 2010); *Parsons v. Power Mountain Coal Co.*, 2009 WL 899457 (S.D.W.Va. 2009) (No. 2:07-00719); *Holland v. North Star Contractors, Inc.*, 2008 WL 7019035 (S.D.W.Va. 2008) (No. 2:06-00692); *United Mine Workers of America v. Panther Branch Coal Co.*, 2008 WL 149142 (S.D.W.Va. 2008) (No. 2:06-00892); *Holland v. Keyrock Energy, Inc.*, 2007 WL 3070492 (S.D.W.Va. 2007) (No. 5:06-0091); *Eastern Associated Coal Corp. v. District 17 and Local Union 9177, United Mine Workers of America*, 2006 WL 2819537 (S.D.W.Va. 2006) (No. 2:04-0641); *Colony Bay Coal Co. v. District 17*, 2006 WL 2691408 (S.D.W.Va. 2006); *District 17 v. Eastern Associated Coal Corp.*, 2006 WL 2691423 (S.D.W.Va. 2006) (No. 2:03-0274); *Grass v. Eastern Associated Coal LLC*, 2006 WL 2527810 (S.D.W.Va. 2006) (No. 2:05-0496); *Holland v. Cline*, 2006 WL

New York and the Second Circuit, by contrast, have had relatively little exposure to issues related to the NBCWA, largely limited to the *Chateaugay* series of cases and the 1994 *Olga Coal Company* bankruptcy.[8]

Moreover, the Southern District of West Virginia has heard and decided numerous cases in which certain of the Debtors here were either plaintiff or defendant.[9] (*See also* PFF, ¶¶ 84-92.) In contrast, this District has been the forum for only two cases in which any of the Debtors' entities was a party.[10] Moreover, three significant actions regarding environmental issues, and with huge remediation liability at stake, are pending against Debtors in the Southern District of West Virginia: *Ohio Valley Environmental Coalition, Inc. v. Patriot Coal Corp.*, 3:11-CV-00115 (S.D.W.Va.); *Ohio Valley Environmental Coalition, Inc. v. Apogee Coal Co., LLC*, 3:07-0413

1728012 (S.D.W.Va. 2006) (No. 2:05-00535); *Flores v. Eastern Associated Coal Corp.*, 2006 WL 1390440 (S.D.W.Va. 2006) (No. 2:04-1270); *United Mine Workers of America v. Banner Coal & Land Co.*, 2006 WL 4524337 (S.D.W.Va. 2006) (No. 5:04-0154); *Holland v. Gapco Min. Co., Inc.*, 2006 WL 890145 (S.D.W.Va. 2006) (No. 1:05-0042); *Howerton v. Bluestone Industries, Inc.*, 2005 WL 2978042 (S.D.W.Va. 2005) (No. 5:05-00198); *Eastern Associated Coal Corp. v. District 17, United Mine Workers of America*, 2004 WL 2538498 (S.D.W.Va. 2004) (No. 2:03-2430); *Eastern Associated Coal Corp. v. Skaggs*, 272 F.Supp.2d 595 (S.D.W.Va. 2003); *Pine Ridge Coal Co. v. Loftis*, 271 F.Supp.2d 905 (S.D.W.Va. 2003); *District 17, United Mine Workers of America v. Brunty Trucking Co.*, 269 F.Supp. 2d 702 (S.D.W.Va. 2003).

[8] In the Southern District of New York, the NBCWA was an issue in: *In re Olga Coal Co.*, 1997 WL 598455 (S.D.N.Y.) and the *In re Chateaugay Corp*. cases at: 154 B.R. 416 (S.D.N.Y. 1993) and 111 B.R. 399 (S.D.N.Y. 1990). In the Second Circuit: *In re Olga Coal Co.*, 159 F.3d 62 (2d Cir. 1998); the *In re Chateaugay Corp*. cases at: 53 F.3d 478 (2d Cir. 1995), 945 F.2d 1205 (2d Cir. 1991), 922 F.2d 86 (2d Cir. 1990), and 891 F.2d 1034 (2d Cir. 1989).

