HEARING DATE AND TIME:
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
	)	
REPUBLIC METALS REFINING CORPORATION, *et al.*,[2]	)	Case No. 18-13359 (SHL)
	)	(Jointly Administered)
Debtors.	)	
	)	**RELATED DOC. NO. 325**

DEBTORS' OBJECTION TO THE MOTION OF THE UNITED STATES TRUSTEE FOR THE ENTRY OF AN ORDER DIRECTING THE APPOINTMENT OF A CHAPTER 11 EXAMINER

[1] Admitted to the New York State Bar. Admission to the United States Bankruptcy Court for the Southern District of New York pending.

[2] 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).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

**TO: THE HONORABLE SEAN H. LANE,
UNITED STATES BANKRUPTCY JUDGE:**

Republic Metals Refining Corporation, et al., the above-captioned Debtors and Debtors-in-Possession (collectively the "Debtors") hereby file this objection ("Objection") to the Motion of the United States Trustee for the Entry of an Order Directing the Appointment of a Chapter 11 Examiner ("Motion"). In support of their Objection, the Debtors respectfully submit as follows:

PRELIMINARY STATEMENT

After refusing three (3) separate offers to consult with the Debtors and their Chief Restructuring Officer ("CRO") (in person) regarding the Debtors' business, operations, customer claims, and ultimately the need for an examiner, the United States Trustee ("Trustee") filed its unsubstantiated and misinformed Motion, pursuant to 11 U.S.C. § 1104(c), for the appointment of an examiner to investigate certain property ownership disputes between the Debtors and certain of their customers. Motion at ¶ 32 [ECF No. 325 at p. 13.] Reduced to its core, the Trustee argues that an examiner is needed to ensure that an efficient, transparent process to determine these ownership issues is needed and that only an examiner can perform this role. *Id*. Citing solely to the fact that multiple creditors have filed claims to reclaim property, or to determine property interests, the Trustee presumes that sophisticated counsel for all, and this Court, are not up to the task of resolving these competing demands. Instead, an examiner is needed that would presumably investigate and report on the issue of title to certain raw materials, processed precious metals, and other of the Debtors' property.

This Court should deny the Motion for several reasons. First, the appointment of an examiner will simply duplicate the efforts already undertaken by other professionals and interested parties in these cases and cause the Debtors' estates to incur substantial expense. The Trustee ignores the fact that complex cases are routinely filed in this district and nearly every large district across the nation, wherein hundreds and thousands of creditors' claims are resolved in complex

chapter 11's. To suggest that a third party must assist merely because ***forty (40)*** creditors made reclamation demands is absurd. The parties, and this Court, are certainly capable of setting up a process to resolve 40 claims. Indeed, the Debtors, Secured Lenders and Unsecured Creditors Committee ("UCC"), as well as nearly every creditor involved in the property disputes, have already agreed to a process to resolve these disputes, and this Court has approved that process. *See* Order Approving Uniform Procedures for Resolution of Ownership Disputes ("Procedures Order") [ECF No. 395.]

Second, what this Court, and creditors and parties in interest, would do with an examiner's report is unclear. The report would be (and has to be) non-binding. The examiner is not an arbitrator. Parties in interest are entitled to their due process and to have this Court, not an examiner, determine property interests following notice and a hearing. The value of an advisory opinion from an examiner is questionable, at best. To use the words of one bankruptcy court in declining to appoint an examiner, "There's going to be a fight. Well, let's get to it. And I don't think there's any reason to keep tiptoeing around it."[1]

Lastly, the Trustee argues that any investigation must be independent and transparent. The UCC is already conducting an investigation, providing the independence the Trustee claims is lacking. Additionally, the Debtors already have a Court-appointed CRO to provide an additional layer of independence and transparency to the process. A third neutral party is not needed and would only exacerbate costs.

Accordingly, the Motion should be denied.

ARGUMENT

The Trustee has the burden of proving that an examiner should be appointed. *In re Dewey & LeBoeuf LLP*, 478 B.R. 627, 636 (Bankr. S.D.N.Y 2012). Contrary to the Trustee's claims that

[1] *In re Visteon Corp*., No. 09-11786-CSS, Hr'g Tr. 171:12-14 (Bankr. D. Del. May 12, 2010).

the relief must be granted, bankruptcy courts caution parties that "[t]he appointment of an examiner should not be routinely granted." *In re Tyler*, 18 B.R. 574, 578 (Bankr. S.D. Fla. 1982).

On request of a party in interest or the Trustee, § 1104(c) provides for the appointment of an examiner "to conduct such an investigation of the debtor as is appropriate" if: (a) "such appointment is in the interests of creditors, any equity security holders, and other interests of the estate"; or (b) the debtor's debt exceeds $5,000,000. 11 U.S.C. § 1104(c). The types of investigations to which § 1104(c) refers include investigations "of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor." 11 U.S.C. § 1104(c). Because the Trustee cannot meet its burden of showing that an examiner is warranted pursuant to Bankruptcy Code § 1104, the Court should deny the Motion.

