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**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

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In re:	: Chapter 11
	: :
REPUBLIC METALS REFINING	: Case No. 18-13359 (SHL)
CORPORATION, <i>et al.</i> , <sup>1</sup>	: :
	: (Jointly Administered)
Debtors.	: :
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**NOTICE OF HEARING OF AGNICO EAGLE MEXICO S.A. DE C.V.'S  
MOTION FOR RELIEF FROM THE AUTOMATIC STAY TO  
PERMIT SETOFF UNDER SECTION 553 OF THE BANKRUPTCY CODE**

**PLEASE TAKE NOTICE THAT** that on **February 21, 2019 at 11:00 a.m. (ET)**, or as soon thereafter as counsel may be heard, a hearing on the Agnico Eagle Mexico S.A. de C.V.

<sup>1</sup> The Debtors in these Chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, include: Republic Metals Refining Corporation, 15 West 47th Street, Suites 206 and 209, New York, NY 10036 (3194), Republic Metals Corporation, 12900 NW 38th Avenue, Miami, FL 33054 (4378), Republic Carbon Company, LLC, 5295 Northwest 163rd Street, Miami Gardens, FL 33014 (5833), Republic High Tech Metals, LLC, 13001 NW 38 Avenue, Miami, FL 33054 (6102), RMC Diamonds, LLC, 12900 NW 38th Avenue, Miami, FL 33054 (1507), RMC2, LLC, 12900 NW 38th Avenue, Miami, FL 33054 (4696), J & L Republic LLC, 12900 NW 38th Avenue, Miami, FL 33054 (7604); R & R Metals, LLC, 12900 NW 38th Avenue, Miami, FL 33054 (7848), Republic Metals Trading (Shanghai) Co., Ltd., 276 Ningbo Road, Huangpu District, Shanghai, P.R. 200001 China (1639), and Republic Trans Mexico Metals, S.R.L., Francisco I. Madero No. 55 Piso 5, Local 409, Centro Joyero Edificio Central, Delegación Cuauhtémoc, Mexico DF 6000 (2942).

(“*Agnico*”) *Motion for Relief from the Automatic Stay to Permit Setoff Under Section 553 of the Bankruptcy Code* (the “*Motion*”) will be held before the Honorable Sean H. Lane, United States Bankruptcy Judge, in Room 701 of the United States Bankruptcy Court for the Southern District of New York (the “*Court*”), One Bowling Green, New York, New York 10004.

**PLEASE TAKE FURTHER NOTICE** that any responses or objections to the Motion: (i) must be in writing; (ii) shall conform to the Federal Rules of Bankruptcy Procedure, the Local Rules and the Order Establishing Certain Notice, Case Management and Administrative Procedures the (the “*Case Management Order*”) D.E. 55; (iii) set forth the name of the responding party, the basis for the response and the specific grounds thereof; and (iv) be filed with the Court electronically in accordance with General Order M-399 (which can be found at [www.nysb.uscourts.gov](http://www.nysb.uscourts.gov)) by registered users of the Court’s case filing system and, by all other parties in interest, on a 3.5 inch floppy disk, CD-ROMs and 100 MB Zip Disks in either PDF or WordPerfect format. Further, pursuant to Local Bankruptcy Rule 9070-1 and the Case Management Order, as least one hard copy, marked “*Chambers Copy*,” be delivered directly to the chambers of the Honorable Sean Lane, and shall be served upon: (i) counsel for Agnico, Alston & Bird LLP, 90 Park Avenue, New York, New York 10016 (Attn: John W. Weiss, Esq.) and Alston & Bird LLP, 1201 West Peachtree Street NW, Suite 4900, Atlanta, Georgia, 30309 (Attn: Jonathan T. Edwards, Esq.); (ii) the Debtors, c/o Republic Metals Refining Corporation, (Attn: Scott Avila); (iii) counsel for the Debtors, Akerman LLP, 2001 Ross Avenue, Suite 3600, Dallas, TX 75201 (Attn: John Mitchell, Esq.) and 98 Southeast Seventh Street, Suite 1100, Miami, FL 3313 (Attn: Andrea S. Hartley, Esq. and Katherine C. Fackler, Esq.); (iv) the Office of the United States Trustee for the Southern District of New York, U.S. Federal Office Building, 201 Varick Street, Suite 1006, New York, New York 10014 (Attn: Shannon Scott, Esq.); (v) counsel for the

Committee, Cooley LLP, 1114 Avenue of the Americas, New York, NY 10036 (Attn: Seth Van Aalten, Esq.); (vi) counsel to any other statutory committee appointed in the Chapter 11 Cases; (vii) any person or entity with a particularized interest in the subject matter of a certain document; and (viii) any persons who have filed a request for notice in the above captioned cases pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure, so as to be filed and received by no later than **February 18, 2019 at 5:00 p.m. (ET)** (the “*Response Deadline*”).

