

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

In re:

TONAWANDA COKE
CORPORATION,

Debtor.

Chapter 11

Case No. 18-12156

Hon. Michael J. Kaplan, U.S.B.J.

SETTLEMENT AGREEMENT

WHEREAS, Tonawanda Coke Corporation (“Debtor”) filed with the United States Bankruptcy Court for the Western District of New York (the “Bankruptcy Court”) a voluntary petition for relief under Title 11 of the United States Code (the “Bankruptcy Code”) on October 15, 2018 (the “Petition Date”), which has been administered as *In re: Tonawanda Coke Corporation*, Case No. 18-12156 (the “Bankruptcy Case”);

WHEREAS, on the Petition Date the Debtor was the owner and operator of a coke manufacturing facility in Tonawanda, New York (“TCC Site”), which includes parcels on the east side of River Road (hereinafter “Main Plant Property”) and west side of River Road (hereinafter “Site 108”);

WHEREAS, on July 15, 2019, the United States Trustee appointed an Official Committee of Unsecured Creditors (the “Creditors’ Committee”), Doc. No. 262, in the Bankruptcy Case;

WHEREAS, the United States, on behalf of the United States Environmental Protection Agency (“EPA”), filed a proof of claim (Claim No. 53) (the “EPA Proof of

Claim”), asserting a general unsecured claim for (a) \$2,002,200 in stipulated penalties that accrued prior to the Petition Date under a consent decree between the United States and Debtor in United States et al. v. Tonawanda Coke Corp., 1:15-cv-00420 (W.D.N.Y.) (“2015 Consent Decree”), and (b) \$11,826.14 in response costs incurred under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. §§ 9601-9675, prior to the Petition Date performing the initial stages of a time-critical removal action to address the release and threatened release of hazardous substances at the TCC Site;

WHEREAS, the EPA Proof of Claim included a protective proof of claim relating to the Debtor’s liability for the post-petition response costs incurred, and to be incurred, by the United States under CERCLA in relation to EPA’s continued time-critical removal action to address the release and threatened release of hazardous substances at the TCC Site;

WHEREAS, the United States filed a Motion for Allowance of Administrative Expense Claim, Doc. No. 282, which was amended, Doc. No. 422, asserting an administrative claim in the amount of \$5,531,521.10, under Section 503(b)(1) of the Bankruptcy Code, 11 U.S.C. § 503(b)(1), relating to response costs incurred after the Petition Date addressing releases and threatened releases of hazardous substances at the TCC Site (“EPA Administrative Expense Motion”);

WHEREAS, the United States filed a Motion for Rule 2004 Examination of the Debtor and Production of Documents on July 23, 2019, Doc. No. 267 (the “2004 Motion”);

WHEREAS, the Debtor and United States negotiated a partial resolution of the 2004 Motion pursuant to a Consent Order Partially Approving the 2004 Motion dated October 8, 2019, Doc. No. 350 (the “Consent Order”);

WHEREAS, the Debtor and the Creditors’ Committee disagree with the United States’ contentions and, but for this Settlement Agreement, would dispute, in whole or in part, the EPA Proof of Claim and EPA Administrative Expense Motion;

WHEREAS, the Debtor, the Creditors’ Committee and the United States wish to resolve their differences with respect to the EPA Proof of Claim, the EPA Administrative Expense Motion, and the 2004 Motion and Consent Order as provided herein;

WHEREAS, the New York State Department of Labor (“DOL”) filed a claim in this proceeding (Claim No. 103-1) seeking administrative expense priority in the amount of \$1,518,651.38 with respect to its claim against the Debtor under the New York State Worker Adjustment and Retraining Notification Act, New York Labor Law §§ 860-860-I (“DOL Proof of Claim”);

WHEREAS, the Debtor filed a motion (Doc. No. 399), supported by the Creditors’ Committee, to disallow and expunge the claim set forth in the DOL Proof of Claim;

WHEREAS, the Debtor, the Creditors’ Committee and DOL wish to resolve their differences with respect to the DOL Proof of Claim as provided herein;

WHEREAS, EPA, DOL, the Debtor and the Creditors’ Committee have reached an agreement concerning a carveout for the payment of general unsecured claims, as set forth herein;

WHEREAS, this Settlement Agreement is in the public interest and is an appropriate means of resolving these matters;

NOW, THEREFORE, without the admission of liability or the adjudication of any issue of fact or law, and upon the consent and agreement of the EPA, DOL, the Creditors' Committee and the Debtor (the "Parties") by their attorneys and authorized officials, it is hereby agreed as follows:

1. The Bankruptcy Court has jurisdiction over the subject matter hereof pursuant to 28 U.S.C. §§ 157, 1331, and 1334; 42 U.S.C. §§ 9607 and 9613(b); 42 U.S.C. §§ 7413; and 42 U.S.C. § 11045.

