

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION**

In re:)	
)	
MOUNTAINSIDE COAL COMPANY,)	Case No. 24-50161
INC.)	
)	Chapter 11
Debtor.)	
<hr/>)	
)	
In re:)	
)	Case No. 24-50162
TRIPLE 7 COMMODITIES, INC.)	
)	Chapter 11
Debtor.)	
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**AMENDED MOTION TO (I) TRANSFER VENUE, OR (II) ALTERNATIVELY,
APPOINT A CHAPTER 11 TRUSTEE OR CONVERT THE CASE TO
CHAPTER 7**

The U.S. Bankruptcy Administrator (the “BA”), under 28 U.S.C. §§ 1406, 1408 and 1412, moves the Court to transfer the venue of this case to the Eastern District of Kentucky absent evidence supporting venue in this district, or alternatively, to appoint a chapter 11 trustee under 11 U.S.C. § 1104 or convert the case to chapter 7 under 11 U.S.C. § 1112(b) if cause exists. In support of this request, the BA states as follows:

SUMMARY

An initial hearing on this motion was held on March 26. At the hearing, the debtors’ president Damian Caldwell testified that business decisions were made in North Carolina, but acknowledged that the debtors’ assets and operations were in

Kentucky and West Virginia. Once schedules are filed, the parties will be better able to evaluate the appropriate venue for these cases. However, the currently available evidence suggests that the debtors' connection to North Carolina is tenuous, and transferring venue to the Eastern District of Kentucky may be appropriate.

The Court continued the matter to April 9, 2024, and established deadlines for the debtors to file schedules and set up debtor-in-possession bank accounts. The Court also ordered the debtors not to take any actions that would materially impact their financial or operational status quo. To the extent that the debtors fail to comply with this order, it would be cause to appoint a chapter 11 trustee under § 1104. Additionally, the BA anticipates that creditors may appear and present evidence that the debtors have engaged in fraud or mismanagement. If such evidence is presented, it would likewise be cause to appoint a trustee.

BACKGROUND

1. The Court has jurisdiction over this case under 28 U.S.C. § 1334. Under 28 U.S.C. § 157(a), the United States District Court for the Middle District of North Carolina has referred these cases to this Court by its Local Rule 83.11. This matter constitutes a core proceeding under 28 U.S.C. § 157(b)(2).

2. The debtors filed voluntary petitions under chapter 11 on March 1, 2024. Both debtors are corporations, and the cases were filed *pro se* by Damian Caldwell. It is well established, as set forth in this Court's show cause orders, that businesses can not represent themselves in bankruptcy cases. However, the debtors

have now retained counsel.

3. The petitions for both Mountainside Coal Company, Inc. (“Mountainside”) and Triple 7 Commodities Inc. (“Triple 7”) indicate that the principal place of business for each debtor is 313 Ashford Court, Winston-Salem, NC 27103. However, Forsyth County tax records suggest this is residential property in Damian Caldwell’s name.¹

4. Mountainside is a Tennessee corporation formed in 1982, according to the Tennessee Secretary of State’s website.² Mountainside’s petition indicates that its principal assets are at 5540 Hwy 1809, Barbourville, KY 40906. This address is also listed as Mountainside’s principal office with the Tennessee Secretary of State.

5. Triple 7 is a West Virginia corporation formed in 2016, according to the West Virginia Secretary of State’s website.³ Triple 7’s petition indicates that its principal assets are at 1969 Yeshua Acres Road, Welch, NC 24801. However, this must be a typo. There is no Welch, NC, and 24801 is the zip code for Welch, WV. Additionally, Triple 7 filings with the U.S. Securities and Exchange Commission in 2020 identify its principal place of business as 1969 Yeshua Acres Road, Welch, WV 24801.⁴

6. There is conflicting information regarding Triple 7’s principal place of business. According to the Kentucky Secretary of State’s website, Triple 7’s

¹ <https://lrcpwa.ncptscloud.com/forsyth/PropertySummary.aspx?REID=6803598516000> (last accessed March 6, 2024).

² <https://tnbear.tn.gov/Ecommerce/FilingDetail.aspx?CN=091152103195003035127192222114136035008116240112> (last accessed March 6, 2024).

³ <https://apps.sos.wv.gov/business/corporations/organization.aspx?org=358105> (last accessed March 6, 2024).

