

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

10-CR-219-S

TONAWANDA COKE CORPORATION

Defendant.

**GOVERNMENT'S MOTION TO COMPEL DISCLOSURE OF
FINANCIAL INFORMATION; RECONSIDER THE STAY OF THE
FINAL COMMUNITY SERVICE PAYMENT; AND IMMEDIATELY
APPOINT A COURT APPOINTED MONITOR**

THE UNITED STATES OF AMERICA, by and through its attorney, James P. Kennedy, Jr., United States Attorney for the Western District of New York, and Jeffrey B. Clark, Assistant Attorney General for the United States Department of Justice, Environment and Natural Resources Division, and the undersigned Assistant United States Attorney and Trial Attorney, respectfully files this motion to (1) compel the disclosure of financial information of Defendant Tonawanda Coke Corporation (“Tonawanda Coke”), (2) reconsider the Court’s prior order staying the final community service payment, and (3) immediately appoint a court appointed monitor to oversee the shutdown and clean up at Tonawanda Coke.

BACKGROUND

On March 19, 2014, the Court sentenced Tonawanda Coke to a term of probation of five years, a \$12,500,000 criminal fine to be paid over five years, and a special assessment of \$5,600. *See* Dkt. #281. As part of Tonawanda Coke’s probationary sentence, the Court

ordered Tonawanda Coke to fund two community service projects, not to exceed \$12,200,000, and set a schedule of payments to be made over the five-year term of probation. *See id.* Under the payment schedule set forth in the judgment, Tonawanda Coke was obligated to make the first payment 60 days from the date the Probation Department approved the updated proposals to be submitted by the project sponsors.

On September 21, 2018, the Court sentenced Tonawanda Coke following a violation of probation, which included, among other conditions, to comply with all previously imposed conditions of probation. *See* Dkt. #440. One of those prior conditions was Tonawanda Coke's "obligation to make the final community service payment of \$2,037,291 on October 8th, 2018." *See* Dkt. #437, p. 37. On October 5, 2018, Tonawanda Coke filed a motion seeking to stay its condition of probation to pay the final community service payment until resolution of the Title V permit revocation proceeding pending before the New York State Department of Environmental Conservation (NYS-DEC). *See* Dkt. #446 (hereinafter "Third Motion to Stay"). The government opposed this motion, *see* Dkt. #447, and on October 9, 2018, the Court granted Tonawanda Coke's motion to stay the final community service payment and ordered the final payment due on November 13, 2018. *See* Dkt. #448.

On October 11, 2018, the government spoke with counsel for Tonawanda Coke, who advised that Tonawanda Coke intends to begin a shutdown of the plant on or about Tuesday, October 16, 2018.¹ Because Tonawanda Coke now plans to shut down, the government has

¹ The government is also aware that on October 10, 2018, counsel for Tonawanda Coke advised other governmental entities that Tonawanda Coke was planning to shut down and to file for a Chapter 11 bankruptcy. However, during the government's conversation with counsel for Tonawanda Coke on October 11, 2018, counsel made it clear that a bankruptcy filing was no longer planned for next week.

concerns regarding Tonawanda Coke's ability to make the final community service payment, and hereby moves the Court to compel the disclosure of financial information of Tonawanda Coke, and to reconsider its prior order staying the payment of the final community service payment.

DISCUSSION

I. TONAWANDA COKE SHOULD BE COMPELLED TO RELEASE ITS FINANCIAL RECORDS TO THE PROBATION DEPARTMENT AND THE GOVERNMENT TO ASSIST IN THE COLLECTION OF THE FINAL COMMUNITY SERVICE PAYMENT

Until recently, Tonawanda Coke has indicated a desire to continue operations so that it could meet its financial obligations to the government, in both this criminal case and a related civil case. Specifically, Tonawanda Coke stated that it was "committing significant resources to address [the problems at the plant]. We have paid our fines, made our community service payments, and it is our -- it continues to be our goal to be a good neighbor within our community." *See* Dkt. 437, p. 18. Less than one week ago, Tonawanda Coke filed a motion to stay the final community service payment, and in doing so, made it clear that it intended to challenge the administrative hearing pending before the New York State Department of Environmental Conservation (NYS-DEC) and/or settle that proceeding in a manner that allowed the company to continue to operate. *See* Dkt. #446-1. Moreover, Tonawanda Coke has also explicitly stated that a shutdown would doom its ability to make the final community service payment. *See* Dkt. #370, p. 3 ("Moreover, if the Company shuts down, it will not be able to marshal the necessary resources to make its last community service payment on October 8, 2018, as required by the Court's sentence."); Dkt. #433, p. 8 ("And the ripple effects of a shut-down are wide-ranging: the last community service payment would not be