2. With respect to the United States' claims for stipulated penalties under the 2015 Consent Decree, the United States, on behalf of EPA, shall have an allowed general unsecured claim of \$2,002,200 (hereinafter "EPA Allowed Stipulated Penalty Claim").

3. With respect to pre-petition response costs incurred at the TCC Site, the United States, on behalf of EPA, shall have an allowed general unsecured claim of \$11,826.14 (hereinafter "EPA Allowed Pre-Petition Response Cost Claim").

4. With respect to United States' Administrative Claim relating to EPA's post-petition response costs incurred addressing threatened releases and releases of hazardous substances at the TCC Site, the United States shall have an allowed administrative expense claim to reimburse costs incurred in relation to the Main Plant Site ("EPA Allowed Administrative Expense Claim") in the amount of the sum of:

- a. \$930,000 (the "EPA Initial Allowed Administrative Expense Claim"); and

- b. the “EPA Supplemental Allowed Administrative Expense Claim,” which shall be equal to 83.7% of the amount remaining in the estate after payment or segregation of:
 - i. all allowed administrative expense claims, including any Chapter 7 and Chapter 11 allowed administrative expense claims, other than said EPA Supplemental Allowed Administrative Expense Claim defined in this Subparagraph 4.b and the DOL Supplemental Allowed Administrative Expense Claim (as defined below in Subparagraph 21.b); and
 - ii. the General Unsecured Claim Initial Carveout (as defined below in Subparagraph 20.a).

The EPA Initial Allowed Administrative Expense Claim shall be paid in full within thirty (30) days of the Effective Date (defined in Paragraph 18 below), and Debtor shall not seek to convert this case under Chapter 11 of the Bankruptcy Code to a case under Chapter 7 of the Bankruptcy Code prior to making this payment. The EPA Supplemental Allowed Administrative Expense Claim shall be paid at such time as funds are distributed to general unsecured creditors in connection with the General Unsecured Claim Initial Carveout and the General Unsecured Claim Supplemental Carveout (as defined in Subparagraph 20.b below or at such earlier time as approved by the Court. The United States shall have no allowed administrative expense claim to reimburse response costs incurred in relation to Site 108.

5. The EPA Allowed Stipulated Penalty Claim and the EPA Allowed Pre-Petition Response Cost Claim (i) shall receive the same treatment under any plan of liquidation, without discrimination, as all other allowed general unsecured claims, with all attendant rights provided by the Bankruptcy Code and other applicable law, and (ii) shall not be entitled to any priority in distribution over other allowed general unsecured claims. In no event shall the EPA Allowed Stipulated Penalty Claim or the EPA Allowed Pre-Petition Response Cost Claim be subordinated to any other allowed general unsecured claims, pursuant to any provision of the Bankruptcy Code or other applicable law that authorizes or provides for subordination of allowed Claims, including, without limitation, Sections 105, 510, and 726(a)(4) of the Bankruptcy Code, except if, with respect to the EPA Allowed Stipulated Penalty Claim, this case under Chapter 11 of the Bankruptcy Code is converted to a case under Chapter 7 of the Bankruptcy Code.

6. EPA may, in its sole discretion, deposit any portion of any cash distributions it receives in payment of the EPA Allowed Pre-Petition Response Cost Claim and the EPA Allowed Administrative Expense Claim into the Hazardous Substance Superfund or into a special account established by EPA for the TCC Site within the Hazardous Substance Superfund pursuant to Section 122(b)(3), 42 U.S.C. § 9622(b)(3), to be retained and used to conduct or finance response actions at or in connection with the TCC Site, or to be transferred to the Hazardous Substance Superfund.

7. Cash distributions and payments to the United States shall be made at <https://www.pay.gov> or by FedWire Electronic Funds Transfer to the United States Department of Justice account in accordance with instructions, including a Consolidated

Debt Collection System (“CDCS”) number, to be provided to the Debtor by the Financial Litigation Unit of the United States Attorney’s Office for the Western District of New York.