⁴ https://www.sec.gov/Archives/edgar/data/1785755/000149315220003215/xslFormDX01/primary_doc.xml (last accessed March 6, 2024).

principal office is located at 5540 KY 1890, Barbourville, KY 40906. However, as discussed above, the debtor's SEC filings place the debtor's principal place of business in West Virginia.

7. Further conflict can be found in the West Virginia Secretary of State's records, which identify Triple 7's principal place of business as 313 Ashford Court, Winston-Salem, NC 27103. But a search of the North Carolina Secretary of State's website reveals no records for either Triple 7 or Mountainside.

8. In August 2023, a group of creditors (the "Spoltore Creditors") filed suit against the debtors, Damian Caldwell, and an entity called GME Mining & Reclamation Inc., in the U.S. District Court for the Eastern District of Kentucky, Case No. 6:23-cv-00143-REW-HAI. In January, 2024, the plaintiffs filed a motion to appoint a receiver, alleging, *inter alia*, that (i) the debtors had multiple creditors, including various default judgments, totaling millions of dollars, (ii) the debtors had "siphon[ed] assets out of Triple 7" and transferred money to Damian Caldwell or entities he controlled, and (iii) that Mountainside's coal wash plant "has been sitting idle for months due to mismanagement."

9. The Spoltare Creditors' motion alleges that "nearby coal mines had already ceased washing their coal with [Mountainside] because it was misrepresenting ash content," and that in November 2023, the Kentucky Department of Natural Resources "revoked [Mountainside's] permit for operating the plant due to numerous violations and imposed a series of fines."

10. The Spoltare Creditors, who appear to be largely or entirely unsecured

creditors, argued that “there remains a demand in the marketplace for washed coal, and this plant remains a fully operational facility which could be brought back online in short order.” They argued that the plant could be reopened and operated profitably for the benefit of creditors.

11. At the time of the filing of this bankruptcy case, there was another motion for the appointment of a receiver for Mountainside pending in Kentucky state court, brought by a secured creditor. It asserts, *inter alia*, (i) many varied financial defaults to the secured creditor and other creditors, (ii) that Mountainside had failed to provide financial and operational information about its business, (iii) that Mountainside has no casualty or liability insurance for its coal washing plant, and (iv) that Mountainside had its operating permits terminated by the Kentucky Department of Natural Resources.

12. At the hearing on March 26, Damian Caldwell testified that he resides in Winston-Salem, NC, and the debtors are managed from that location. He testified that other key personnel for the debtors reside in North Carolina, Florida, and Ohio. He acknowledged that the debtors’ assets and operations were in Kentucky and West Virginia. He also acknowledged that the debtors are not registered to do business in North Carolina with the NC Secretary of State.

ARGUMENT

Based upon the limited facts currently available, it appears that this district is either an improper venue, or that venue should be transferred under 28 U.S.C. § 1412. This Court should transfer venue to the Eastern District of Kentucky, where

the future of these cases can be decided. However, if the schedules or other evidence later presented support venue in this district, then this Court should appoint a trustee if cause exists.

I. The Court should transfer venue of these cases to the Eastern District of Kentucky, absent evidence to support venue in this district.

Under 28 U.S.C. § 1408(1), a bankruptcy case may be filed in the district of the debtor’s “domicile, residence, principal place of business in the United States, or principal assets in the United States” during the 180 days pre-petition (or longest portion of such 180-day period). A corporate debtor’s “principal place of business” is “where the corporation’s officers direct, control, and coordinate the corporation’s activities.” *Hertz Corp. v. Friend*, 559 U.S. 77, 92-93, 130 S. Ct. 1181, 1192 (2010). A bankruptcy case can also be commenced in the district where the case of an affiliate is already pending. 28 U.S.C § 1408(2).

“[T]he venue requirements of 28 U.S.C. § 1408 are mandatory, not optional.” *In re Zagaroli*, 2018 Bankr. LEXIS 2117, at *2 (Bankr. M.D.N.C. July 18, 2018). When a bankruptcy case is filed in an improper venue, the court “shall dismiss, or if it be in the interest of justice, transfer such case” to an appropriate district. 28 U.S.C. § 1406(a); *see also* Fed. R. Bank. P. 1014(a)(2). Transfer is generally favored over dismissal. *See, e.g., In re Allen*, 2022 Bankr. LEXIS 922, at *4-5 (Bankr. M.D.N.C. Feb. 10, 2022) (collecting cases).