**PLEASE TAKE FURTHER NOTICE** that, if no responses or objections are timely filed and served with respect to the Motion, counsel for Agnico may, on or after the Response Deadline, submit to the Court an order, substantially in the form of the proposed order annexed to the Motion, for which the order may be entered with no further notice or opportunity to be heard.

Dated: New York, New York  
January 8, 2019

Respectfully submitted,

/s/ John W. Weiss  
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In re:	: Chapter 11
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REPUBLIC METALS REFINING	: Case No. 18-13359 (SHL)
CORPORATION, <i>et al.</i> , <sup>1</sup>	: :
	: (Jointly Administered)
Debtors.	: :
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**AGNICO EAGLE MEXICO S.A. DE C.V.'S MOTION  
FOR RELIEF FROM THE AUTOMATIC STAY TO PERMIT  
SETOFF UNDER SECTION 553 OF THE BANKRUPTCY CODE**

Agnico Eagle Mexico S.A. de C.V. ("*Agnico*"), a Mexican corporation and subsidiary of Agnico Eagle Mines Limited, moves the Court under section 362(d)(1) of title 11 of the United

<sup>1</sup> The Debtors in these Chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, include: Republic Metals Refining Corporation, 15 West 47th Street, Suites 206 and 209, New York, NY 10036 (3194), Republic Metals Corporation, 12900 NW 38th Avenue, Miami, FL 33054 (4378), Republic Carbon Company, LLC, 5295 Northwest 163rd Street, Miami Gardens, FL 33014 (5833), Republic High Tech Metals, LLC, 13001 NW 38 Avenue, Miami, FL 33054 (6102), RMC Diamonds, LLC, 12900 NW 38th Avenue, Miami, FL 33054 (1507), RMC2, LLC, 12900 NW 38th Avenue, Miami, FL 33054 (4696), J & L Republic LLC, 12900 NW 38th Avenue, Miami, FL 33054 (7604); R & R Metals, LLC, 12900 NW 38th Avenue, Miami, FL 33054 (7848), Republic Metals Trading (Shanghai) Co., Ltd., 276 Ningbo Road, Huangpu District, Shanghai, P.R. 200001 China (1639), and Republic Trans Mexico Metals, S.R.L., Francisco I. Madero No. 55 Piso 5, Local 409, Centro Joyero Edificio Central, Delegación Cuauhtémoc, Mexico DF 6000 (2942).

States Code (the “*Bankruptcy Code*”) and Rules 4001(a) and 9014 of the Federal Rules of Bankruptcy Procedure, for relief from the automatic stay to setoff (or recoup) part of the prepetition debt Republic Metals Corporation (the “*Debtor*”) owes to Agnico against prepetition unpaid refining charges, interest on advances, and shipping costs Agnico owes to Debtor. In support of its motion, Agnico states as follows:

### I. INTRODUCTION

1. This Court should grant Agnico relief from the automatic stay to setoff (or recoup)<sup>2</sup> \$395,483.00 in amounts that Agnico presently owes to Debtor for refining charges, interest on advances, and shipping costs against Debtor’s prepetition unpaid indebtedness to Agnico of \$404,579.00, all of which arise pursuant to Agnico’s prepetition relationship with Debtor. Agnico owns and operates the Mascota and Pinos Altos mines in Mexico (the “*Mines*”), from which it mines substantial amounts of gold and silver. Before the Petition Date, Agnico had begun shipping gold and silver doré (the “*Doré*”) to Debtor for refining. Debtor would advance approximately 98% of the initial assay of the Dore, refine it, and then charge Agnico a refining charge, interest on the advances, and shipping charges. In turn, Debtor owed Agnico for the remaining balance of the metal, creating the classic setoff situation: “If A is indebted to B, and B is likewise indebted to A, it makes sense simply to apply one debt in satisfaction of the other rather than require A and B to satisfy their mutual liabilities separately.” *See* 5 Collier on Bankruptcy P 553.01 (16th ed. 2018). Because the debts owing between Agnico and Debtor are prepetition, mutual debts and otherwise satisfy the requirements of section 553 of the Bankruptcy Code, Agnico should be granted relief from the automatic stay to setoff (or recoup) such debts.

