IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re:	
PATRIOT COAL CORPORATION, *et al.*,	**Chapter 11** **Case No. 12-12900**
	(Jointly Administered)
Debtors.	**[D.I. 127, 287, 406, and 425]**

OPPOSITION OF THE FIRST OUT DIP AGENT TO (I) MOTION OF THE UNITED MINE WORKERS OF AMERICA TO TRANSFER THE CASES TO THE SOUTHERN DISTRICT OF WEST VIRGINIA, (II) SURETIES' MOTION TO TRANSFER JOINTLY ADMINISTERED CASES TO THE SOUTHERN DISTRICT OF WEST VIRGINIA, AND (III) THE UNITED STATES TRUSTEE'S MOTION TO TRANSFER VENUE OF THESE CASES IN THE INTEREST OF JUSTICE, AND JOINDER OF THE FIRST OUT DIP AGENT IN THE DEBTORS' MEMORANDUM OF LAW IN OPPOSITION TO THE FOREGOING MOTIONS

For the reasons set forth herein, Citibank, N.A., as administrative agent (the "***First Out DIP Agent***") for the new money lenders and letter of credit issuers (the "***First Out DIP Lenders***") under that certain Superpriority Secured Debtor-in-Possession Credit Agreement, dated as of July 9, 2012, (as amended from time to time, the "***First Out DIP Credit Agreement***"), pursuant to which the First Out DIP Lenders have agreed, subject to the terms set forth therein, to provide certain debtor in possession financing in a total amount of $500 million, supports the Debtors' choice of venue in this Court. The First Out DIP Agent thus opposes the motions (collectively, the "***Motions***") filed by (i) the United Mine Workers of America [D.I. 127] (the "***Union***"), (ii) Argonaut Insurance Company, Indemnity National Insurance Company, US Specialty Insurance, and Westchester Fire Insurance Company [D.I. 287] (collectively, the "***Sureties***"), and (iii) the United States Trustee for the Southern District of New York [D.I. 406]

(the "***U.S. Trustee***" and, together with the Union, the Sureties, and any other party that files a joinder to the Motions, the "***Movants***"), seeking a transfer of venue of these chapter 11 cases (the "***Cases***") from this Court to the United States Bankruptcy Court for the Southern District of West Virginia or to another court. In connection with its opposition to such Motions, the First Out DIP Agent joins in the Debtors' opposition to the Motions [D.I. 425] (the "***Debtors' Opposition***"), and further states as follows:

PRELIMINARY STATEMENT

1. The First Out DIP Lenders, having provided hundreds of millions of dollars of debtor in possession financing (the "***DIP Financing***") in these Cases, have a vested interest in the economic and efficient administration of these Cases. The First Out DIP Agent, on behalf of the First Out DIP Lenders, thus supports the election of Patriot Coal Corporation and its affiliated debtors (the "***Debtors***") to file these Cases in the Southern District of New York. Maintaining venue in the Southern District of New York will preserve estate resources for the benefit of all stakeholders. The Debtors' Opposition to the Motions persuasively argues that, unlike the Southern District of West Virginia—or any other forum—the Southern District of New York is convenient to those parties and individuals that will be the most frequent and regular participants in hearings in these Cases, namely, the representatives and advisors of the Debtors and their significant creditors, all of whom are either located in or have convenient access to New York City, and that significant additional costs, including increased travel expenses and professional fees, would therefore be incurred were the Cases transferred to another court. Notably, the Union's own counsel is based in New York and would be required to travel significant distances to appear in West Virginia.

2. In light of these facts, the Movants have failed to meet their heavy burden of demonstrating that the Debtors' venue choice should be displaced in favor of a forum that the Movants prefer. The well-settled standards applicable to a Court's exercise of discretion on a venue transfer motion put the burden on the movant to demonstrate that only by transferring the case to an alternative forum can significant inconvenience for the parties be avoided or the interest of justice otherwise be served. At best, the Movants have established that, were the Motions granted, the burden of any inconvenience would shift from the minority of affected creditors to the substantial majority of all parties in interest. In light of the fact that courts consider the interests of economic and efficient administration of the estates the most important factor in determining whether the interest of justice or the convenience of the parties demands a transfer of venue, the Movants' abject failure to introduce any evidence that transferring venue would advance such interests is a glaring omission, and the Motions should be denied on that basis alone.

