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 and
MARK L. KAMHOLZ

Defendants.

GOVERNMENT'S REPLY REGARDING THE SUPPLEMENTAL SENTENCING MEMORANDUM AND MOTION FOR DESIGNATION UNDER THE CVRA

THE UNITED STATES OF AMERICA, by and through its attorney, William J. Hochul, Jr., United States Attorney for the Western District of New York, and Robert G. Dreher, Acting Assistant Attorney General for the United States Department of Justice, Environment and Natural Resources Division, and the undersigned Assistant United States Attorney and Senior Trial Attorney, respectfully files this reply to the response filed by Defendant Tonawanda Coke Corporation ("Tonawanda Coke") and Defendant Mark L. Kamholz ("Defendant Kamholz") (Dkt. #264) (hereinafter "Response") to the government's supplemental sentencing memorandum and motion for designation under the Crime Victims' Rights Act (hereinafter "CVRA Motion") (Dkt. #261).

I. The Information Proffered by the Government Establish that Community Members Have Been Directly and Proximately Harmed as a Result of the Defendants' Conduct

In their Response, the defendants attempt to argue that any harm in the present case is too attenuated to warrant a designation of victim status under the CVRA. *See* Dkt. #264,

pp. 8-11, 21-25. In support of this argument, the defendants cite principally to three cases: *In re Local #46 Metallic Lathers Union*, 568 F.3d 81 (2d Cir. 2009); *In re Rendon Galvis*, 564 F.3d 170 (2d Cir. 2009); and *United States v. Sharp*, 463 F. Supp. 2d 556 (E.D. Va. 2006). These three cases, the defendants proclaim, are analogous to the facts in the present case and since victim designation was not conferred in those cases, this Court should deny outright the government's CVRA Motion. However, even a basic reading of these three cases illustrates the substantial differences to the defendants' conduct here, which resulted in the release of substantial quantities of hazardous air pollutants and particulate matter into the air of the surrounding community and the direct effect such conduct had on individual community members.

In *Local 46*, *Galvis*, and *Sharp,* all of the parties claiming victim status were never directly affected by the offenses of conviction, and, in applying the proximate harm but for test, it was impossible for the courts to conclude that the harm suffered by the purported victims was directly caused by the defendants' conduct giving rise to the count of conviction. *See Galvis*, 564 F.3d at 175 ("there are too many questions left unanswered concerning the link between the Defendant's federal offense and [the petitioner's harm]." *quoting Sharp*, 463 F. Supp. 2d at 566. Stated another way, the parties seeking victim designation in those cases were no doubt affected by the criminal conduct, but there was insufficient evidence before the courts to find that but for the defendants' conduct, the parties would not have suffered the harm. Hence, the courts were correct in finding that the harm was too attenuated to warrant a finding of victim status.

The present case is substantially different from the circumstances presented in *Local 46*, *Galvis*, and *Sharp*. As established at trial and previously briefed by the government, the defendants' illegal operation of the byproducts bleeder valve allowed for significant quantities of coke oven emissions, which is a hazardous air pollutant, to be released to the air. Similarly, the defendants' operation of quench towers without the proper pollution control equipment allowed for unmitigated particulate matter to be released into the surrounding community. That surrounding community, which is made up of living, breathing human beings, was subjected to the defendants' illegal air pollution for decades. Through the 128 impact statements already presented to the Court, and the briefing submitted in the government's CVRA Motion, there is no doubt that the defendants' conduct was the direct and proximate cause of the harms suffered by the Community Members. Although the government originally viewed the community as a whole as a victim, which was a legally justifiable position,[1] based on a reevaluation of the numerous impact statements, the government is now of the view that certain individuals in the community, namely, the people who were forced to breathe air contaminated with benzene and particulate matter as a result of the defendants' illegal and deliberate acts, should be accorded victim status and given a voice during the sentencing process. Unlike *Local 46*,

[1] Although the defendants claim that the government's CVRA Motion "resolves the defects in the government's earlier position," *see* Dkt. #264, p. 2, the government continues to assert that it was proper to view the community as a whole as the victim. In *United States v. Kaminski*, 501 F.3d 655, 669-70 (6th Cir. 2007) (affirming a district court's finding that "society at large" was the victim of offenses under Food, Drug and Cosmetic Act, involving sales of unapproved and adulterated drugs, and imposing restitution as a condition of probation in amount of retail sales to consumers). Moreover, the defendants are unable to point to any case where, under appropriate facts, a court refused to designate a community as a "victim." Rather, circuit court decisions make clear that it is not just individuals that can be considered victims. *See United States v. Bengis*, 631 F.3d 33 (2d Cir. 2011) (holding that the Republic of South Africa was a victim of the defendants conspiracy to illegally harvest lobsters from South African waters); *United States v. Gibbons*, 25 F.3d 28 (1st Cir. 1994) (holding that any local, state, or federal governmental entity could be a victim entitled to restitution); and *United States v. Oceanpro Industries*, 674 F.3d 323 (4th Cir. 2012) (determination that the states of Maryland and Virginia were victims of illegal fishing).

Galvis, and *Sharp*, the Community Members here were immediately and directly affected as a result of the defendants' acts.