made....”); and Dkt. #427, p. 2 (“a ‘hot idle’ would prevent Tonawanda Coke from meeting contractual obligations to third parties which could result in significant financial repercussions and foreclose Tonawanda Coke’s ability to complete the community payment owed in October 2018.”).

Now, the government has obtained information that Tonawanda Coke plans to begin a shutdown on or about October 16, 2018. Based on Tonawanda Coke’s prior representations, the government believes that Tonawanda Coke does not intend to make its final community service payment of \$2,037,291. Therefore, the government moves this Court to compel Tonawanda Coke to provide its financial records to the U.S. Probation Department and the government to aid in the collection of this final payment. Such a request, at least in part, has already been specifically authorized by the Court and incorporated into Tonawanda Coke’s special conditions of probation, which provides that Tonawanda Coke “shall provide the U.S. Probation Office with access to any requested personal and/or business financial information. The U.S. Probation Office is authorized to release pre-sentence and post-sentence financial information submitted by the defendant corporation to the U.S. Attorney’s Office for use in the collection of any unpaid fine.” *See* Dkt. #281.

The government is now attempting to collect a financial obligation owed to the government and the community. During the original sentencing phase of this case, Tonawanda Coke vigorously contested the government’s motion to obtain access to the financial records Tonawanda Coke submitted to the probation department for purposes of preparing the PSR. *See* Dkt. ##204, 209, 210. Importantly, once those records were obtained

by the government and provided to an EPA cost recovery expert, it was determined that Tonawanda Coke engaged in financial transactions that removed assets from Tonawanda Coke. In particular, the government argued that

that between 2005 and the present [2014], substantial assets have flowed out of Tonawanda Coke in the form of shareholder dividends. During that time period, Tonawanda Coke paid a total of \$39,250,000 to its shareholders, who at present remain unknown. For the fiscal year ending June 30, 2013, which is the same year that Tonawanda Coke was tried and convicted of several environmental felony offenses, dividends were paid in the amount of \$2.5 million. It should be noted that the dividends for this year alone [2014] are greater than the \$2 million fine that Tonawanda Coke has suggested to the Court as the maximum it could pay.

Dkt. #266, p. 3. The government is unaware of whether shareholder dividends have been paid since imposition of the original sentencing, however, if such shareholder dividends were paid without approval of the probation officer, that would constitute a violation of a condition of Tonawanda Coke's probation, which provides that "the defendant organization shall not waste, nor without permission of the probation officer, sell, assign, or transfer its assets." *See* Dkt. #281.

The government is especially concerned that Tonawanda has now stated that it may not file for bankruptcy. This would mean that the company can distribute any assets and funds without judicial or government oversight, despite owing more than \$2 million in community service payments. Therefore, so that the probation department and the government can assess Tonawanda Coke's current ability to pay its final community service payment, the government moves to compel Tonawanda Coke to release, for fiscal year 2017 and 2018, the same category of financial documents that were previously released to the

government during the underlying sentencing phase of the case. *See* Dkt. ##259, 229-6, Appendix B.

II. THE COURT SHOULD RECONSIDER ITS PRIOR ORDER AND IMMEDIATELY ORDER TONAWANDA COKE TO PAY THE FINAL COMMUNITY SERVICE PAYMENT

The information provided by Tonawanda Coke that it will shut down in a few days is a substantial change in circumstances that warrant the Court to reconsider its previous order to stay the final community service payment until November 13, 2018, and instead, this Court should immediately order the payment due. The government is troubled by the fact that just one day after the Court issued the stay, counsel for Tonawanda Coke indicated to other governmental agencies that Tonawanda Coke intended to shut down. Moreover, if Tonawanda Coke proceeds to declare bankruptcy prior to the current due date of November 13, 2018, it is possible that the final payment will be discharged because it has not yet come due. Such an outcome would improperly allow Tonawanda Coke to avoid a lawful debt to the government and the community, and potentially, would constitute a separate violation of a condition of its probation, which states “the defendant organization shall not dissolve, change its name, or change the name under which it does business unless this judgment and all criminal monetary penalties imposed by this court are either fully satisfied or are equally enforceable against the defendant’s successors or assignees.”

