

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

In re: )  
 )  
 ) Chapter 11  
REPUBLIC METALS REFINING CORP., *et* )  
*al.*, ) Case No. 18-13359 (SHL)  
 )  
Debtors. ) Jointly Administered  
 )

**JOINT OPPOSITION OF CERTAIN CUSTOMERS TO THE MOTION OF THE  
UNITED STATES TRUSTEE FOR THE ENTRY OF AN ORDER DIRECTING THE  
APPOINTMENT OF A CHAPTER 11 EXAMINER**

The undersigned parties (the “**Objecting Customers**”),<sup>1</sup> by their respective counsel, jointly object to the *Motion of the United States Trustee for the Entry of an Order Directing the Appointment of a Chapter 11 Examiner* (ECF 325-1) (the “**Examiner Motion**”), and state as follows in support of their objection:

**I. Summary of Objection**

1. From the outset of these chapter 11 cases, the question of who owns the metals and other products delivered by customers to the Debtors (the “**Ownership Disputes**”) has been a central, disputed issue. The issue arose initially in the context of the Debtor’s first-day cash

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<sup>1</sup> The Objecting Customers are customers who claim ownership rights in Assets (as defined in the Customer Procedures Order) held by the Debtors with ownership claims ranging from tens of thousands to tens of millions of dollars, and include: (1) Alamos Gold Inc. and its subsidiaries, Minas de Oro Nacional, S.A. de C.V., and Minera Santa Rita S. de R.L. de C.V.; (2) Apmex, Inc.; (3) Argonaut Gold Inc., on behalf of itself and certain of its subsidiaries; (4) Coeur Mexicana S.A. de C.V., Coeur Rochester, Inc. and Wharf Resources (U.S.A.), Inc.; (5) Cornerstone Capital Investment, Inc.; (6) Cyber Fox Trading Inc.; (7) First Majestic Silver Corp., on behalf of itself and certain of its subsidiaries; (8) Fundación Rafael Dondé, I.A.P.; (9) Geib Refining Corp.; (10) GMR Gold; (11) Midwest Refineries, LLC; (12) Minas de Oroco Resources, S.A. de C.V.; (13) Music City Group, LLC; (14) My Gold Limited; (15) North American Bullion Exchange, LLC; (16) Premier Gold Mines Limited; (17) Pretium Exploration Inc.; (18) Prince & Izant Company; (19) Scotsman Coin & Jewelry, Inc.; (20) Strategic Gold Corp; (21) Texas Precious Metals, L.L.C.; (22) Tiffany and Company, on its own behalf and on behalf of its wholly-

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collateral motion and since that time – with the Court’s helpful direction and guidance at multiple hearings and status conferences – the real parties-in-interest with regard to the Ownership Disputes, *i.e.*, the customers (including the Objecting Customers), the Debtors, and the Debtors’ secured lenders and the Creditors Committee, have devoted substantial time, attention and resources in developing and negotiating streamlined and consolidated litigation and discovery procedures to facilitate the adjudication of the Ownership Disputes in a cost-effective and timely manner in accord with principles of due process. As a result of those efforts, the parties agreed upon a proposed order governing the litigation and discovery procedures for resolution of the Ownership Disputes, and on January 11, 2019, the Court entered that order (ECF 395) (the “**Customer Procedures Order**”).

2. The Examiner Motion should be denied as unnecessary, duplicative and wasteful, because it will involve investigation of the very same Ownership Disputes that will otherwise be resolved efficiently and expediently pursuant to the Customer Procedures Order. *See* Examiner Mot. at 3 (requesting examiner “to investigate and report on the issues presented regarding the ownership of the property in the Debtors’ possession, including the raw materials, processed precious metals, and potentially segregated items that may have been identified for shipment back to their respective owners”). The appointment of an examiner would not help facilitate the resolution of the Ownership Disputes and instead would materially increase the costs of the Debtors and each of the customers and delay and disrupt the streamlined process contemplated by the Customers Procedures Order.

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owned subsidiary Laurelton Sourcing, LLC; and (23) Yamana Gold Inc., on behalf of itself and certain of its subsidiaries.

3. The US Trustee waited to bring the Examiner Motion until after the parties already had devoted substantial resources to the drafting and negotiation of the Customer Procedures Order, an order and process to which the US Trustee did not object. As a result, the US Trustee's request is belated, having been made after the real parties-in-interest reached agreement, with the guidance and supervision of the Court, on the streamlined discovery and litigation procedures ultimately reflected in the Customer Procedures Order.