[9] *See e.g.*, *Young v. Apogee Coal Co.*, 2:12-CV-01324 (S.D.W.Va.); *Bailey v. Eastern Associated Coal, LLC*, 2:11-CV-00470 (S.D.W.Va.); *Grounds v. Burgess*, I2:10-CV-01333 (S.D.W.Va.); *Davis v. Murdock*, 2:10-CV-01332 (S.D.W.Va.); *Nash v. Patriot Coal Corp.*, 2:10-CV-01031 (S.D.W.Va.); *Jenkins v. Patriot Coal Corp.*, 2:10-CV-1032 (S.D.W.Va.); *Huddleston v. Patriot Coal Corp.*, 2:10-CV-1033 (S.D.W.Va.); *Hubbard v. Speed Mining, LLC*, 2:10-CV-00359 (S.D.W.Va.); *Bird v. Metropolitan Life Insurance Co.*, 1:10-CV-00161 (S.D.W.Va.); *McClanahan v. Eastern Associated Coal, LLC*, 2:09-CV-01068 (S.D.W.Va.); *Deavers v. Patriot Coal Corp.*, 2:09-CV-01031 (S.D.W.Va.); *U.S. v. Patriot Coal Corp.*, No. 2:09-CV-00099 (S.D.W.Va.); *Rowland Land Co. v. Peachtree Ridge Mining Co., Inc.*, 3:08-CV-00318 and 00319 (S.D.W.Va.); *O'Neal v. Speed Mining LLC*, 5:10-CV-00446 (S.D.W.Va.); *Rollins v. Monsanto Co.*, 3:09-CV-01459 (S.D.W.Va.); *Agee v. Monsanto Co.*, 3:09-CV-1336 (S.D.W.Va.); *Campbell v. Brook Trout Coal, LLC*, 2:07-0651 (S.D.W.Va.); *McNeal v. Nelson Bros., LLC*, 2:09-0306 (S.D.W.Va.); *Ohio Valley Environmental Coalition, Inc. v. U.S. Army Corps of Engineers*, 3:05-0784 (S.D.W.Va.); and *Hudson v. Pine Ridge Coal Co.*, 2:11-00248 (S.D.W.Va.).

[10] *Klein v. Citigroup, Inc.*, 1:11-CV-06853 (LBS) (S.D.N.Y.); *Donoghue v. Patriot Coal Corp.*, 1:10-CV-03343 (LTS) (S.D.N.Y.).

(S.D.W.Va.), and; *Ohio Valley Environmental Coalition, Inc. v. Hobet Mining, LLC*, 3:08-0088 and 3:09-1167 (S.D.W.Va.). (PFF, ¶¶ 84-92.)

In addition, Debtors filed actions for breach of contract against two customers, Bridgehouse Commodities Trading Limited and Keystone Industries, LLC, for defaulting on their contractual obligations to purchase coal from Debtors. Those actions deal with defaults that are cited by Debtors as immediately leading to the financial crisis that necessitated filing this chapter 11 case. Debtors filed these actions in West Virginia: *Patriot Coal Sales, LLC v. Keystone Industries, LLC*, 2:12-CV-01808 (S.D.W.V.), filed on June 1, 2012; *Patriot Coal Sales LLC v. Bridgehouse Commodities Trading Limited, et al.* (Circuit Court of Kanawha Co. W. Va.), filed on April 3, 2012. (PFF, ¶ 133.) Though the sale contracts in those cases are governed by New York law and the defendants are not based in West Virginia, Debtors commenced the actions in the Southern District of West Virginia because that it is where the alleged breaches occurred. (PFF ¶ 133.)