8. At the time of any cash or non-cash distribution pursuant to this Settlement Agreement, the Debtor shall transmit written confirmation of such distribution to the United States at the addresses specified below, and email confirmation of such distribution to the EPA Cincinnati Finance Office shall be made to cinwd_acctsreceivable@epa.gov, with a reference to *In re Tonawanda Coke Corporation*, Case No. 18-12156 (Bankr. W.D.N.Y), the CDCS number, and Site/Spill ID Number A28U:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
Ref. DOJ File No. 90-5-2-1-09994/1

Margo B. Ludmer
Assistant Regional Counsel
New York/Caribbean Superfund Branch
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 2
New York, NY 10007

9. Only the amount of cash received by EPA pursuant to this Settlement Agreement for the EPA Allowed Pre-Petition Response Cost Claim and the EPA Allowed Administrative Expense Claim shall be credited as a recovery of CERCLA response costs by EPA for the TCC Site, which credit shall reduce the liability of non-settling potentially responsible parties for the TCC Site by the amount of the credit.

10. In consideration of the distributions that will be made under the terms of this Settlement Agreement, and except as specifically provided in Paragraphs 11-13, EPA covenants not to file a civil action or take administrative action against the Debtor:

(i) pursuant to Sections 106 or 107 of CERCLA, 42 U.S.C. §§ 9606 or 9607, with respect to the TCC Site or (ii) to obtain stipulated penalties under the Consent Decree for the violations of the Consent Decree alleged in the EPA Proof of Claim.

11. The covenant set forth in Paragraph 10 extends only to the Debtor and does not extend to any other person. Nothing in Paragraphs 10 and 14 of this Settlement Agreement is intended as a covenant for any person or entity other than the Debtor and the United States. The United States and the Debtor expressly reserve all claims, demands, and causes of action, either judicial or administrative, past, present, or future, in law or equity, which they may have against all other persons, firms, corporations, entities, or predecessors of the Debtor for any matter arising at or relating in any manner to the TCC Site. Further, nothing in this Settlement Agreement diminishes the right of the United States, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to enter into any settlement that gives rise to contribution protection for any person not a party to this Settlement Agreement.

12. The covenant set forth in Paragraph 10 does not pertain to any matters other than those expressly specified therein. The United States expressly reserves, and this Settlement Agreement is without prejudice to, all rights against the Debtor with respect to all matters other than those set forth in Paragraph 10. The United States also specifically reserves, and this Settlement Agreement is without prejudice to, any action based on a

failure to meet a requirement of this Settlement Agreement. In addition, the United States reserves, and this Settlement Agreement is without prejudice to, all rights against the Debtor with respect to the TCC Site for liability under federal or state law for acts by the Debtor or its successors or assigns that occur after the date of lodging of this Settlement Agreement.

13. Nothing in this Settlement Agreement shall be deemed to limit the authority of the United States to take any response action under Section 104 of CERCLA, 42 U.S.C. § 9604, or any other applicable statute or regulation, or to alter the applicable legal principles governing judicial review of any action taken by the United States pursuant to such authority, provided, however, that nothing in this sentence affects the covenant set forth in Paragraph 10. Nothing in this Settlement Agreement shall be deemed to limit the information-gathering authority of the United States under Sections 104 and 122 of CERCLA, 42 U.S.C. §§ 9604 and 9622, or any other applicable statute or regulation, or to excuse the Debtor from any disclosure or notification requirements imposed by CERCLA or any other applicable statute or regulation.

14. The Debtor covenants not to sue and agrees not to assert or pursue any claims or causes of action against the United States, including any department, agency, or instrumentality of the United States, with respect to the TCC Site, including, but not limited to: (i) any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established pursuant to 26 U.S.C. § 9507; (ii) any claim under Sections 107 or 113 of CERCLA, 42 U.S.C. §§ 9607 or 9613, or Section 7002(a) of RCRA, 42 U.S.C. § 6972(a); or (iii) any claims arising out of response activities at the

TCC Site. Nothing in this Settlement Agreement shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

15. Notwithstanding any other provision of this Settlement Agreement, the Debtor reserves, and this Settlement Agreement is without prejudice to, claims against the United States in the event any claim is asserted by the United States against the Debtor pursuant to any of the reservations set forth in Paragraph 12, other than for failure to meet a requirement of this Settlement Agreement, but only to the extent that the Debtor's claims arise from the same response action or response costs that the United States is seeking pursuant to the applicable reservation.

16. The United States and Debtor agree, and by entering this Settlement Agreement the Bankruptcy Court finds, that this Settlement Agreement constitutes a judicially-approved settlement pursuant to which the Debtor has, as of the Effective Date, resolved its liability to the United States within the meaning of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and is entitled, as of the effective date, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, or as may be otherwise provided by law, for the "matters addressed" in this Settlement Agreement. The "matters addressed" in this Settlement Agreement are claims by EPA or potentially responsible parties with respect to the \$11,826.14 in EPA response costs set forth in the EPA Proof of Claim and the \$5,531,521.10 in EPA response costs set forth in the United States' Motion for Allowance of Administrative Expense Claim, Doc. No. 282, as amended, Doc. No. 422.