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<sup>2</sup> Agnico reserves its right to contend that the amounts it is owed from the Debtor and the amounts it owes to the Debtor arise out of the same transaction or occurrence and are subject to the equitable doctrine of recoupment, which is not subject to the automatic stay. *Westinghouse Credit Corp. v. D’Urso*, 278 F.3d 138, 147 (2d Cir. 2002) (citing *Univ. Med. Ctr. v. Sullivan (In re Univ. Med. Ctr.)*, 973 F.2d 1065, 1081 (3d Cir. 1992)).

## II. BRIEF FACTUAL BACKGROUND

### A. General Background

2. On November 2, 2018 (the “*Petition Date*”), Debtor and certain of its affiliates filed voluntary petitions under chapter 11 of the Bankruptcy Code.

3. The Debtors are in possession of their properties and continue to operate their businesses as debtors and debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these chapter 11 cases, though the United States Trustee has moved for the appointment of an examiner. D.E. 325.

4. An official committee of unsecured creditors (the “*Committee*”) was appointed in these chapter 11 cases on November 19, 2018, D.E. 113, and the Debtor presently intends to sell substantially all its assets under section 363 of the Bankruptcy Code. D.E. 358.

5. As noted above, Agnico owns and operates the Mines, from which it mines substantial amounts of gold and silver. In 2018, although Agnico had no signed contract with Debtor, Agnico began shipping Doré to Debtor for refining. As a new customer to Debtor, Agnico was essentially test-driving Debtor as a refiner before agreeing to formalize any business relationship via contract.

6. Thus, Agnico would not deliver and release Doré to Debtor until Debtor advanced approximately 98% of the initial assay. Debtor would then refine the Doré and invoice Agnico for a refining charge, interest on the monies previously advanced, as well as certain shipping costs associated with movement of the Doré.

7. After refining the Doré, Debtor was responsible for remitting to Agnico the balance for the remaining metals determined upon final assay.

8. Based on a review of its books and records, as of the Petition Date, Agnico has provided Debtor with Doré from the Mines, for which Debtor still owed Agnico for the following (the “*Agnico Claim*”):

***AMOUNTS DUE AGNICO FROM DEBTOR***

	<b>Au Oz</b>	<b>Ag Oz</b>	<b>Au value \$1,200</b>	<b>Ag value \$15</b>	<b>Total \$</b>
Due from Republic Pinos	171.876	6177.341	\$206,251	\$90,498	\$296,749
Due from Republic Mascota	75.266	1195.212	\$90,319	\$17,510	\$107,829
<b>Due from Republic (Pinos + Mascota)</b>	<b>247.142</b>	<b>7372.553</b>			<b>\$404,579</b>

9. Based on a review of its books and records, Agnico, in turn, owed Debtor for unpaid refining charges, interest on prior advances, and certain shipping costs relating to the Doré in the following amounts (the “*Agnico Payable*”):

***AGNICO REFINING CHARGE DUE TO DEBTOR***

<b>Due to Republic</b>	
<b>Refining Charge Due to Republic</b>	
Pinos invoices received but unpaid	\$193,858
Pinos estimated invoices not yet received	\$38,208
<b>Total Pinos Due to Republic</b>	<b>\$232,066</b>
Mascota invoices received but unpaid	\$22,147
Mascota estimated invoices not yet received	\$0
<b>Total Mascota Due to Republic</b>	<b>\$22,147</b>
<b>Total Refining charge Due to Republic</b>	<b>\$254,214</b>

