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Hearing Date and Time:
September 11, 2012, at 1:30 p.m.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

UNITED STATES TRUSTEE'S OMNIBUS REPLY TO OBJECTIONS TO UNITED STATES TRUSTEE'S MOTION, PURSUANT TO 28 U.S.C. § 1412 AND FED. R. BANKR. P. 1014(a)(1), TO TRANSFER VENUE OF THESE CASES IN THE INTEREST OF JUSTICE

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

Tracy Hope Davis, the United States Trustee for Region 2 (the "United States Trustee"), by and through her counsel ("UST Counsel"), respectfully submits this omnibus reply (the "UST Reply") to the objections (the "Objections") of: (i) Patriot Coal Corporation ("Patriot Coal") and its affiliated debtor entities (collectively, the "Debtors"), (ii) Citibank, N.A., as administrative agent (the "First-Out DIP Agent") for the new money lenders and letter of credit issuers under that certain Superpriority Secured Debtor-in-Possession Credit Agreement, dated as of July 9, 2012, (iii) the Official Committee of Unsecured Creditors (the "Creditors' Committee") and (iv)

the joinders of various parties (collectively, the "Joinders"),[1] to the United States Trustee's motion (the "UST Venue Motion"),[2] pursuant to 28 U.S.C. § 1412 and Rule 1014(a)(1) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), to transfer venue of these cases in the interest of justice.[3] (ECF Nos. 424, 425, 427, 437 and 456). In support hereof, the United States Trustee states:

INTRODUCTION

The Debtors and the Creditors' Committee have failed to refute the central argument made by the United States Trustee—namely, that the eve of bankruptcy creation of two affiliates in New York by the Debtor's bankruptcy lawyers was a transparent and improper attempt to

[1] The parties that joined in the Objections include: Bank of America, N.A., as "Second Out DIP Agent," American Freedom Innovations, LLC, Penn Virginia Coal Company, Penn Virginia Operating Co., L.L.C., K-Rail LLC (f/k/a Kanawha Rail Corp.) and Suncrest Resources LLC (successor in interest to Penn Virginia Resource GP, LLC, and Penn Virgin), Pocahontas Land Corporation, Shepard Boone Coal Company, LLC, WPP LLC and ACIN LLC (the "NRP Creditors") and Southern Land Company Limited Partnership, Dickinson Properties Limited Partnership, Chesapeake Mining Company, The Imperial Coal Company, Quincy Center, Quincy Coal Company, Branch Banking & Trust Company, Nelle Ratrie Chilton, and Charles C. Dickinson, III, Successor Trustees of the C. C. Dickinson Testamentary Trust, Horse Creek Land & Mining Company, and Payne-Gallatin Company. See ECF Nos. 428, 434, 437, 456, 460 and 468.

[2] Several parties have joined in the UST Venue Motion, including: The United Mine Workers of America 1992 Benefit Plan, the United Mine Workers of America 1993 Benefit Plan, the United Mine Workers of America 1974 Pension Trust, the United Mine Workers of America Combined Benefit Fund, CompassPoint Partners, L.P., Frank Williams and Eric Wagoner. See ECF Nos. 423 and 433.

[3] The United Mine Workers of America (the "UMWA" or the "Union") and Argonaut Insurance Company, Indemnity National Insurance Company, US Specialty Insurance, and Westchester Fire Insurance Company (collectively, the "Sureties") each filed motions (the "UMWA Venue Motion" and the "Surety Venue Motion", and together with the UST Venue Motion, the "Venue Motions") to transfer venue of these cases to the Southern District of West Virginia. (ECF Nos. 116, 127 and 287). Some of the parties that filed joinders in opposition to a change in venue directed their oppositions solely at the UMWA Venue Motion and the Surety Venue Motion, but "not" the UST Venue Motion. See ECF 419, 420, 431, 454, 465 and 472.

manufacture venue. Instead, their primary defense relates to a perverse sense of "convenience of the parties." The proponents of New York venue elevate the professionals to party status and demote employees and retirees to a status less than that of full-fledged parties who have the right to be heard. Incredibly, it is argued that the Debtors', the Creditors' Committee's, and the large lenders' professionals should not have to travel in 37-seat aircraft that make a stop, and that all others outside of New York should be satisfied to appear by videoconference. The objecting parties do not explain why those inconveniences are not significant obstacles for employees and retirees whose very livelihoods are at stake. Furthermore, the objecting parties argue that the cost of airfare between New York and West Virginia is too steep for the estates to bear, but they do not explain how these costs could possibly be within the budgets of employees and retirees.