17. This Settlement Agreement constitutes a judicially-approved settlement pursuant to which the Debtor has, as of the Effective Date, resolved its liability to the United States within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).

18. For the purposes of this agreement, “Effective Date” means the date on which this Settlement Agreement is approved by the Bankruptcy Court pursuant to a final non-appealable order.

19. The United States agrees that the information previously provided by the Debtor in response to the 2004 Motion and the Consent Order is a satisfactory resolution of the 2004 Motion.

20. Agreement of Creditors’ Committee: The Creditors’ Committee agrees to the terms set forth herein, including treatment of the administrative claims of the United States and DOL in consideration of the agreed carveout for general unsecured claims in the amount of the sum of:

- a. \$200,000 (the “General Unsecured Claim Initial Carveout”); and
- b. The “General Unsecured Claim Supplemental Carveout,” which shall equal 10% of the amount remaining in the estate after payment or segregation of:
 - (i) all allowed administrative expense claims, including any Chapter 7 and Chapter 11 allowed administrative expense claims, other than the EPA Supplemental Allowed Administrative Expense Claim and the DOL Supplemental

Allowed Administrative Expense Claim (as defined in Subparagraph 21.b); and

(ii) the General Unsecured Claim Initial Carveout.

21. Agreement of the New York State Department of Labor: The DOL agrees to the terms set forth herein with respect to the United States' claims and the carveout for general unsecured claims. DOL also agrees that, in full resolution of the DOL Proof of Claim, it shall have an allowed administrative expense claim ("DOL Allowed Administrative Expense Claim") in the amount of the sum of:

- a. \$70,000 (the "DOL Initial Allowed Administrative Expense Claim"); and
- b. the "DOL Supplemental Allowed Administrative Expense Claim," which shall equal 6.3% of the amount remaining in the estate after payment or segregation of:
 - i. all allowed administrative expense claims, including Chapter 7 and Chapter 11 allowed administrative expense claims, other than said DOL Supplemental Allowed Administrative Expense Claim defined in this Subparagraph 21.b and the EPA Supplemental Allowed Administrative Expense Claim, and
 - ii. the General Unsecured Claim Initial Carveout.

The DOL Initial Allowed Administrative Expense Claim shall be paid in full within thirty (30) days of the Effective Date, and Debtor shall not seek to convert this case under

Chapter 11 of the Bankruptcy Code to a case under Chapter 7 of the Bankruptcy Code prior to making this payment. The DOL Supplemental Allowed Administrative Expense Claim shall be paid at such time as funds are distributed to general unsecured creditors in connection with the General Unsecured Claim Initial Carveout and the General Unsecured Claim Supplemental Carveout or at such earlier time as approved by the Court.

22. Payments to the DOL shall be made payable to the New York State Commissioner of Labor and shall be sent to the DOL at Counsel's Office, NYS Department of Labor, W.A. Harriman State Office Campus, Building 12, Suite 509, Albany, NY 12240, Att: Joan K. Harris, Senior Attorney (phone 518-485-2191). At the time of any cash or non-cash distribution pursuant to this Settlement Agreement, the Debtor shall email confirmation of such distribution to the DOL at joan.harris@labor.ny.gov and seth.kupferberg@ag.ny.gov with a reference to *In re Tonawanda Coke Corporation*, Case No. 18-12156 (Bankr. W.D.N.Y).

23. This Settlement Agreement shall be applicable whether this case remains in Chapter 11 or is converted to Chapter 7 and, if converted to Chapter 7, shall be binding on the Chapter 7 Trustee given that the priorities and distributions provided for herein are in accordance with and comply with those mandated under the Bankruptcy Code, except insofar as the rights and claims of the United States and DOL, as holders of Chapter 11 administrative claims, which are compromised as set forth herein pursuant to this Settlement Agreement.

24. This Settlement Agreement shall be subject to approval of the Bankruptcy Court. The Debtor shall seek approval of this Settlement Agreement under Bankruptcy Rule 9019 or applicable provisions of the Bankruptcy Code.

25. This Settlement Agreement shall be lodged with the Bankruptcy Court and shall thereafter be subject to a period of public comment following publication of notice of the Settlement Agreement in the *Federal Register*. After the conclusion of the public comment period, the United States will file with the Bankruptcy Court any comments received, as well as the United States' responses to the comments, and at that time, if appropriate, the United States will request approval of the Settlement Agreement. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Settlement Agreement disclose facts or considerations which indicate that the Settlement Agreement is not in the public interest.