The available evidence is admittedly sparse. However, it suggests Mountainside is a Tennessee corporation with its principal place of business and its

principal assets in the Eastern District of Kentucky. It suggests that Triple 7 is a West Virginia corporation, with its principal place of business in West Virginia or Kentucky, and its principal assets in West Virginia.

The debtors' petitions state that their principal place of business is in North Carolina, but the available evidence suggests otherwise. First, the address provided is Damian Caldwell's personal residence. Second, to transact business within North Carolina, a corporation must obtain a certificate of authority from the North Carolina Secretary of State. N.C. Gen. Stat. § 55-15-01. Neither debtor has done so. Third, the debtors' assets and operations are not located in North Carolina. These factors support a conclusion that the debtors' principal places of business were not in North Carolina.

Moreover, even if Mr. Caldwell's residence was the debtors' principal place of business, this Court could still transfer venue "in the interest of justice or for the convenience of the parties." 28 U.S.C. § 1412. Factors considered under § 1412 include: "(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 estate's assets; (5) the economical administration of the estate; and (6) the necessity for ancillary administration if liquidation should result." 1 *Collier on Bankruptcy* ¶ 4.05 (16th 2024). It appears many factors support venue transfer, but the filed schedules will reveal more.

Therefore, venue for both cases should be transferred to the Eastern District

of Kentucky. Venue for the Mountainside case is proper in the Eastern District of Kentucky, as the undisputed location of its principal assets. In Triple 7's case, venue is proper in the Eastern District of Kentucky – at minimum⁵ – as an affiliate of Mountainside.

II. Alternatively, if the Court declines to transfer venue, it should appoint a chapter 11 trustee or convert the cases to chapter 7 if cause exists.

If this Court concludes that the evidence is insufficient to support a venue transfer, the Court should appoint a chapter 11 trustee if there is cause. A bankruptcy court “shall” appoint a chapter 11 trustee “for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management . . . or . . . if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate.” 11 U.S.C. § 1104(a). The Code’s examples of “cause” are non-exclusive. *In re Marvel Entm't Grp.*, 140 F.3d 463, 472 (3d Cir. 1998) (“the language of § 1104(a)(1) does not promulgate an exclusive list of causes for which a trustee must be appointed”).

The Court continued the hearing on this motion to April 9, 2024, and established deadlines for the debtors to file schedules and set up debtor-in-possession bank accounts. The Court also ordered the debtors not to take any actions that would materially impact their financial or operational status quo. To the extent that the debtors fail to comply with this order, it would be cause to appoint a chapter 11 trustee under § 1104. Additionally, the BA anticipates that

⁵ As noted above, the records of the Kentucky Secretary of State identify Triple 7's principal place of business in Barbourville, KY.

creditors may appear and present evidence that the debtors have engaged in fraud or mismanagement. If such evidence is presented, it would likewise be cause to appoint a trustee (or if the court declines to appoint a chapter 11 trustee, to convert the case to chapter 7).

If the debtor has complied with this Court's deadlines, and there is not sufficient evidence of fraud or mismanagement presented at the hearing, then the BA seeks the appointment of an examiner. The debtors consent to the appointment of an examiner as reflected in a separately filed consent motion.

THEREFORE, the BA requests that the Court enter an order:

1. Transferring venue of these cases to the Eastern District of Kentucky, unless evidence supporting venue in this district is presented at the hearing on this matter; and
2. Alternatively, if cause exists, appointing a chapter 11 trustee or converting the case to chapter 7; and
3. Granting such other relief as the Court deems proper.

Respectfully submitted on March 28, 2024.

JOHN PAUL H. COURNOYER
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CERTIFICATE OF SERVICE

This is to certify that, on this date, the foregoing document was served upon the following parties or counsel by automatic CM/ECF service as follows:

SERVED BY CM/ECF

Ally Bank, c/o AIS Portfolio Services, LLC
c/o Amitkumar Sharma

AmeriCredit Financial Services, Inc. dba GM Financial
c/o Mandy Youngblood

BRCPF M&M Mountainside BLKR LLC
c/o Charles N. Anderson, Jr. &
Dale R Clemons

Binderless Coal Briquetting Company PTY Limited
c/o Charles N. Anderson, Jr. &
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David Jorjani

Philip Sasser

Dated: March 28, 2024

/s/ Traci D. Galloway
Bankruptcy Paralegal