***AGNICO INTEREST DUE TO DEBTOR ON DEBTOR ADVANCES***

<b>Interest Due to Republic</b>	
Pinos invoices received but unpaid	\$13,703
Pinos estimated invoices not yet received	\$28,241
<b>Total Pinos Due to Republic</b>	<b>\$41,944</b>
Mascota invoices received but unpaid	\$1,808
Mascota estimated invoices not yet received	\$4,687
<b>Total Mascota Due to Republic</b>	<b>\$6,495</b>
<b>Total Interest Due to Republic</b>	<b>\$48,439</b>

***AGNICO SHIPPING CHARGES DUE TO DEBTOR***

<b>Brink Charge due to Republic</b>	
Pinos invoices received but unpaid	\$29,237
Pinos estimated invoices not received	\$36,500
<b>Total Pinos Due to Republic</b>	<b>\$65,737</b>
Mascota invoices received but unpaid	\$12,093
Mascota estimated invoices not received	\$15,000
<b>Total Mascota Due to Republic</b>	<b>\$27,093</b>
<b>Total Brink Charge Due to Republic</b>	<b>\$92,830</b>

10. Thus, the total amounts due by Agnico to Debtor are \$395,483.00, resulting in a net claim equal to \$9,095.00 by Agnico against Debtor. More detailed information substantiating the calculations in the charts above is set forth in Exhibit A and Exhibit B hereto.

11. As noted in the charts above, Debtor has yet to invoice Agnico for all amounts Agnico believes it may owe Debtors and has otherwise ceased communications with Agnico. Moreover, counsel for Agnico attempted to resolve this motion by consent before filing it, though Debtor refused to acknowledge Agnico's right of setoff or recoupment.

**III. RELIEF REQUESTED**

12. Without waiving any of its rights in these cases, Agnico seeks entry of an order substantially in the form attached hereto as Exhibit C granting it relief from the automatic stay for "cause" under section 362(d)(1), to the extent the stay applies, so Agnico can exercise its rights to setoff (or recoup) under section 553 of the Bankruptcy Code by applying the Agnico Payable against the Agnico Claim, resulting in a net claim against Debtor's estate equal to \$9,095.00.

**IV. ARGUMENT AND CITATION OF AUTHORITY**

**A. This Court Should Find Cause Under Section 362(d)(1) to Permit Agnico to Setoff the Agnico Payable Against the Agnico Claim**

13. Section 553 of the Bankruptcy Code does not codify the right to setoff, but it does preserve the right under applicable non-bankruptcy law, as it provides, in pertinent part:



(a) Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect the right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before commence of the case. . . .

11. US.C. § 553(a).

14. Under section 553, “[t]he right to setoff exists where there are mutual debts between parties.” *SEC v. Elliot*, 953 F.2d 1560, 1572 (11th Cir. 1992). Indeed, the right to setoff mutual obligations allows “entities to apply their mutual debts against each other, thereby avoiding ‘the absurdity of making A pay B when B owes A.’” *See Citizens Bank v. Strumpf*, 516 U.S. 16, 18 (1995) (citation omitted). Although section 553(a) of the Bankruptcy Code is clear that a creditor’s setoff rights are recognized and enforceable under the Bankruptcy Code, any action by a creditor to setoff a debt owing to the debtor that arose prior to the debtor’s filing of its bankruptcy petition against a debt owed by the debtor is subject to the automatic stay. 11 U.S.C. § 362(a)(7). Under section 362(d)(1) of the Bankruptcy Code, however, a bankruptcy court may grant a party relief from the automatic stay for “cause.” 11 U.S.C. § 362(d)(1). Because “cause” is not defined in the Bankruptcy Code, whether relief should be granted is to be determined based on the facts of each case. *See In re Mazzeo*, 167 F.3d 139, 142 (2d Cir. 1999).

15. Although “cause” is not defined, bankruptcy courts have consistently found a creditor’s desire to exercise a setoff right constitutes “cause” for relief from the automatic stay. *See e.g.*, 11 U.S.C. § 553(a) (listing section 362 as one of the few exceptions to a creditor’s setoff right); *In re Garden Ridge Corp.*, 338 B.R. 627, 631-32 (Bankr. D. Del. 2006); *Official Comm. of Unsecured Creditors v. Mfr. and Traders Trust Co. (In re Bennett Funding Group, Inc.)*, 146 F.3d 136, 140-41 (2d Cir. 1998) (holding that the bankruptcy court did not abuse its discretion by lifting the automatic stay to allow bank to exercise right of setoff).