3. The First Out DIP Agent, which is headquartered in New York and is represented in these Cases by New York counsel, respectfully submits that its circumstances serve as a prime example of why transferring venue would serve none of the policies underlying the venue transfer statute. Any alternative forum would be less convenient for the First Out DIP Agent, whose role as agent to the First Out DIP Lenders demands that it be a frequent and consistent participant in most, if not all, aspects of these Cases. Certainly, the First Out DIP Agents' fees and expenses would increase, and such increase would be borne by the estates.

4. Finally, in asserting that the Debtors have few, if any connections, to New York, the Movants ignore the fact that the DIP Financing is a significant financing transaction that was negotiated within New York's borders, by entities that do business in New York, and pursuant to

agreements that are governed by New York law. Because neither the interest of justice nor the convenience of the parties would be advanced by transferring these Cases to an alternative forum, the First Out DIP Agent respectfully requests that this Court deny the Motions in their entirety and that the Cases remain to be administered in this Court.

OBJECTION

5. As set forth in the Debtors' Opposition, their basis for venue is the domicile of certain subsidiaries, which is consistent with a plain reading of 28 U.S.C. § 1408. Indeed, the Movants do not dispute that venue is appropriate in this district as a matter of law. It is well settled that "a corporation's domicile is generally held to be its state of incorporation." *In re Dunmore Homes, Inc*., 380 BR 663, 670 (Bankr. S.D.N.Y. 2008). Two of the Debtors are organized under the laws of the State of New York: Patriot Beaver Dam Holdings, LLC and PCX Enterprises, Inc. (Declaration of Mark N. Schroeder Pursuant to Local Bankruptcy Rule 1007-2, dated July 9, 2012 ("***Schroeder Decl.***") ¶ 7.) The remaining Debtors were appropriately brought into the Southern District of New York via the affiliate provisions of the Judicial Code.[1] Accordingly, venue of the Debtors' chapter 11 cases is proper in the Southern District of New York.[2]

[1] In addition to the grounds provided under section 1408(1) of the Judicial Code, section 1408(2) provides that a debtor's chapter 11 case may also be commenced where there is already a pending case under title 11 for an affiliate of the debtor. Thus, and because Patriot Coal Corporation is the direct or indirect parent of each of the Debtors, (*See* Schroeder Decl. ¶ 16), including the Debtors that are New York Corporations, venue in the SDNY is proper for all of the Debtors.

[2] In their Opposition, the Debtors note that Congress has considered, but has never enacted, amendments to the bankruptcy venue statute that would eliminate the ability for debtors to engage in what is now the common practice of conducting a bankruptcy case in a forum far away from the corporate enterprise's nerve center or operations in a jurisdiction in which a member of the corporate family happens to be domiciled. The First Out DIP Agent respectfully requests that this Court decline the Movants' invitation to read into the venue statute a requirement that Congress has thus far always rejected, especially where doing so would unnecessarily deplete the estates' resources to the detriment of all stakeholders.

6. Where venue is proper, "a debtor's choice of forum is entitled to great weight." *In re Enron Corp*., 274 BR at 342 (*citing In re Ocean Properties of Delaware, Inc*., 95 B.R. 304, 305 (Bankr. D. Del. 1988)). Although 28 U.S.C. § 1412 permits a court, in its discretion, to transfer a case if it determines that such transfer is "[(i)] in the interest of justice or [(ii)] for the convenience of the parties," neither consideration exists here. Rather, the facts of these Cases establish that the Southern District of New York is a convenient and fair venue, and that there is no alternative forum, particularly not the Southern District of West Virginia, that is any more significantly convenient or fair as to justify a venue transfer.