II. THE CASE SHOULD BE TRANSFERRED TO THE SOUTHERN DISTRICT OF WEST VIRGINIA FOR THE CONVENIENCE OF THE PARTIES

The Motion of the UMWA to transfer this case to West Virginia is not primarily about the convenience of the parties. Rather, it is about the interests of justice. Nevertheless, there are compelling reasons why this case should be transferred for the convenience of the parties.[11]

A. The Proximity of Creditors and of the Debtors to the Southern District of West Virginia Supports Transfer of the Cases

[11] The relevant factors to be considered by the Court in determining whether a case should be transferred for the convenience of the parties are: "(1) the proximity of creditors of every kind to the Court; (2) the proximity of the debtor to the Court; (3) the proximity of the witnesses necessary to the administration of the estate; (4) the location of the assets; and (5) the economic administration of the estate." *In re Enron Corp.* ("*Enron I*"), 274 B.R. 327, 343 (Bankr. S.D.N.Y. 2002); *see also In re Éclair Bakery Ltd.*, 255 B.R. at 141; *Landmark Capital Co.*, 19 B.R. 342, 347-48 (Bankr. S.D.N.Y. 1982). The last factor is the same as the "efficient administration of the bankruptcy estate" set forth in *Manville*, 896 F.2d at 1391.

The proximity of creditors to the Southern District of West Virginia and the minimal connection between Debtors and New York has been well documented, and there is no need to repeat it here. (PFF ¶¶ 1-16, 18-23, 28-36.) Bankruptcy cases have been transferred to districts in which more of the creditors were located than the district in which the petition was filed. *In re EB Capital Management LLC*, No. 11-12646 (MG), 2011 WL 2838115, at *4 (Bankr. July 14, 2011) (case transferred to South Dakota where four of the seven creditors were located); *In re Dunmore Homes, Inc.*, 380 B.R. 663, 676 (Bankr. S.D.N.Y. 2008) (case transferred to California where most creditors were located); *In re B.L. of Miami, Inc.*, 294 B.R. 325, 330-31 (Bankr. D. Nev. 2003) (case transferred to Miami where the vast majority of unsecured creditors were located); *Landmark Capital*, 19 B.R. at 348 (case transferred to Arizona where three of four creditors were located). Where, as here, the reorganization of Debtors depends on the resolution of labor and environmental liabilities, the proximity of those creditors should be given greater weight than the location of bondholders and lenders.

Furthermore, the location of a debtor's assets is most important where those assets constitute the value of the debtor's business. *Compare Dunmore Homes*, 380 B.R. at 677 (real estate assets were relevant in transferring case) *with In re Enron*, 274 B.R. at 347-48 (physical location of assets is not significant in a "financial" case where their location is less important); *see also B.L. of Miami*, 294 B.R. at 332 (case transferred to district where debtor's principal asset was located); *Landmark Capital*, 19 B.R. at 345, 348 (same). The principal assets which constitute the Debtors' value are the operating coal mines in West Virginia and nearby Kentucky.

In *B.L. of Miami*, 294 B.R. at 331, the court transferred the case from Nevada to Florida, stating: "Although Debtor was incorporated in Nevada on September 3, 1997, and thus may

technically 'reside' in Nevada, its primary place of business and its assets are in Florida." Similarly, in *Dunmore Homes,* 380 B.R. at 676, the court transferred the case from this District to California, stating: "While the Debtor is incorporated in New York, all of its remaining employees, sole shareholder, and the majority of its professionals are located in California."

Debtors argue that the fact that most of their assets—including over 47,000 acres of properties owned and leased, nine mining complexes, and millions of tons of coal reserves—are largely located in West Virginia should bear no weight in the venue transfer analysis because these factors are less crucial for chapter 11 debtors in reorganization. (Debtors' Obj., at 29-33.) Debtors cited cases which suggest that where the goal is rehabilitation and not liquidation, the location of a debtor's assets is not as pertinent a factor in the transfer analysis. However, Debtors themselves have acknowledged that in the context of the current market, their successful reorganization is highly questionable. Debtors have indicated that "[a]t this time, there is no assurance we will be able to restructure as a going concern or successfully propose or implement a plan of reorganization" and that "the Bankruptcy Case and weak industry conditions and financial markets raise substantial doubt about our ability to continue as a going concern." (PFF, ¶ 37.) Thus, the cases which minimize the importance of the location of the assets should be read in light of Debtors' admission that there is "substantial doubt" about their ability to stay in business. Also, "if a sale of the Debtor's assets became necessary, supervision would be easier" in the district where the assets are located. *See In re Seton Chase Associates, Inc.*, 141 B.R. 2, 6 (Bankr. E.D.N.Y. 1992). Notably, Debtors have indicated that they "may sell or otherwise dispose of or liquidate assets." (PFF, ¶ 38.)