The insensitivity of this argument is matched only by its legal insufficiency. Convenience, no matter how or by whom defined, does not defeat the interest of justice. That is, the interest of justice is an independent basis on which to challenge venue under Section 1412, and it can be determinative of venue even when the convenience of the parties suggests another result. Manufactured venue violates the interest of justice, and this Court should transfer these cases to another district where venue is proper.

FACTS

1. The pertinent venue facts are on pages 3-5 of the UST Venue Motion, which are incorporated by reference. See ECF No. 406. Supplemental facts learned since the UST's Venue Motion was filed are below.

The Section 341(a) Meeting

2. On August 23, 2012, Mark N. Schroeder, the Senior Vice President and Chief Financial Officer of the Debtors, testified under oath as the Debtors' representative at the

meeting of creditors (the "341(a) Meeting"). See Supplemental Declaration of Andrea B. Schwartz dated August 31, 2012 ("Supplemental Schwartz Declaration"), at ¶ 2. A copy of the Transcript of the Section 341(a) Meeting in the Matter of Patriot Coal Corporation is annexed to the Supplemental Schwartz Declaration at **Exhibit A.** See Supp. Schwartz Decl., Ex. A, Tr. 5:3–5-17.

3. Davis, Polk and Wardwell, LLP ("Davis Polk"), the Debtors' retained counsel, represented Mr. Schroeder, in his capacity as the Debtors' Chief Financial Officer, at the 341(a) Meeting. Id., Tr. 4:20- 5:2.

4. Mr. Schroeder stated that he oversees and supervises the functions of various departments within the Patriot Coal enterprise, including: "the treasury function, investor relations, tax, IT, and materials management." Id., Tr. 13:20-14:9. He also represented that he was involved in the decision-making process with respect to the Patriot Coal bankruptcy filings, which he estimated began within three months prior to the Petition Date. Id., Tr. 18:9-18:22 and Tr. 18:17-19:10.

5. When asked about PCX Enterprises, Inc. ("PCX") and Patriot Beaver Dam Holdings, LLC ("Patriot Beaver"), the two "New York" affiliates of Patriot Coal, Mr. Schroeder stated that he did not believe that either company existed before the company began discussing reorganization. Id., Tr. 41:4-41:10.

6. Mr. Schroeder also testified with respect to PCX that:

(i) he did not believe PCX had any business operations, id.,Tr. 22:7-23:10;

(ii) he did not believe that PCX had any employees, id., Tr. 23:11-23:12;

(iii) he was not aware of any offices that PCX has in New York, id., Tr. 25:20-25:22 and;

(iv) the only assets of which he was aware consisted of $98,000.00 of cash held at Capital One Bank at 1432 Second Avenue, New York, New York. Id., Tr. 24:11-25:6. Mr. Schroeder testified that he did not know when the bank account was opened, what the purpose of the account was or the identities of the signatories on the account. Id., Tr. 25:7-25:19.

7. In response to questions concerning Patriot Beaver, Mr. Schroeder testified that

(i) he did not believe that Patriot Beaver had any employees, id., Tr. 39:1-39:3;

(ii) he did not know the business in which Patriot Beaver is engaged, id., Tr. 40:18-40:20;

(iii) he was not aware of any offices that Patriot Beaver had in New York, id., Tr. 39:4-39:6 and

(iv) he could not recall any of Patriot Beaver's assets. Id., Tr. 38:10-38:15.

8. When asked at the 341(a) Meeting about the statement contained in his declaration that was submitted to the Court in support of the Debtors' "first day" motions, that Patriot Coal's "principal assets" are located in New York, see Declaration of Mark N. Schroeder Pursuant to Local Bankruptcy Rule 1007 dated July 9, 2012 (the "Schroeder R. 1007 Declaration"), at ¶ 7, **Mr. Schroeder was unable to identify one asset located in New York.** Supp. Schwartz Decl., Ex. A, Tr. 39:17-40:12. (emphasis added).