A. Appointment of an Examiner is Not Mandatory Even if the Statutory Debt Threshold Under § 1104(c)(2) is Met

Although there is authority to the contrary, [2] courts in numerous jurisdictions, including in this district, have held that they have the discretion to deny the appointment of an examiner in appropriate circumstances. *In re Residential Capital, LLC*, 474 B.R. 112, 116-17 (Bankr. S.D.N.Y. 2012). Although § 1104(c)(2) provides that an examiner shall be appointed where a debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000, a party in interest requesting appointment of an examiner to conduct an investigation "as is appropriate" must demonstrate that appointment of the examiner is indeed appropriate, and thus in the interests of creditors and other interests of the estate. In other words, appointment of an examiner is permissive, not mandatory, and appointing an examiner where it

[2] *See In re Revco D.S., Inc.*, 898 F.2d 498, 500-01 (6th Cir. 1990) (holding that appointment is mandatory when the financial debt threshold of § 1104(c)(2) is satisfied); *In re Loral Space & Comm. Ltd.*, 2004 WL 2979785, No. 04 Civ. 8645RPP (S.D.N.Y. Dec. 23, 2004) (reversing the bankruptcy court's denial of motion to appoint examiner and finding that an investigation by an independent functionary would provide extra protection to the debtor's stockholders).

would be inappropriate under the circumstances would be an "absurd result." *In re Visteon Corp*., No. 09-11786-CSS, Hr'g Tr. 170:16-17 (Bankr. D. Del. May 12, 2010).

Whether an investigation, and thus the appointment of an examiner, is "appropriate" is not clearly defined in the statute or the legislative history of § 1104(c)(2). Nevertheless, in applying the discretionary appointment standard, courts have looked at three factors indicative of an inappropriate appointment: (1) the timing and underlying motives of the motion, or if there is no factual basis to conclude that an investigation needs to be conducted; (2) whether the appointment of an examiner would increase costs and cause a delay with no corresponding benefit; and (3) whether the investigation has already been conducted by other parties. *In re Residential Capital*, 474 B.R. at 120, 121.

In *In re Residential Capital*, Judge Glenn ruled that appointment of an examiner is not mandatory in all cases under § 1104(c)(2) and that the language "such an investigation of the debtor as is appropriate" provides courts discretion to decide whether appointment would be appropriate after considering the facts and circumstances of a case. 474 B.R. at 116-17. *See also In re Dewey & LeBoeuf*, 478 B.R. at 639 (adhering to the view that it has discretion to deny a motion for appointment of examiner even where the fixed, liquidated, unsecured debt exceeds $5 million); *In re Calpine Corp.*, No. 05-60200, Hr'g Tr. 73:9-12 (Bankr. S.D.N.Y. Oct. 24, 2007) (noting that "the mandatory nature of [Section 1104(c)] was not intended and should not be relied upon to permit blatant interference with the Chapter 11 case or the plan confirmation process") (internal quotation marks omitted); *In re Innkeepers USA Trust*, No. 10-13800-scc, Hr'g Tr. 168:4-6 (Bankr. S.D.N.Y. Sept. 30, 2010) (denying motion to appoint examiner).

Courts in other jurisdictions agree. The court in *In re Spansion* found "no sound purpose in appointing an examiner, only to significantly limit the examiner's role when there exists insufficient basis for an investigation" even though the statutory debt threshold was met. 426 B.R.

114, 127 (Bankr. D. Del. 2010) ("To appoint an examiner with no meaningful duties strikes me as a wasteful exercise, a result that could not have been intended by Congress."); *In re Shelter Resources Corp.*, 35 B.R. 304, 305 (Bankr. N.D. Ohio 1983) (denying motion for the appointment of an examiner despite debt threshold being reached); *In re Washington Mutual, Inc.*, No. 08-12229 (MFW) (Bankr. D. Del. May 5, 2010), Hr'g Tr. 97:6-13 ("I do believe that 1104(c)(2) gives the Court some discretion, even if the debt level is reached, and the discretion is that the Court has the discretion to determine what appropriate investigation of the debtor should occur and that, if the Court determines that there's no appropriate investigation that needs to be conducted, the Court has the discretion to deny the appointment of an examiner."); *In re Visteon Corp.*, No. 09-11786-CSS, Hr'g Tr. 170:23-171:3 (requiring a "level of smoke . . . not a lot but more than none, more than just a whiff of smoke – but some sort of indication, some sort of allegation or facts that make the Court think in a whole that, hmm, somebody needs to look into this independently and tell the Court what's going on"); *In re GHR Companies, Inc.*, 43 B.R. 165, 170 (Bankr. D. Mass. 1984) (holding that appointment of an examiner even where the statutory debt threshold is met is not mandatory); *In re Rutenberg*, 158 B.R. 230, 232-33 (Bankr. M.D. Fla. 1993) (motion denied despite the fact that the debtor's debt was in excess of $5 million).[3] As shown below, the Trustee has not met its burden in showing that the appointment of an examiner would be appropriate in this case.