B. The Proximity of Witnesses Necessary to the Administration of the Estate to the Southern District of West Virginia Supports Transfer of the Cases

Debtors' have repeatedly stated that their principal problems are with their legacy costs, including their labor and retiree costs and their environmental liabilities. (PFF ¶¶ 100-105, 123, 126-133.) This means that the issues that are the central focus of this entire proceeding are located in West Virginia and, to a lesser extent, in Kentucky. Therefore, the witnesses who will likely testify at any hearing will most likely be located where the work is performed and the facilities are located—in and near West Virginia. Witnesses who are likely to testify with regard to the central issues in this case are more proximate to West Virginia than to New York.

C. The Economic Administration of the Estate in the Southern District of West Virginia Supports Transfer of the Cases

Debtors argue that the cost of New York professionals, especially attorneys, traveling to West Virginia would impose additional prohibitive costs on the estate. (Debtors' Obj. at 22-24.) Convenience of travel, however, is not a factor that should outweigh the interest of justice. *In re Standard Tank Cleaning Corp.*, 133 B.R. 562, 567 (E.D.N.Y. Bankr. 1991). ("Although travel to this district would not pose any significant hardship to these creditors, it would nevertheless be preferable to have this case administered in the district where a vast majority of them are located.")

Debtors do not take into account the opportunities for reduced professional fees that would result from a transfer of this case to West Virginia. Simply stated—and as shown by the applications Debtors have filed seeking approval for retaining West Virginia counsel—prevailing attorneys' fees in West Virginia are much lower than attorneys' fees in New York. (PFF ¶¶ 134, 135.)

Judge Drain recognized the potential savings in transferring a case out of New York in *Winn-Dixie*. 4/12/ 2005 Tr. at 161:22 to 162:10. Debtors have an obligation to reduce the costs to the estate as much as possible, including legal fees. The U.S. Trustee's oversight of legal fees

provides further reason to believe that, to the extent possible, legal work should be shifted to the less expensive lawyers. Transferring this case to West Virginia increases the likelihood of such cost reductions.

Convenience of counsel is not a significant factor to be considered on a motion to change venue. Courts have found "either that it is not to be considered at all, that it is 'irrelevant' or 'improper' to consider, or that it is to be given very little weight by the district court." FPP, § 3850, 15 Fed. Prac. & Proc. Juris. § 3850 (3d ed.); *see also In re Seton Chase*, 141 B.R. at 6 ; *In re Standard Tank*, 133 B.R. at 567; *In re Centennial Coal, Inc.*, 282 B.R. 140, 146 (Bankr. D. Del. 2002) ("[T]he convenience of counsel is generally not relevant to the determination of whether to transfer venue of a proceeding pursuant to § 1412 …"); *In re Perry*, 02-13366, 2002 WL 31160132 (Bankr. W.D. Tenn. Sept. 26, 2002); *In re Capital Hotel Group, Inc.*, 206 B.R. 190, 193 (Bankr. E.D. Mo. 1997) (transferring case from the district where it was more convenient for counsel); *Matter of Wells*, 17 B.R. 531, 533 (Bankr. W.D. Mo. 1982) ("The fact that the petitioner's counsel is in Kansas City cannot constitute [a reason for transfer] for it is rudimentary that it is the convenience of the parties which is to be considered, rather than that of their counsel.") (emphasis added); *In re Standard Tank Cleaning Corp.*, 133 B.R. 562, 567 (E.D.N.Y. 1991).