9. The 341(a) Meeting was not concluded, and has been adjourned sine die because, among other things, the Debtors have not yet filed their schedules of assets and liabilities or statements of financial affairs (collectively, the "Schedules").[4] Id. at ¶ 12.

[4] By Order dated July 12, 2012, the Debtors obtained an extension of time within which to file their Schedules with the Court through August 20, 2012. (ECF No. 53). On August 20, 2012, the Debtors filed a notice (the "Notice") of a proposed order further extending their time to file the Schedules through September 5, 2012. (ECF No. 397). The Notice provides that the order would be submitted to the Court for signature on August 27, 2012, if no objections were filed. See id. A review of the Court's docket reveals that, as of the date hereof, the Court has not

10. A hearing to consider the UST Venue Motion is scheduled for September 11, 2012, at 1:30 p.m. (ECF No. 409).

REPLY

A. The Debtors Do Not Dispute That They Manufactured Facts on the Eve of Bankruptcy to Create Venue in the Southern District of New York.

In their opposition, the Debtors never rebut or refute the dispositive issue on this venue motion—that they manufactured venue by incorporating two entities in New York just weeks before filing. Indeed, Debtors essentially ignore the singular point of the United States Trustee's objection and focus instead almost exclusively on convenience factors irrelevant to the interest of justice prong upon which the UST Venue Motion is based. The absence of specific evidence otherwise in either the Schroeder Rule 1007 Declaration or petitions initially led to the overwhelming inference that venue was manufactured solely for the convenience of the professionals and larger institutional creditors and prompted the UST Venue Motion. Debtors' silence in their opposition on this central fact elevates the overwhelming inference to an inescapable conclusion.

Mr. Schroeder's sworn testimony at the 341(a) Meeting only buttresses the United States Trustee's contention of manufactured venue. Mr. Schroeder testified that he did not believe that either of the two New York entities were incorporated before the Debtors began considering a bankruptcy reorganization. See Supp. Schwartz Decl., Ex. A, Tr. 41:4-41:10. Upon information and belief, these two entities were created and formed under New York law by Debtors' bankruptcy counsel. In addition, Mr. Schroeder acknowledged that PCX and Patriot Beaver are each non-operating affiliates with no business operations or employees. Id., Tr. 22:7-38:10-

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entered the proposed and the Debtors have not filed their Schedules with the Court. Supp. Schwartz Decl. at ¶ 12.

38:15. Further, Mr. Schroeder stated that he did not believe either company had offices in New York. Id. In fact, the only asset that Mr. Schroeder had knowledge of at the 341(a) Meeting for either of these companies was one bank account for PCX consisting of $98,000.00 held by Capital One Bank in New York City. Id., Tr. 24:11-25-6.[5] It is fair to conclude that the primary purpose for which PCX and Patriot Beaver were formed was to gain access to this Court by creating facts to manipulate the venue requirements of Section 1408. But Section 1412 limits a debtor's discretion on venue, particularly when that discretion is an abuse of the bankruptcy system.

B. Section 1412 Prohibits the Debtors' Abuse of the Venue Statute.

Section 1412's "interest of justice" standard is an important statutory check on abusive or unfair venue even if a debtor satisfies the venue requirements of Section 1408.[6] The Debtors argue that the apparent "loophole" in Section 1408 permits them to manufacture venue, and that the only way that their misuse of the statute can be corrected is by an act of Congress. The United States Trustee agrees that Section 1412 should not be used to close so-called "statutory loopholes" or to rewrite Section 1408 to remedy perceived defects in the venue statute. That is

[5]When Mr. Schroeder was asked about his sworn statement in the Schroeder 1007 Declaration that Patriot Coal, one of the Debtors' operating companies, has "principal assets" in New York, he was unable to identify a single asset in New York. See Supp. Schwartz Decl., Ex. A, Tr. 39:17-40:12. This is perplexing in light of the representations contained in his declaration. Nevertheless, Mr. Schroeder's inability to identify one asset of Patriot Coal located in New York apparently explains why the Debtors asserted venue for Patriot Coal based only upon the venue of the two New York affiliates under Section 1408(2) and not on Patriot Coal's assets or place of business. See Schroeder 1007 Decl. at ¶ 7. A copy of the Voluntary Petition for Patriot Coal Corporation is annexed as **Exhibit C** to the Supplemental Schwartz Declaration as Exhibit C. See Ex. C at 2.