Therefore, based on the drastically changed circumstances, this Court should reconsider its prior order and instead order that Tonawanda Coke must immediately make its final community service payment.

III. THE COURT SHOULD SELECT AN INDEPENDENT COURT APPOINTED MONITOR TO ENSURE AN ORDERLY SHUTDOWN AND CLEANUP AT TONAWANDA COKE

On September 24, 2018, the Court sentenced Tonawanda Coke following a violation of probation, which included, among other conditions, a requirement that Tonawanda Coke submit to monitoring by an independent court appointed monitor (“CAM”). *See* Dkt. #438. The Court requested the parties to work together to try and agree on a suitable CAM, and if no agreement could be reached, to submit recommendations to the Court for a CAM within one week. On September 28, 2018, the parties submitted their recommendations to the Court regarding the qualified court appointed monitors. *See* Dkt. ##441, 442. Now, based on the information provided by counsel for Tonawanda Coke that the company will begin a shut down next week, and based on prior representations by Tonawanda Coke, this Court should continue to select a court appointed monitor to ensure that an orderly shutdown and cleanup occurs at Tonawanda Coke. Specifically, in prior submissions, Tonawanda Coke noted that a shutdown was a “significant process” with grave safety dangers. *See* Dkt. #434, p. 9. Moreover, in its sentencing submission as part of the probation violation proceeding, Tonawanda Coke contemplated and agreed to the appointment of a court appointed monitor, *see id.* pp. 8-9, so Tonawanda Coke should have already set aside funding for such monitoring services.

In addition to ensuring that a safe and orderly shutdown occurs, the government understands that Tonawanda Coke will abandon the current site without engaging in any environmental cleanup. Indeed, Tonawanda Coke has already explicitly stated that if they shutdown, they will walk away from the site and leave the community and taxpayers to fund

any cleanup. *See* Dkt. #382, p. 6 (“Moreover, the broader community will be adversely affected by a shutdown. Without an entity to operate the site and clean up existing conditions, many of which predate TCC’s operation of the site, the Government will be left to pursue others (potentially even the taxpayers) for the resources to conduct the cleanup. That pursuit could delay any remedy for decades or more.”); Dkt. #370, p. 3 (“Moreover, if the Company shuts down, it will not ... have the resources to ‘continue to perform all work required under the Orders on Consent and Administrative Settlement for the Superfund Site #915055,’ as requested by the DEC in its letter of July 20, 2018....”); and Dkt. #381, p. 4 (“Shutting the plant down will necessarily result in a permanent closure of the facility....”). Based upon information that Tonawanda Coke has recently provided to EPA, *see* attached affidavit of Harish Patel marked as **Exhibit 1**, the company’s current intention is to shut down the batteries on Tuesday morning, and there is no plan for cleaning up the associated hazardous waste. Tonawanda Coke has stated that Richard Westbrook will be on site to oversee operations. Mr. Westbrook, however, was very clear that he is not an expert in general coke operations, and is a “process engineer that solves combustion problems” who was hired “specifically for stack opacity.” He will undoubtedly be valuable during the shutdown process, but the ongoing environmental hazards at Tonawanda Coke are much larger than the battery stack alone.

Therefore, to ensure that a safe and proper shutdown and clean up occurs at Tonawanda Coke, this Court should immediately implement its prior sentence and designate a court appointed monitor to oversee operations and cleanup at Tonawanda Coke.

CONCLUSION

For the foregoing reasons, the government moves this Court to (1) compel the disclosure of financial information of Tonawanda Coke, (2) reconsider the Court's prior order staying the final community service payment, and (3) immediately appoint a court appointed monitor to oversee the shutdown and clean up at Tonawanda Coke. The government is available for a hearing on this Motion if the Court would like further information or argument.

DATED: Buffalo, New York, October 12, 2018.

Respectfully submitted,

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EXHIBIT 1

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UNITED STATES OF AMERICA

-v-

10-CR-219-S

TONAWANDA COKE CORPORATION

Defendant.