**II. The Appointment of an Examiner Is Not in the Interests of the Customers or Other Parties in Interest**

4. Appointment of an examiner at this time to investigate the Ownership Disputes would serve no practical purpose and would be contrary to the interests of the customers as well as all other parties in interest in the cases, including the Debtors, the secured lenders and other unsecured creditors. *See* 11 U.S.C. § 1104(c)(1) (providing for appointment of examiner if appointment is in interests of creditors, any equity security holders and other interests of the estate).

5. On its face, the Examiner Motion is wholly duplicative of the Customer Procedures Order and is entirely unnecessary. The Customer Procedures Order provides for a thorough and efficient framework for the prompt adjudication of the factual and legal issues related to the Ownership Disputes. Specifically, the Customer Procedures Order contains comprehensive provisions setting deadlines and procedures for (a) the submission of written Customer Statements by this Friday, January 18,<sup>2</sup> and responses thereto by the Debtors and the Debtors' secured lenders to be filed in the following weeks; (b) initial disclosures and document productions by February 28, 2019, with service of additional written discovery, deposition

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<sup>2</sup> Accordingly, customers will have already devoted material resources to the preparation and filing of their Customer Statements prior to the hearing on the Examiner Motion.

notices, third-party discovery and expert discovery to follow, with all discovery to close by May 10, 2019; (c) summary judgment and other dispositive motions; (d) the submission of joint statements of undisputed facts, disputed facts and disputed legal issues; and (e) the conducting of evidentiary hearings in May 2019. *See* Customer Procedures Order at ¶¶ 2-4, 9-10.

6. As such, a Court-ordered process already is in place that will result in the production, consistent with the Federal Rules of Civil Procedure, of all non-privileged documents and information relevant to the Ownership Disputes, whether in the possession of the Debtors, their secured lenders, or their customers. It is highly unlikely that an investigation by an examiner would yield more or any different information relevant to the Ownership Disputes than will be generated as a result of the process set forth in the Customer Procedures Order. Indeed, an examiner investigation would likely be *less* efficient and informative, because an examiner would be new to the cases, which now are more than two months old, and, with no background, would have a limited amount of time to get up to speed on the pending issues and would be disruptive to and interfere with the adjudication and discovery processes contemplated by the Customer Procedures Order. In fact, under the circumstances, it is highly likely that the streamlined process contemplated by the Customer Procedures Order will be concluded or nearly concluded before the examiner would even issue a report.

7. Importantly, an examiner's investigation will not help facilitate the resolution of the Ownership Disputes. As noted above, discovery procedures are already in place pursuant to the Customer Procedures Order and, as a result, the parties are hopeful that most of the disputes to be presented to the Court for resolution will focus on questions of law—which only this Court,

and not an examiner, can resolve. Moreover, an examiner's report would be, at most, an advisory document that would not be binding on the Court nor any party in these cases.<sup>3</sup>

8. An examiner will also impose substantial costs on the Debtors' estate, not only due to the direct cost of the examiner and his or her professional advisors, which will be borne by the Debtors, but by the increased consequential costs resulting from the investigation which will be borne by the Debtors, the Creditors Committee and the lenders, all of whose professionals are being compensated by the Debtors. The customers' costs will likewise be increased as they will be forced to participate in the examiners' investigatory process, which may very well expand and upend the streamlined discovery process contemplated by the Customer Procedures Order. These increased costs are particularly problematic here, where the Debtors have already acknowledged that they do not have sufficient product on hand to satisfy the customers' ownership claims and where it appears that the Debtors are already administratively insolvent. Imposing additional costs and expenses on the estates to advance an examiner investigation wholly duplicative of the Customer Procedures Order is wasteful and not in the best interests of the estates or creditors. And it is particularly unfair to the customers, whose ownership rights will be further adversely impaired by the costs associated with the examiner.

9. In addition, the Court, the US Trustee, the Debtors, the secured lenders and the Creditors' Committee are all aware from numerous submissions in the case that an overarching

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<sup>3</sup> The Examiner Motion misleadingly cites the Creditors Committee's objection to the Debtors' cash collateral motion (ECF 193) (the "**Committee Objection**") as if it supports the appointment of an examiner. See Examiner Mot. at ¶¶ 27, 32; Committee Obj. at p. 6 (stating that Ownership Disputes "must be **resolved** in a balanced and streamlined process that fosters due process, preserves evidence, and minimizes prejudice and administrative cost" and that "[a]ppropriate and universal procedures ... including a timeline and process for discovery and adjudication" of Ownership Disputes should be implemented) (emphasis added). While an examiner can investigate and report on facts discovered in that investigation, he or she cannot adjudicate legal issues. It is the exclusive province of the Court to do that. Therefore, the appointment of an examiner would not in any way **resolve** the Ownership Disputes as the US Trustee suggests.

concern of many customers is the speedy resolution of the Ownership Disputes, because the impact to the customers—particularly smaller customers—is severe. There are customers whose business is threatened by the unresolved Ownership Disputes. Appointing an examiner would exacerbate this problem by needlessly delaying resolution and the return of the metals or their proceeds to the rightful owner.