[6] The convenience standard is a similar limit on a debtor's discretion. The United States Trustee does not base the UST Venue Motion, however, on this prong of Section 1412.

the sole province of Congress. Just as it is improper to rewrite Section 1408 through judicial fiat, it is similarly improper to ignore Section 1412's important limits on Section 1408.

C. The Court in Winn-Dixie Properly Transferred the Cases In the Interest of Justice, and the Debtors' Criticism of the Court's Decision is Ill-Conceived and Unwarranted.

The Debtors also argue that the United States Trustee's reliance on the New York bankruptcy court's decision in In re Winn-Dixie Stores, Inc., (SDNY Case No. 05-11063-(RDD)), is misplaced for several reasons. First, the Winn-Dixie debtors consented to the venue transfer. Second, the Patriot Debtors contend that the Winn-Dixie debtors' connections with Florida were substantially greater than their connections with West Virginia. The Debtors, however, misread Winn-Dixie and the UST Venue Motion.

The Debtors' consent to the transfer in Winn-Dixie was irrelevant to the court's decision, which was based only upon the interest of justice. Although the Winn Dixie court stated that debtor consent was very important to the "convenience of the parties" analysis, it was not relevant to the court's the interest of justice decision, which was predicated on a single finding:

> Given the circumstances here, first and foremost, and really solely the following factor, that DSI 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 think that the interests of justice require transfer of venue where, again, the facts were created to fit the statute. In that sense, you are building the shop that you choose to act in as opposed to going to it. **On that sole basis, and none other, I will grant the motion.**

Schwartz Decl., Ex. 3, Tr. 166:19-167:3; 170:12-20. (emphasis added). In reaching this decision, the Winn-Dixie court found that there is "a critical distinction between creating the facts to fit the statute "which I believe is undeniable here," as opposed to applying the statute to fit the facts." Schwartz Decl., Ex. 3, Tr. 169:12-18.

Nor has the United States Trustee suggested transfer to West Virginia or any other particular venue, recognizing that several proper venue options may exist. But the Southern District of New York is not one of them. Other parties have strongly urged transfer to the West Virginia, and a transfer to West Virginia would certainly comply with the venue requirements of both Sections 1408 and 1412.

Debtors suggest that the United States Trustee has acted improperly or illogically by departing from the former United States Trustee's position in Winn-Dixie. It is not at all clear from the transcript of the oral argument that the former United States Trustee actually advocated that the court retain venue in Winn-Dixie, although the court interpreted it that way. It is also irrelevant whether she did or did not. Judicial estoppel generally does not apply against the U.S. Government and, therefore, it does not preclude the United States Trustee from re-evaluating legal positions in different and unrelated cases, particularly seven years apart and where a prior position (if that is what the policy statement was) was wrong.[7] If it was unclear before, let it be clear now: The United States Trustee believes manufacturing venue with an eve of bankruptcy incorporation violates the interest of justice standard and compels transfer to another district where venue is proper.

D. Capitol Motor Does not Permit Venue Manipulation.

The Debtors argue that the only binding precedent is Capitol Motor Courts v. LeBlanc Corp., 201 F.2d 356 (2nd Cir. 1953) ("Capitol Motor"), and that the court in Winn-Dixie misunderstood the facts of Capitol Motor. The Debtors, however, are incorrect; the Winn-Dixie court understood Capitol Motor and properly found that it presented a very different situation

[7] "The different standard for estoppel of the Government springs from the tenet that estoppel would frustrate the Government's ability to enforce the law and, in turn, undermine the public interest in full enforcement of the law." U.S. v. Boccanfuso, 882 F.2d 666, 669 (2d Cir. 1989).

from that where a new company was created solely to manufacture venue. Specifically, the Winn-Dixie court stated:

> [T]hat corporation [in Capitol Motor], although recently formed, had a separate and valid reason for existing. That is, real buyers, different owners, if you will, purchased the debtor shortly before the filing. They were located in New York and they created the corporation in New York because that is where they were. So I view that as distinguishable.