7. Where a debtor's chosen venue is proper, "transferring venue of a bankruptcy case is not to be taken lightly." *In re Enron Corp*., 274 BR 327, 342 (Bankr. S.D.N.Y. 2002) (*citing In re Commonwealth Oil Refining Co., Inc.*, 596 F2d 1239, 1241 (5th Cir 1979)). In fact, a debtor's choice of venue should be disturbed only when the balance weighs heavily in favor of transfer. *In re Enron Corp*., 274 BR at 342-43 (*citing In re Garden Manor Assoc*., L.P., 99 BR 551, 555 (Bankr. S.D.N.Y. 1988)). Indeed, "[w]here a transfer *would merely shift the inconvenience from one party to the other*, or where after balancing all the factors, the equities leaned but slightly in favor of the movant, the [debtor's] choice of forum should not be disturbed." *Id.* (emphasis added). Thus, the movant, who bears the burden of establishing by a preponderance of the evidence that a venue transfer is warranted,[3] must do much more than simply establish that the proposed alternative forum has some connection to the bankruptcy cases. Rather, the movant must establish that the debtors' chosen forum is *significantly* less

[3] In the context of a motion to transfer venue, it is the movant's burden to show, by a preponderance of the evidence, that the transfer of venue is warranted. *See*, e.g., *In re Enron Corp*., 274 B.R. 327, 342 (Bankr. S.D.N.Y. 2002); *see also Gulf States Exploration Co. v. Manville Forest Prods. Corp. (In re Manville Forest Products Corp.)*, 896 F.2d 1384, 1390 (2d Cir.1990); *In re Eclair Bakery Ltd.*, 255 B.R. 121, 141 (Bankr. S.D.N.Y. 2000); *In re Suzanne de Lyon, Inc.*, 125 B.R. 863, 868 (Bankr. S.D.N.Y. 1991); *In re Garden Manor Assoc., L.P.*, 99 B.R. 551, 553 (Bankr. S.D.N.Y. 1988).

convenient than such alternative forum and that, for that reason or some other reason, the interests of justice require transfer. *In re Onco Inv. Co.*, 320 B.R. 577, 579 (Bankr. D. Del. 2005).

8. In addition to the policy rationale for preferring the forum in which a debtor chose to file its case, the burden allocation is also grounded in practical considerations. At this point in the Cases, this Court has already approved the Debtors' postpetition financing and in the process become intimately familiar with the complex terms upon which the financing was extended and has also heard numerous other procedural and substantive motions, thereby becoming versed in the Debtors' needs and operations as well as the views expressed by other parties in interest. Transferring venue at this point in the Cases would result in cost and delay, to the detriment of all stakeholders, as a new court familiarizes itself with the Debtors' businesses, the terms of the postpetition financing, the terms of the various procedural and substantive orders that have been entered in these Cases, and all other events that have already transpired.

9. In considering whether a movant has met its burden, courts generally look to "whether transfer of venue will promote the efficient administration of the estate, judicial economy, timeliness, and fairness. . . ." *In re Enron Corp.*, 274 BR at 343 (*citing In re Manville Forest Products Corp.*, 896 F2d 1384, 1391 (2d Cir 1990)). In considering the convenience of the parties, Courts weigh a number of factors, such as: (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 assets; (5) the economic administration of the estate; and (6) the necessity for ancillary administration if liquidation should result. *In re Enron Corp.*, 274 BR at 343 (*citing Commonwealth of Puerto Rico v. Commonwealth Oil Refining Co., Inc. (In re Commonwealth Oil Refining Co., Inc.)*, 596 F.2d

1239, 1241 (5th Cir. 1979)). Case law has established that "the factor given the most weight is the promotion of the economic and efficient administration of the estate." *In re Enron Corp.*, 274 BR at 343.

10. In the Debtors' Opposition, they persuasively argue that the Movants have failed to meet their burden of establishing that consideration of the foregoing factors warrants a venue transfer, and the First Out DIP Agent joins in the Debtors' Opposition in its entirety, including with respect the application of each of the foregoing factors to these Cases. With respect to certain of the above-listed factors, the First Out DIP Agent further submits as follows:

(a) Economic and Efficient Administration of the Estates

11. In the first instance, those parties with the greatest economic interest in these Cases are not seeking to transfer venue. Pursuant to the First Out DIP Credit Agreement, the First Out DIP Lenders have agreed, subject to the terms set forth therein, to provide debtor in possession financing in a total amount of $500 million which has already been funded in full. The First Out DIP Agent, as agent to the First Out DIP Lenders, thus has a vested interest in the economic and efficient administration of the Debtors' estates, and consideration of this factor is its primary rationale for opposing the relief requested in the Motions. The Second Out DIP Lenders (as defined in this Court's orders approving the DIP Financing) are similarly situated and, upon information and belief, the Second Out DIP Agent will also oppose the Motions. And not just the Debtors' secured creditors request that these Cases remain before this Court. Indeed, neither the official committee of unsecured creditors in these Cases (the "***Creditors' Committee***") nor any of the Debtors' 50 largest unsecured creditors has filed or joined in any motion to transfer venue from the Southern District of New York.

12. It is well established that consideration of whether a transfer will result in a significantly more economic and efficient administration of the Debtors' estates is of paramount importance to the Court's analysis. *See, e.g., In re Enron Corp.*, 274 BR at 343; *In re Commonwealth Oil Refining Co., Inc.*, 596 F.2d at 1247; *Huntington National Bank v. Indus. Pollution Control, Inc., (In re Indus. Pollution Control, Inc.),* 137 B.R. 176, 182 (Bankr. W.D. Pa. 1992). As more fully briefed in the Debtors' Opposition, here, transfer would clearly increase the costs of administration. The individuals that will most frequently appear in hearings in these Cases, namely, the parties' advisors, almost uniformly are located not in Southern District of West Virginia or any other district, but in New York City. Specifically, the representatives for the Debtors' significant creditors are also either headquartered in or maintain significant corporate offices in New York City, including: the First Out DIP Agent, Bank of America, the administrative agent (the "***Prepetition Agent***") for Patriot Coal Corporation's prepetition secured credit facility; the administrative agent with regard to the Debtors' "second out" debtor in possession financing (the "***Second Out DIP Agent***"); and each of Wilmington Trust Company and U.S. Bank National Association, the indenture trustees (the "***Indenture Trustees***") for the Debtors' $450 million in principal amount of prepetition unsecured notes. In addition, each of the Debtors, the Creditors' Committee, the Prepetition Agent, one of the Indenture Trustees, the First Out DIP Agent, the Second Out DIP Agent, and even the Union and certain pension plans related to the Union, among others, has retained and is represented in these Cases by New York counsel as primary counsel (not simply local counsel), as reflected in the notices of appearance that each such party has filed with this Court. [D.I. 61, 71, 82, & 152.] Thus, most if not all of the individuals that will most frequently participate in hearings before this Court are located in this district.

13. In contrast, as explained more fully in the Debtors' Opposition, transferring these Cases to the Southern District of West Virginia or any other forum would result in excessive and unnecessary costs related to extensive traveling to and from the Southern District of West Virginia for the lawyers, financial advisors, and creditors that can be expected to attend each of the many hearings to occur in these Cases. Indeed, were the Motions granted, the costs associated with adjudication of these Cases in the Southern District of West Virginia could increase administrative expenses associated with the Debtors' reorganization that would be economically detrimental to both those efforts and the prospective recoveries for creditors in the cases. These crucial facts make New York the prudent and appropriate venue choice for these Cases.

(b) Proximity of Creditors

14. As is the case for many parties in interest in these Cases, the Southern District of New York is the most convenient forum for the First Out DIP Agent, which is headquartered in New York City and represented in these Cases by New York counsel. At the outset of the negotiations regarding the Debtors' postpetition financing, weeks prior to the Debtors' filing of their chapter 11 petitions, the First Out DIP Agent learned that the Debtors intended to file the Cases in the Southern District of New York. Accordingly, the parties' understanding regarding venue for these Cases is reflected in the First Out DIP Credit Agreement, which defines "Bankruptcy Court" as the "United States Bankruptcy Court for the Southern District of New York" and thus contemplates venue in this Court. (First Out DIP Credit Agreement, §§ 1.01; 12.14(b).)