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:
CITY OF NEW YORK)

HARISH PATEL, being duly sworn, deposes and states:

1. I am an Environmental Engineer/Team Leader with the Senior Enforcement Team in the Air Compliance Branch of the U.S. Environmental Protection Agency ("EPA"), Region 2, New York, New York. I have been employed at EPA Region 2 since April 1987. I have a B.E. and M.E. in Chemical Engineering from the City College of New York. I have over 30 years of professional work experience conducting Clean Air Act inspections and developing Clean Air Act enforcement actions.

2. As an Environmental Engineer at EPA, I am responsible for, among other things, performing compliance inspections and evaluating technical reports and data submitted by facilities relating to compliance with the Clean Air Act ("CAA") and its

implementing regulations. I have been assigned to evaluate Tonawanda Coke's compliance with the CAA since April 2009.

3. Through my position at EPA, I am familiar with the Tonawanda Coke facility ("TCC"). I have performed numerous inspections at the facility and reviewed numerous reports submitted by Tonawanda Coke.

4. On Wednesday night, October 10, TCC supplied a draft shut-down plan and informed EPA and DEC that TCC was planning to begin ceasing operations early next week. TCC wanted EPA and DEC to review draft plan and approve it.

5. On a telephone call convened at approximately 10 am on Thursday morning, TCC detailed that they planned to charge the last oven at 8 am on Tuesday, October 16 and tell all but 10 employees that the facility was shutting down. The 10 retained employees would be necessary to shut down the facility. It is unclear if this is a sufficient number of employees to shut down the facility safely.

6. During that call, DEC and EPA went through a list of concerns with the shut-down plan. TCC did not have answers to all of the questions posed and indicated that they would convene a call later in the day to provide answers.

7. At approximately 4 pm on Thursday, the call was reconvened. At that time, in response to a request by DEC, TCC indicated that Westbrook Thermal Technologies LLC

would be available to oversee the shut-down. The draft closure plan allocated 37 ½ hours to push approximately 30 ovens that are currently in service.

8. TCC provided answers to the questions raised by EPA and DEC, not all of which were acceptable.

9. One concern that I raised was about the moat in the by-product work area. The by-product work area houses several tanks, including the tar decanter and the asphalt storage tanks, among others. During the June 2018 inspection in which I participated, the liquid level in the moat was about six inches deep with an oily sheen. I asked what TCC planned to do with that liquid and they indicated that they were going to leave it as it was when they left the facility, because they don't have the money to pump it out. If the moat overflows during a rain event, it could overflow and contaminated water may eventually go into the Niagara River.

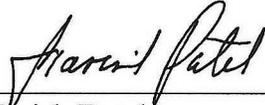
10. Another concern is the integrity and handling of the thermal refractory in the ovens (oven walls). After the heat is stopped, the refractory inside the ovens will crack and crumble. During our call with TCC, I was concerned about asbestos being present in the thermal refractory and oven insulation and they informed us that there was very little, if any, asbestos present. However, another concern we have is the fact that organics and other polycyclic compounds may have impregnated the walls during the coating process. Some of these materials will remain in the walls after the ovens have been pushed and crumble with the wall debris. In the past, some of the tars and sludges from the coking process have been

determined to be RCRA waste, and it is likely that the debris from the crumbling walls will be deemed a RCRA hazardous waste.

11. The regulatory agencies stated that TCC needed to make sure that they alerted the fire department. TCC stated that the only risk of explosion was the battery.

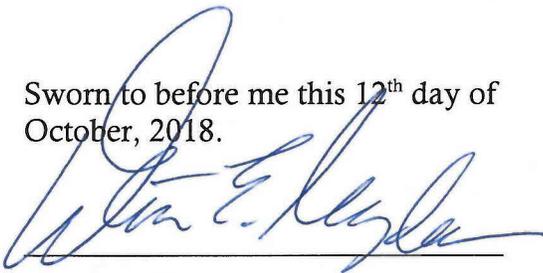
12. In the afternoon call, they also stated that they were in such bad financial straits that they had payroll only for one week.

DATED: October 12, 2018



Harish Patel

Sworn to before me this 12th day of
October, 2018.



Walter E. Mugdan

Notary Public, State of New York
Qualified in Erie County
My Commission Expires 2/28/2019

WALTER E. MUGDAN
NOTARY PUBLIC, State of New York
No. 4640199, Qual. in Queens County
Commission expires 2/28/19.