Schwartz Decl., Ex. 3, Tr. 168:7-17.

E. The Houghton Mifflin Case is Not Relevant Because the Debtors Here Satisfied Section 1408, Unlike the Debtors in Houghton Mifflin.

Because Debtors cannot and do not refute the central and dispositive question presented by this Motion, Debtors seek to divert attention from their venue problem by citing In re Houghton Mifflin Harcourt Publ'g Co., 474 B.R. 122 (Bankr. S.D.N.Y. 2012). It is perplexing that Debtors would do so because the Houghton Mifflin debtors failed to satisfy the venue requirements of Section 1408, and the United States Trustee moved—and her objection was sustained—on that basis alone. Thus, Houghton Mifflin is not relevant to Patriot because the United States Trustee agrees that the Debtors here satisfied Section 1408.

It is also irrelevant that the court in Houghton Mifflin stated that the debtor there would have defeated a Section 1412 challenge to venue based on convenience if the United States Trustee had brought one. She did not. Moreover, the court in Houghton Mifflin ultimately agreed with the United States Trustee that the convenience of the parties cannot alone justify venue where the debtor does not first comply with Section 1408.[8]

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[8] Contrary to the Debtors' assertion, there is nothing perplexing in the venue objections that the United States Trustee filed in Houghton-Mifflin or here. The Debtors would presumably have preferred that the United States Trustee spare sophisticated parties and lawyers from clear legal error and disclosure of material misrepresentations to the court (which they only belatedly

F. The Debtors' Reliance on the Enron Venue Decisions is Misplaced Because the Facts in the Patriot Cases Differ Materially From Those In Enron.

The Debtors rely on the Enron venue decisions for various propositions. In re Enron Corp., 274 B.R. 327 (Bankr. S.D.N.Y 2002) ("Enron I"); In re Enron Corp., 284 BR 376 (Bankr. S.D.N.Y 2002) ("Enron II"). These decisions are distinguishable. Enron I resolved a motion to transfer the entire panoply of Enron cases to Texas. The Enron Metals & Commodity Corp. ("EMC") case was filed first, and the remaining cases were filed as affiliates of EMC or of one another. EMC was an existing, operating company, which had an established principal place of business in the Southern District of New York. Enron I, 274 B.R. at 338-39. EMC had 55 employees in New York and more than $265 million in assets. Id. Four of 11 EMC executives resided in New York. Id.

Enron II resolved a motion to transfer venue of an affiliated case filed in the Southern District months after the initial Enron filings. See generally Enron II. Enron did not abuse the venue statute and manufacture venue by forming a new entity weeks before filing. By contrast, PCX and Patriot Beaver Dam exist for no apparent reason other than to bring these cases into a venue that is convenient for professionals and large institutional creditors.

Patriot is a very different case and is in a very different posture than Enron. When reviewing the concerns of employees, the Court in Enron I, while "sympathetic to their concerns" regarding venue, found "it is not certain that all the issues that the former employees may want addressed . . . will be brought before the bankruptcy court." Enron I, 274 B.R. at 346. In contrast, in Patriot it is widely acknowledged and expected that the key issues in the bankruptcy case relate to labor and pension costs, issues vitally important to the well-being of

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corrected) or, in this case, condone manufactured venue when Section 1412 plainly limits the *debtor's discretion.*

current and former employees. Had the Enron court been presented with the facts here, it very well may have reached a different conclusion.

G. The Convenience of the Parties Does not Trump the Interest of Justice.

Section 1412 is written in the disjunctive, which means that the "interest of justice" and "convenience of the parties" are each independent grounds for transferring venue." In re Asset Resolution LLC, No. 09-16142 (AJG), 2009 WL 4505944, at *2 (Bankr. S.D.N.Y. Nov. 24, 2009); In re Portjeff Dev. Corp., 118 B.R. 184, 192 (Bankr. E.D.N.Y. 1990). Thus, the Court may transfer these cases if it finds "either" that the interest of justice "or" the convenience of the parties so warrant.