15. Further, because the First Out DIP Agent and its counsel are located in New York City, venue in the Southern District of New York is both more convenient for the First Out DIP

Agent and more cost effective for the Debtors' estates, which bear the burden of paying the First Out DIP Agents' fees and expenses. (*See* Final DIP Order ¶ 6(f)(iii) (providing that the Debtors' must pay the First Out DIP Agents' fees and expenses, including those incurred by the professionals it retains).) The First Out DIP Agent's New York counsel has now worked for several months to become intimately familiar with the Debtors' businesses and assets and to fully understand the legal issues particular to the collateral package securing the Debtors' obligations under the First Out DIP Credit Agreement. The First Out DIP Agent anticipates that both it and its counsel will continue to actively participate in many aspects of these Cases, both in and out of court. In addition, pursuant to the First Out DIP Credit Agreement, the First Out DIP Lenders have significant rights with respect to the Debtors' assets, including their numerous contracts and leases, such that the First Out DIP Agent and its counsel must by necessity actively monitor and, if necessary, participate in hearings or other proceedings related to attempts by the Debtors to sell such assets or to assume, assign, or reject such contracts and leases. Similarly, the First Out DIP Agent and its counsel will observe and participate if necessary in hearings and other proceedings related to the Debtors' negotiation and resolution of significant claims in these Cases, as the resolution of such claims may impact the First Out DIP Lenders' financial interests in recovering the funds they have loaned to the Debtors' estates as well as the likelihood that the Debtors can be rehabilitated as a standalone going concern. To the extent the relief requested in the Motions is granted, the First Out DIP Agent would be required to expend the time and resources required to ensure that local counsel is informed with respect to the Debtors' businesses and the Cases in general, all at the estates' expense.

16. The First Out DIP Agent submits that the Southern District of New York is the most convenient and cost effective forum for many other parties that will frequently participate

in these Cases as well, as evidenced by the fact that the negotiations regarding the Debtors' postpetition financing primarily occurred in New York City. These negotiations typically included the Debtors' New York counsel and their New York-based financial advisors, the First Out DIP Agent and its New York counsel, and the Second Out DIP Agent, which maintains a significant corporate office in New York City, and their New York counsel, with occasional teleconferences when necessary with members of the Debtors' management who are located out-of-state. The First Out DIP Agent submits that the concentration of the postpetition financing negotiations in New York City is indicative of the location in which all of the significant aspects of these Cases—including, for example, any plan of reorganization—are likely to be negotiated and resolved.

(c) New York State's Significant Connections to These Cases

17. Although the First Out DIP Agent does not dispute that the Debtors have operations in West Virginia, among other states, it respectfully requests that this Court also take New York's significant connections to these Cases into account in connection with its consideration of whether the Movants have met their burden of establishing that it would be unjust to proceed with these Cases in this Court. These Cases involve, among other contracts and agreements governed by New York law, a significant financing transaction that was negotiated primarily within New York's borders, that is governed by New York law, and that involved, in roles as agents, arrangers, and lenders, several entities that do business in New York and employ New York residents. Thus, any consideration of whether venue in this Court is just must take into account the fact that New York has significant connections to these Cases.

CONCLUSION

18. The First Out DIP Agent stands prepared to participate in the Debtors' chapter 11 cases, wherever they are located. However, these Cases bear significant connections to the

Southern District of New York and there are substantial cost efficiencies that can be achieved by proceeding in this Court. In contrast, there is a lack of any clear concentrated presence of the Debtors, their creditors, or interested parties in the Southern District of West Virginia or any other jurisdiction. Accordingly, the Motions fall far short of satisfying the Movants' heavy burden of demonstrating that this Court should override the presumption in favor of the Debtors' venue choice. A venue transfer would merely shift inconveniences among parties in interest in these Cases, rather than result in any significant overall benefit, and as such a transfer is very likely to drastically increase the amount of professional fees and expenses to be incurred in these Cases to the detriment of all stakeholders. Accordingly, the First DIP Out Agent respectfully submits that a transfer would neither further the interest of justice nor advance the convenience of the parties, and respectfully requests that the Motions be denied in their entirety.

WHEREFORE the First Out DIP Agent respectfully requests that this Court deny the Motions and grant such other and further relief as it deems just and appropriate.

Dated: August 27, 2012
New York, New York

/s/ Joseph H. Smolinsky
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