CONCLUSION

Accepting Debtors' sweeping arguments about New York's convenience and its status as a financial hub would assign to New York the role of the nation's default forum for all large, complex bankruptcies. While we do not doubt the capacity of the Court to serve this role, Congress purposefully created separate bankruptcy courts in 94 different judicial districts, at least one in each state and territory, and gave each of them co-equal status. Citizens living and

working in these districts have a right to protection against actions that remove from their view the adjudication of disputes with tremendous implications for their lives and communities. Debtors cannot be permitted to curtail that right by creating facts to fit the law. The last minute creation of corporate entities for the sole purpose of obtaining technical compliance with the venue statute undermines the integrity of Congress' geographically based system and cannot seem right to thousands of interested parties with so much at stake. It is precisely the type of scheme § 1412 is intended to thwart. That is what the "interests of justice" means; that is what Judge Friendly was talking about, and that is exactly what Congress intended.

WHEREFORE, the UMWA respectfully requests that the Court grant the relief requested herein and such other and further relief as is just and proper.

Dated: October 5, 2012
New York, NY

Respectfully submitted,

KENNEDY, JENNIK & MURRAY, P.C.
Counsel for the United Mine Workers of America

/s/ Susan M. Jennik
By: Susan M. Jennik
Serge Ambroise
113 University Place, 7th floor
New York, NY 10003
Tel: (212) 358-1500
Fax: (212) 358-0207
sjennik@kjmlabor.com
sambroise@kjmlabor.com

Grant Crandall, General Counsel
Arthur Traynor, Staff Attorney
United Mine Workers of America
18354 Quantico Gateway Drive, Suite 200
Triangle, VA 22172
Tel: (703) 291-2429
Fax: (703) 291-2448
gcrandall@umwa.org
atraynor@umwa.org

EXHIBIT A

Digested 1/11

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

EXHIBIT
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C

In the matter of	)	
	)	
JITNEY JUNGLE STORES OF AMERICA, INC., et al.,	)	Case No. 99-3602 (MFW)
	)	
Debtors.	)	

United States Bankruptcy Court
824 Market Street - Sixth Floor
Wilmington, Delaware

Tuesday, December 7, 1999
9:40 a.m.

BEFORE: HONORABLE MARY F. WALRATH,
United States Bankruptcy Judge

TRANSCRIPT OF PROCEEDINGS

WILCOX & FETZER
1330 King Street - Wilmington Delaware 19801
(302) 655-0477

evidence to come in from Nabisco, I would like them to come put it in. I don't have that letter either.

MR. ZOTT: Well, it is okay, Judge. It is right here. Anyway, only point I am making, when you look at the factor you should look at where they are headquartered because the question is, are they big enough that they can handle going to Delaware or Jackson, and they may only have a satellite office, that's the proper way to look at it.

Judge, thank you. I have nothing further. Thank you very much for your time. I appreciate it.

THE COURT: Anyone else?

Let me make my ruling. I agree with the debtor that 1408 (a) does not bar even a nonoperating company that has no assets from incorporating. If P&S was incorporated in Delaware it had the right to file bankruptcy in Delaware. The stipulation of facts shows that the incorporation was, in fact, done in Delaware in sufficient time to permit a filing of bankruptcy.

However, finding that it is not illegal does not establish that it is fair, and this type of a tactic I think not only hurts the reputation of counsel but hurts the reputation of the court. For that reason I find it fails the 1412 interest of justice prong. It is

prong. It is an alternative.

Although I also, for the reasons stated below, find the convenience of the parties does not support venue here. I think that it is an extremely dangerous precedent to allow counsel to incorporate a company in Delaware solely to get venue here for bankruptcy proceeding. I think the facts of this case support a finding that that is what occurred here. The suspicious timing of the forming of the corporation almost one year after the operations people recommended it, apparently, because of the inactivity of senior management, I conclude that senior management had determined that separate incorporation was not necessary or not of such a priority that it had to be done before the company even opened up its first operation.