The government has already fully briefed the particular harms that the defendants' criminal conduct caused to the Community Members in its CVRA Motion, and will not repeat the same arguments in this submission. However, the defendants' attempts to argue that the government too broadly interprets the types of harms cognizable under the CVRA must be addressed. Although, as the defendants correctly point out, the court in *United States v. Citgo Petroleum Corp.*, side-stepped the issue of whether an increased risk of future illness due to illegal air pollution constituted a harm under the CVRA, the Ninth Circuit has addressed that issue head-on and found that such increased risk does constitute a harm under the CVRA. In *In re Parker*, 2009 WL 5609734 (9th Cir. Feb. 27, 2009), the court held that the district court erred in finding that community members in Libby, Montana, who for years had been exposed to asbestos air emissions from a mine operated by W.R. Grace, were not victims under the CVRA. Prior to the Ninth Circuit's decision, the district court excluded lay witnesses that the government claimed were victims from attending the entire trial pursuant to Federal Rule of Evidence 615. *See United States v. Grace*, 597 F.Supp.2d 1157 (D. Mont. 2009). Thereafter, a writ of mandamus was brought before the Ninth Circuit by Melvin and Lerah Parker, in which the victims specifically argued that their exposure to asbestos placed them at an increased risk of contracting future asbestos-related diseases. After reviewing briefs submitted by the Parkers, the district court judge, and the government, the court concluded that the "district court erred in denying petitioners' motions to accord rights to victim-witnesses based on its finding that the 34 victim-witnesses

identified by the United States as prospective victims do not meet the meaning of "crime victim" set forth in the [CVRA]…." *Parker*, 2009 WL 5609734 at *1. As a result, the court ordered the district court to make "particularized findings" regarding whether the victim/witness's testimony would be "materially altered" by attending the entire trial. *Id.* A website maintained by the University of Montana contains all of the pertinent documents relating to the Ninth Circuit's decision in *Parker*. *See* http://archive.umt.edu/gracecase/victimwitness-controversy (last visited November 19, 2013). Because of the similarity in arguments made by the victims in *Parker*, and the government's position in the present case, attached hereto as **Exhibit 1** is a copy of the brief submitted by the victims to the Ninth Circuit.

Moreover, in their Response, the defendants attempt to argue that certain asbestos cases cited by the government that involved medical monitoring as part of the sentence imposed, particularly, *United States v. Scardecchio et al.*, 05-CR-472 (E.D. Pa.) (although the lead defendant's name was actually "Wallace Heidelmark") and *United States v. Mauck et al.*, 02-CR-24 (N.D. W.V.) (although lead defendant's name was actually "Scott Rind"),[2] are inapplicable to the present analysis. *See* Dkt. #264, pp. 27-28. However, a simple review of the dockets for both of these cases reveal that they did indeed involve restitution payments to fund medical monitoring of exposed workers. Attached hereto as **Exhibit 2** is a copy of the docket for the *Scardecchio/Heidelmark* case, with emphasis on Docket Entry #90 which sets forth medical monitoring for exposed workers. Attached hereto as **Exhibit 3** is a copy

[2] The government acknowledges that an incorrect case number was originally listed for this case in its CVRA Motion.

of the docket for the *Mauck/Rind* case, with emphasis on Docket Entry #177 which sets forth medical monitoring for exposed workers.

The government also takes serious issue with the defendants' position that an analysis of the term "victim" under the CVRA should not rely on companion cases under the Mandatory Victims Restitution Act ("MVRA") and the Victim Witness Protection Act ("VWPA") which involve the identical term. *See* Dkt. #264, pp. 3-8. On this point, government notes that in *United States v. Battista*, the Second Circuit wrestled with the issue of defining who was a victim in a case involving a former referee's conviction for conspiracy to transmit wagering information. *United States v. Battista*, 575 F.3d 226 (2d Cir. 2009). In that case, the court began its analysis by setting forth the definition of "victim" under the VWPA, highlighted that this definition was in accord with the MVRA, and importantly, that the CVRA "contains a similar definition." *Id.* at 231, n. 4. The court specifically noted that "the definition of victim is certainly broad…." *Id.* at 231. It is important to note that *Battista* was decided *after* the decisions in *Local 46* and *Galvis*, which the defendants rely on in support of their argument that the term "victim" must be narrowly construed. *See also United States v. Rubin*, 558 F.Supp.2d 411, 418 (E.D.N.Y. 2008) (stating that "the CVRA is meant to be liberally construed within the confines of the rights guaranteed"), and *United States v. Turner*, 367 F.Supp.2d 319, 327 (E.D.N.Y. 2005) (taking an "inclusive approach" regarding victim identification).