16. To effectuate and appropriately preserve one's right to setoff, the party seeking setoff must demonstrate that: (1) it has an independent right of setoff under applicable non-bankruptcy law, (2) the setoff must involve a mutual debt (that is, both parties owe each other money), (3) both obligations arose before bankruptcy, and (4) the setoff does not fall within the exceptions enumerated in Section 553 of the Bankruptcy Code. *See In re Dillard Ford, Inc.*, 940 F.2d 1507, 1512 (11th Cir. 1991); *In re Ionosphere Clubs, Inc.*, 164 B.R. 839, 841 (Bankr. S.D.N.Y. 1994). Agnico can demonstrate the setoff requirements under section 553 of the Bankruptcy Code.

**B. Agnico Has a Valid Right of Setoff**

17. First, Agnico has an independent right of setoff under applicable non-bankruptcy law, which is preserved under section 553. Although Agnico has no signed contract with Debtor that selects the governing law applicable to their business relationship, all potential non-bankruptcy law—whether Florida (the place of Debtor's incorporation), Mexico (the place of Agnico's incorporation) or New York (the state in which these cases are pending)—provide Agnico with a right of setoff. Indeed, according to Article 2185 of the Mexican Federal Civil Code,<sup>3</sup> a setoff (*compensación*) exists when two individuals or corporations are reciprocally creditor and debtor of each other. The effect of such setoff extinguishes the debts of such persons up to the amount of the smallest debt. *Id.* Art. 2186. In addition, Article 105 of the Mexican insolvency law (*Ley de Concursos Mercantiles*)<sup>4</sup> provides that all debts and credits shall be offset on the date of the declaration of insolvency, even if the debt or credit is not yet quantified and due at such date, but is subject to be quantified and due. New York and Florida also provide a right of

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<sup>3</sup> Automatic translation available at <https://wipolex.wipo.int/en/text/199821>

<sup>4</sup> *See Ley de Concursos Mercantiles* Art. 105 available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/29.pdf>.

setoff. *See* N.Y. Debtor & Creditor Law § 151; *In re Hunt*, 250 B.R. 482, 485 (Bankr. E.D.N.Y. 2000); *In re First Foliage, L.C.*, 2014 WL 2616618, \*12-13 (Bankr. S.D. Fla. June 11, 2014).

18. Second, the debts owing between Agnico and Debtor are mutual. Although the Bankruptcy Code does not define “mutual,” it has been interpreted to mean “the entity that owes a debt is the same entity that is owed a debt.” *Carlton Co. v. Jenkins (In re Jenkins)*, No. 03-60548, 2004 WL 768574 at \*3 (Bankr. S.D. Ga. Mar. 30, 2004). Debts are only considered “mutual” when “they are due to and from the same persons in the same capacity.” *E.g. In re Semcrude, L.P.*, 399 B.R. 388, 393 (Bankr. D. Del. 2009) (citing *Westinghouse Credit Corp. v. D’Urso*, 278 F.3d 138, 149 (2d Cir. 2002)). In this instance, both Agnico and Debtor owe each other a debt and such debts arise out of the same business relationship, which is between Agnico and Debtor. Thus, the parties’ debts—the Agnico Claim and the Agnico Payable—are mutual.

19. Third, as evidenced by Exhibit A and Exhibit B, the debts owing between Agnico and Debtor arose before the Petition Date.

20. Finally, Agnico’s setoff right is not curtailed by the exceptions set forth in section 553(a)(1)-(3). Agnico’s claim has not been disallowed, its claims have not been transferred to a third party, and the Agnico Claim was not incurred for the purpose of obtaining a right of setoff against Debtor.

## V. CONCLUSION

21. All the conditions for setoff under section 553(a) are present. Thus, Agnico’s setoff right is preserved and so “cause” exists to lift the automatic stay to permit Agnico to apply the Agnico Payable in satisfaction, in part, of the Agnico Claim. This Court should therefore grant this motion.

WHEREFORE, Agnico seeks entry of an order, a copy of which is attached hereto as Exhibit C: (i) granting the motion; (ii) authorizing Agnico to offset any amount owed by Agnico to Debtor against the claims of Agnico against Debtor; and (iii) granting to Agnico such other and further relief as is just and proper.

Dated: New York, New York  
January 8, 2019

Respectfully submitted,

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