Before the 1984 amendments to Section 1412, a motion to transfer venue had to satisfy both the convenience of the parties and the interest of justice. Portjeff, 118 B.R. at 192. That is no longer so. Id. Although creditor preference is part of the convenience analysis, it plays no part in the justice analysis. "It is true that generally what serves the convenience of the parties will also serve the interest of justice, but the contrary is not necessarily true." Id. In Winn-Dixie, the court followed Portjeff and similarly concluded that "the interests of justice prong of it [the statute] will not always serve the convenience of the parties . . . ." Schwartz Decl., Ex. 3, Tr. 165-20-166:6. The interest of justice standard can be determinative of the venue issue even if the convenience and preferences of the parties suggest a different result. Portjeff, 118 B.R. at 192 (comparing Sections 1412 and 1404 venue provisions).[9]

[9] The decision in Portjeff may be pertinent to the venue issue here for an additional reason. In Portjeff, one of the reasons that the court granted the motion to transfer venue was that the debtors had "no need or intention to reorganize." 118 B.R. at 197. Thus, the court drew the inference that the bankruptcy cases "were filed for reason [sic] other than the debtors' need for relief." Id. The court ruled this was impermissible "forum shopping" and "an abuse of the jurisdiction of the Court," which the court found violated the interest of justice standard and

The Debtors, the Creditors' Committee, and the Debtors' lenders rely almost exclusively on the convenience of the parties and professionals to justify the manufactured venue. Similarly, their oppositions cast these cases as "financial." Although concerns regarding debtor-in-possession loans and financing are not de minimus, they are not the only major issues to be addressed in these chapter 11 cases. Indeed, Mr. Schroeder testified in his declaration that labor contracts and legacy labor liabilities are one of the three primary causes of the bankruptcy filing. See Schroeder 1007 Decl. at ¶¶ 21 and 33. The Debtors seek to minimize the import that these allegedly "substantial and unsustainable legacy costs" have in these cases and urge the Court instead to put the convenience of their professionals and lenders ahead of those of their laborers and retirees. But the convenience of some of the parties or their professionals does not trump the interest of justice. Just as in Winn Dixie, creditor opposition (or preference) cannot defeat the interest of justice venue requirement. If manufacturing venue by incorporating a new affiliate without a valid reorganization purpose violates the interest of justice, as the United States Trustee contends and Winn-Dixie held, then no amount of creditor or professional support can override the interest of justice.

To the extent this Court would disagree with Winn-Dixie and find that the convenience of the professionals or any costs that transfer may impose on the estates affect the interest of justice analysis, the Winn-Dixie court addressed that issue in its "convenience" analysis. The court stated:

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required a transfer of venue. Id. Here, two non-operating entities were created just weeks before the bankruptcy filing. What bankruptcy relief do these two entities need? There are many unanswered questions about how and why they acquired their assets and liabilities. If the new Patriot entities were created solely to establish a "venue hook" for the affiliates and have no need of bankruptcy reorganization, this, too, is an abuse of the jurisdiction of the Court and a violation of the interest of justice standard.

> "[I]it is quite possible that with the transfer, the Debtor will be able to, for itself, use local counsel efficiently and may be able to persuade other constituents to use local counsel efficiently to somewhat offset the travel cost for the New York professionals. In addition to that, while I believe that a debtor and a committee and other parties in interest are allowed leeway in choosing the professionals that they do, it is not a significant reason to keep venue in a particular venue that those professionals come from one location or another."

Schwartz Decl., Ex. 3, Tr. 162:3-18.

CONCLUSION

WHEREFORE, the United States Trustee respectfully requests that this Court (i) overrule the Objections, (ii) transfer these cases to another district where venue is proper and (iii) grant such further relief as is just.

Dated: New York, New York
August 31, 2012

Respectfully submitted,

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UNITED STATES TRUSTEE

By *_/s/ Andrea B. Schwartz_*

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