26. If for any reason (a) the Settlement Agreement is withdrawn by the United States as provided in Paragraph 23, or (b) the Settlement Agreement is not approved by the Bankruptcy Court: (i) this Settlement Agreement shall be null and void, and the Parties hereto shall not be bound under the Settlement Agreement or under any documents executed in connection herewith; (ii) the Parties shall have no liability to one another arising out of or in connection with this Settlement Agreement or under any documents executed in connection herewith; and (iii) this Settlement Agreement and any documents prepared in connection herewith shall have no residual or probative effect or value.

27. This Settlement Agreement constitutes the sole and complete agreement of the Parties with respect to the matters addressed herein.

28. This Settlement Agreement may not be amended except by a writing signed by the Parties and approved by the Bankruptcy Court.

29. This Settlement Agreement may be executed in counterparts, each of which shall constitute an original, and both of which shall constitute one and the same agreement.

30. The Bankruptcy Court (or, upon withdrawal of the Bankruptcy Court's reference, the United States District Court for the Western District of New York) shall retain jurisdiction over the subject matter of this Settlement Agreement and the Parties hereto for the duration of the performance of the terms and provisions of this Settlement Agreement for the purpose of enabling any of the Parties to apply at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or interpretation of this Settlement Agreement or to effectuate or enforce compliance with its terms.

The undersigned party hereby enters into this Settlement Agreement in *In re Tonawanda Coke Corporation*, Case No. 18-12156 (Bankr. W.D.N.Y.).

FOR THE UNITED STATES OF AMERICA:

Date: _____

By: **ELLEN MAHAN** Digitally signed by ELLEN MAHAN
Date: 2020.09.11 16:42:03 -04'00'
ELLEN M. MAHAN
Assistant Section Chief
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice

Date: _____

By: **DAVID GORDON** Digitally signed by DAVID GORDON
Date: 2020.09.29 15:24:41 -04'00'
DAVID L. GORDON
Senior Counsel
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611

The undersigned party hereby enters into this Settlement Agreement in *In re Tonawanda Coke Corporation*, Case No. 18-12156 (Bankr. W.D.N.Y.).

FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

Date: _____

By: **Evangelista, Pat**
PAT EVANGELISTA
Director
Superfund and Emergency Management
Division
Region 2
U.S. Environmental Protection Agency
290 Broadway
New York, New York 10007

Digitally signed by
Evangelista, Pat
Date: 2020.09.29
12:51:29 -04'00'

The undersigned party hereby enters into this Settlement Agreement in *In re Tonawanda Coke Corporation*, Case No. 18-12156 (Bankr. W.D.N.Y.).

FOR THE DEBTOR:

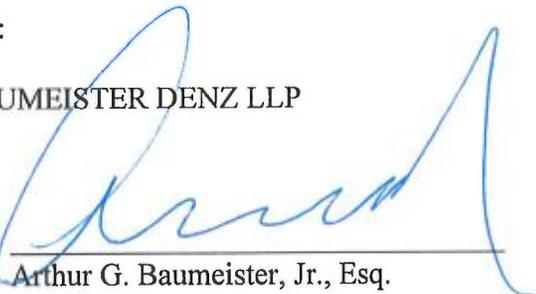
Date: 09/03/2020 By: Michael Kushner

The undersigned party hereby enters into this Settlement Agreement in *In re Tonawanda Coke Corporation*, Case No. 18-12156 (Bankr. W.D.N.Y.).

FOR THE CREDITORS' COMMITTEE:

BAUMEISTER DENZ LLP

Date: September 1, 2020

By: 

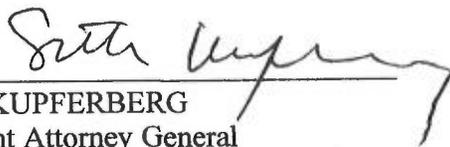
Arthur G. Baumeister, Jr., Esq.
174 Franklin Street, Suite 2
Buffalo, New York 14202
716-852-1300

*Attorneys for Official Committee of
Unsecured Creditors*

The undersigned party hereby enters into this Settlement Agreement in *In re Tonawanda Coke Corporation*, Case No. 18-12156 (Bankr. W.D.N.Y.).

FOR THE NEW YORK STATE DEPARTMENT OF LABOR:

Date: 8/31/20

By: 
SETH KUPFERBERG
Assistant Attorney General
Office of the Attorney General, Labor Bureau
28 Liberty Street
New York, New York 10005
212-416-8856