The business reasons for incorporating would have militated in favor of incorporating before the operations were opened to avoid the liabilities, as counsel for Alabama Power suggests.

So I find that there was not a legitimate business reason for incorporating here in Delaware, and that the sole reason to incorporate here, based on the timing and the factors and the testimony, was simply to allow venue of the bankruptcy proceeding.

While the debtor is correct that the parents could have filed a bankruptcy in Delaware because they are Delaware corporations, apparently the debtor made a decision not to do so, for whatever business reason or other reason. But that is not before me.

With respect to the convenience of the parties, let me address that factor. I believe that all of the factors that the courts look to regarding the convenience of factors seem to weigh in favor of transfer to Jackson, Mississippi, with the exception of the location of the professionals and the largest creditors, both the DIP lenders and the bondholders, but for the same reason as I stated in TransTexas, I believe that the convenience factor has to be determined with an eye towards permitting representation of bankruptcy cases by all entities.

The largest creditors in this case and the debtor itself has national bankruptcy counsel, who are very familiar and able to travel nationally and represent their clients wherever the bankruptcy case may be filed.

The small creditors in this case do not have that capability. Both the size of their claim, the nature of their claim and their interest in this bankruptcy case I think transcends the debtors' argument

that they are simply a small creditor who won't participate in the bankruptcy.

The Mississippi and southeast United States creditors consist of landlords, equipment lessors, employees, local trade vendors, none of whom, if the case remains here, will have a voice in this bankruptcy proceeding. If they chose not to travel to Jackson, Mississippi, at least it won't be my fault.

With respect to the other factors, virtually all of the debtors' assets are located in the southeast, all the business operations are in the southeast, all the employees are in the southeast, all of their physical assets, their books and records, witnesses and documents are located closer to Mississippi than to here.

With respect to the issue of the travel plans and convenience, I agree with counsel for Alabama Power, it is a two-way street. While transfer of venue to Mississippi requires that certain counsel and other parties must travel to Mississippi, leaving it here means that all of the debtors' witnesses must travel the reverse route, which would be equally inconvenient. So I think that that factor is at most awash.

In addition, considering the state of the

proceedings, we are in the early stage of these bankruptcies cases, it is less than two months since the case was filed, other than the SUPERVALU issue, which I will get to, there is not a pressing need to retain the case here for consideration of any pending matter. The DIP financing is in place, the debtors' operations I assume are stable enough that transfer will not cause a major disruption.

With respect to the argument that the Christmas season is the debtors' large season, I don't think that transfer of venue of the bankruptcy case is going to have any negative effect on operations. Again, the witnesses that would be coming from Mississippi will be saved that two-day flight time, and I think they are more crucial to the operations than counsel.

With respect to the arguments that the debtor is a national company, this is a national case, I don't give it much weight. Again, in considering the convenience of the parties, I think it is important in any bankruptcy case that all parties have a voice in the bankruptcy and, therefore, I am persuaded to go with the small creditors' rights to assure that not only they are adequately represented but that this Court is not besmirched by accepting every case that gets filed here

if it is not appropriate.

With respect to the SUPERVALU issue, let me hear from the debtor as to the alternatives suggested. Grant on a provisional basis with a right of the Mississippi court to vacate it after full hearing or retain jurisdiction for a short period of time? I am not sure what Alabama's position would be on that either.

MR. STEMPEL: Why don't you address first.

MR. HAMMOND: If I understand it correctly, I think the motion for relief is for a noticing provision, and I think provisionally granting would be good, and if the debtor would consent and the committee would consent it could be granted today, I would think. That's up to them.

Your Honor, our position would be we want to probably take the conditional in favor of SUPERVALU because I thought their argument was reasonable.

MR. STEMPEL: Your Honor, the debtor, just from the perspective of full analysis and discussion with the committee, I don't believe we have a problem with provisional entry of the order, if the parties have the right to object to it by a date certain. I think that works.

I would raise one related issue which