**III. Appointment of an Examiner Is Not Required Where No Investigation Is Appropriate Under the Circumstances of These Cases**

10. Appointment of an examiner is not mandatory under 11 U.S.C. § 1104(c)(2). Several courts have held that even if the \$5,000,000 threshold set forth in Section 1104(c)(2) is satisfied, the question of whether an examiner should be appointed remains subject to the condition, set forth in Section 1104(c), that there is an “appropriate” basis for the appointment of an examiner. *See In re Residential Capital, LLC*, 474 B.R. 112, 117 (Bankr. S.D.N.Y. 2012) (“The Court concludes that appointment of an examiner is not mandatory in *all* cases satisfying subsection (c)(2) [of Section 1104] because the phrase ‘such an investigation of the debtor as is appropriate’ provides a limitation on the requirement for appointment of an examiner”); *In re Spansion, Inc.*, 426 B.R. 114, 126-28 (Bankr. D. Del. 2010) (notwithstanding \$5 million in fixed, liquidated, unsecured debt, appointment of an examiner was not required where there was no showing that an examiner was warranted or appropriate); *In re Shelter Resources Corp.*, 35 B.R. 304, 305 (Bankr. N.D. Ohio 1983) (although debtor had fixed, liquidated, unsecured debts in excess of \$5 million, an examiner would not be appointed where doing so would “entail undue delay in the administration of this estate and most likely cause the debtor to incur substantial and unnecessary costs and expenses detrimental to the interests of creditors and parties in interest”).

11. Where creditors’ committees and other parties are active in the case and would have the ability to investigate the same subject matter for which the appointment of an examiner

has been proposed, appointing an examiner would not be appropriate. In *In re Shelter Resources Corp*, the court denied a motion to appoint an examiner, in part, because a debenture holders committee had already been appointed in the case and had the ability to carry out an investigation of the same subject matter for which the appointment of an examiner had been proposed, observing that “[t]he appointment of an examiner under these circumstances, with the possibility of duplicated effort, is not in the spirit of economy of administration in the handling of bankruptcy estates.” *In re Shelter Resources Corp.*, 35 B.R. at 305.

12. The bankruptcy court for the District of Delaware relied on similar grounds in denying a motion to appoint an examiner in *In re Spansion*, noting that:

The Creditors Committee and various *ad hoc* committees have vigorously represented the interests of unsecured creditors. All of the parties have had ample opportunity to conduct—and have conducted—extensive discovery, and to investigate the Debtors. Appointment of an examiner at this time, based on this record, is neither warranted nor appropriate, and would cause undue cost to the estate, which would be harmful to the Debtors and would delay the administration of this chapter 11 case. The request for appointment of an examiner pursuant to § 1104(c)(2) will be denied.

*In re Spansion*, 426 B.R. at 128.

13. The same reasoning applies here. The parties with a vested interest in the outcome of the Ownership Disputes—the customers, the Debtors and the Debtors’ secured lenders as well as the Creditors Committee—already are actively involved, and the Customer Procedures Order provides a thorough framework for the development of all facts and evidence necessary to resolve the Ownership Disputes. The customers have already begun taking steps in accord with the Customer Procedures Order including drafting Customer Statements and reviewing and assembling documents for discovery, and presumably the Debtors and the secured lenders have begun taking their own actions to comply with their obligations under the Customer Procedures Order. There is no reason to add a duplicative layer of investigation of the same facts

by an examiner, which would not further the ultimate adjudication of the Ownership Disputes and will instead delay and disrupt such adjudication. Therefore, there is no appropriate basis for the appointment of an examiner within the scope of Section 1104(c)(2).

**IV. Conclusion**

14. For the foregoing reasons, the Objecting Customers respectfully request that the Court deny the Examiner Motion without prejudice.<sup>4</sup>

Dated: January 16, 2019

Respectfully submitted,

*/s/ Benjamin Mintz*

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<sup>4</sup> The Objecting Customers reserve their rights regarding a renewed motion for appointment of a chapter 11 examiner in the event that the Debtors or their secured lenders fail to comply with the Customer Procedures Order.

*/s/ David J. Kozlowski*

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