Throughout their Response, the defendants argue that the trial record is insufficient to allow this Court to make determinations regarding victim status under the CVRA. The

reason for this is that the trial in this case did not focus on evidence to establish who was, and who was not, a victim of the defendants' illegal conduct. Rather, it focused on the basic elements of the crimes, which established decades-long practices that allowed substantial amounts of air pollution to be released. It is the government's position now, that based on the 128 impact statements, that a logical inference can be made that the defendants' conduct directly and proximately harmed individual Community Members. The government does not dispute that additional evidence on the issue of victim identification would be warranted, and in fact, is the reason for the government's request to allow an evidentiary hearing to develop the record. That is exactly what was ordered in *CITGO* and *Grace*, which on their facts, are substantially similar to the present case. *See also United States v. Archer*, 671 F.3d 149, 174 (2d Cir. 2011) (noting that on remand the facts would support "allowing additional evidence" on the issue of victim determination and restitution).

Therefore, the government continues to assert that certain Community Members have been directly and proximately harmed as a result of the defendants' conduct, and that an evidentiary hearing should be ordered to develop a factual record regarding victim designation under the CVRA.

II. <u>Irrespective of the CVRA Motion, Community Service is Appropriate in this Case</u>

In a footnote, the defendants assert that the government has failed to outline how the CVRA Motion should be evaluated in light of the government's previous requests for community service. *See* Dkt. #264, p. 16 n. 7. The clear any confusion, the government hereby states that irrespective of the outcome of the government's CVRA Motion, the

government maintains that community service is appropriate and respectfully requests that the Court fund the community service projects previously outlined in the government's sentencing memorandum. *See* Dkt. 216. In that document, the government previously set forth the legal basis for the Court to grant the funding of community service projects as a condition of probation, and that pursuant to USSG §8B1.3, the Court has authority to order as a condition of probation that the defendant engage in community service "where such community service is reasonably designed to repair the harm caused by the offense." *See* Dkt. #216, pp. 6-7. Therefore, all that is required for this Court to order community service is to find that a harm has occurred, and the project funded will help repair that harm. Importantly, there is no requirement to make a determination as to who is a victim, be it individual community members or the community as a whole. In fact, the legislative history to 18 U.S.C. § 3563 indicates that community service may be appropriate when, among other instances, the victims cannot readily be identified. *See* S. Rep. No. 98-225, at 98 (1983) reprinted in 1984 U.S.C.C.A.N. 3182, 3281, 1983 WL 25404, *98 ("THIS CONDITION MIGHT PROVE ESPECIALLY USEFUL IN A CASE IN WHICH THE IMPOSITION OF A FINE OR RESTITUTION IS NOT APPROPRIATE, EITHER BECAUSE OF THE DEFENDANT'S INABILITY TO PAY OR BECAUSE THE VICTIMS CANNOT BE READILY IDENTIFIED OR THE ACTUAL AMOUNT OF INJURY IS SLIGHT.").

In the present case, the government respectfully submits that the requested community service will address the harm caused by the defendants' prolonged contamination of the air and soil in and around Tonawanda Coke. Accordingly, a sentence

in this matter involving community service as set forth in the government papers is not only supported by the law but warranted.

III. The Cases Presented by the Government Provide Adequate Context for the Court to Evaluate the Seriousness of the Present Offenses

In reference to the factors to be considered in imposing a sentence contained in 18 U.S.C. §3553, the Court has requested information regarding the "seriousness of the offense". To determine the context in which this case should be considered, the government has proposed that the Court consider the facts and sentences imposed in similar or analogous cases. The defendants have contended that how other courts have handled similar offenses is irrelevant. Instead, the defendants suggest that the Court should be guided by or have its evaluation replaced by the opinions of experts purchased by the defendants. The government contends that a hearing regarding the seriousness of the criminal offenses would leave the court in no better position than it is without it such testimony.[3] There is no doubt that if the Court orders such a hearing, both sides would present contradictory testimony that would not resolve the critical questions in dispute, i.e., how much benzene and particulate matter was actually released as a result of the defendants' criminal conduct.

In evaluating the seriousness of the present offenses, this Court does not have to resort to a full blown evidentiary hearing. Rather, the Court can use the substantial

[3] In addition, to be clear, the government notes that any hearing the Court may permit under the CVRA should be treated separate and apart from the defendants' request for a hearing regarding the seriousness of the offense.

evidence presented at trial regarding the defendants' criminal conduct, and now, can use the substantial briefing submitted by the parties in evaluating the case and arriving at a just and proper sentence. Therefore, the government submits that sufficient information has already been presented to "put this case into context," and that further hearings are unnecessary.

CONCLUSION

For the foregoing reasons, and for the reasons previously set out in the government's sentencing submissions and its CVRA Motion, this Court should allow the Community Members that have been affected by the defendants' criminal conduct to testify during a sentencing hearing, and after evaluating such testimony, impose the substantial criminal penalties previously requested by the government when sentencing Tonawanda Coke and Defendant Kamholz.

DATED: Buffalo, New York, November 19, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2013, I electronically filed the foregoing GOVERNMENT'S REPLY REGARDING THE SUPPLEMENTAL SENTENCING MEMORANDUM AND MOTION FOR DESIGNATION UNDER THE CVRA with the Clerk of the District Court using its CM-ECF system, which would then electronically notify the following CM/ECF participants on this case:

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I further certify that I provided a copy of the foregoing via inter office mail to the following participant on this case:

United States Probation Department
Attn: Susan C. Murray, USPO

S/ AARON J. MANGO

AARON J. MANGO