[3] *See also In re Am. Home Mortgage Holdings, Inc.*, No. 07-11047 (CSS), Hr'g Tr. 76:9-12 (Bankr. D. Del. Oct. 31, 2007) ("I think the financial criteria are important, and obviously, they're met in this case, but that's only one piece of the puzzle, and the other piece of the puzzle is that there has to be an investigation to perform that's appropriate."); *In re HSH Delaware GP LLC*, No. 10-10187-MFW, Hr'g Tr. 31:18-22 (Bankr. D. Del. Apr. 23, 2010) ("I do agree that there is some discretion in 1104(c)(2) that the Court must exercise, not only in determining whether and the amount of the unsecured non-trade debt but also in determining whether, in fact, any investigation is appropriate"); *In re SA Telecomms., Inc.*, Nos. 97-2395-2401 (PJW), Hr'g Tr. 23:15-18 (Bankr. D. Del. Mar. 27, 1998) ("I'm going to point out that this Court has for years consistently viewed 1104(c)(2) as not being a mandatory provision."); *In re Webcraft Techs., Inc.*, No. 93-1210, Hr'g Tr. 104:7-16 (Bankr. D. Del. Nov. 4, 1993).

This Court has discretion to decide whether or not to appoint an examiner. Because the Trustee has not shown that an investigation by an examiner would be appropriate (nor, as discussed below, has it shown that appointment would be in the best interests of the creditors and other interests of the estate, including the Debtors), this Court should deny the Trustee's motion.

1. There is No Factual Basis for the Appointment of an Examiner and Appointment Would Increase Costs and Cause a Delay With No Corresponding Benefit

First, while the Debtors do not contend that the Trustee has filed its motion for an improper purpose or to cause a delay, the Trustee has not established a factual basis to conclude that an investigation needs to be conducted. The Trustee seeks to have the Court appoint an examiner to investigate the ownership of materials issues. Separate and apart from the fact that this would result in merely a third party's, non-binding advisory opinion, this is not the type of dispute Congress intended to have a debtor's estate expend substantial sums of money to investigate. Section 1104(c) provides examples of the types of investigations that are appropriate for an examiner to investigate, which include "allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor." § 1104(c). While the list is certainly not exhaustive, what all of the examples have in common is that they all suggest some sort of transgression on the part of the debtor. What's more is that the appointment of an examiner requires an *allegation* of a transgression. No allegations of any transgressions have been made here.

In the case of *In re Spansion*, the court recognized that an investigation into the value of the debtor companies was not an "appropriate" type of investigation under § 1104(c). 426 B.R. at 128. The court concluded, "The record before me does not provide sufficient evidence of conduct that would make an investigation of the Debtors 'appropriate,' but rather reveals deep and heated differences of opinion about the value of the Debtor companies." *Id.* It also found that allegations

of bad faith against management for rejecting an offer was not grounds for an investigation by an examiner, but rather a classic confirmation dispute. *Id.* There has to be an actual examination that needs to be done. Here, there just is not one.

In *In re Visteon Corp.*, where the court characterized the arguments of the parties as a "good old fashioned brawl" over a debtor that has value, it did not find that there was a need for an examiner to *investigate what the parties were going to fight in court about anyway*. No. 09-11786-CSS, Hr'g Tr. 171:8 (emphasis added). "There's going to be a fight. Well, let's get to it. And I don't think there's any reason to keep tiptoeing around it." *Id.* at 171:12-14.

Here too, what we have before us is a pure, old fashioned property fight. As such, it should not be subject to an investigation by an examiner, especially since the parties are going to fight about it anyway. To that end, on January 11, 2019, this Court signed the Procedures Order. [ECF No. 395.] The fight is on, and the parties should get to it. An examiner would only delay the settlement efforts and introduce unnecessary complication into the process.

2. Investigations by Other Parties in the Case are Ongoing

On November 19, 2018, the Trustee appointed the UCC. The UCC, like any appointed committee, has broad powers under § 1103 of the Code. Among other powers, it has the power to "investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business." § 1103(c)(2). The UCC may also perform such other services as are in the interest of those represented. § 1103(c)(5). "The investigative authority granted to a committee is extremely broad and a committee may undertake whatever investigation is appropriate to enable it to fulfill its duty to monitor the operations of the debtor." 7 COLLIER ON BANKRUPTCY ¶ 1103.05. These powers include the investigation into the property ownership dispute.

Having the UCC carry on with its investigation will allow for a balanced and streamlined process that fosters due process and minimizes prejudice and administrative cost, which were some concerns the UCC and Senior Lenders shared in their respective objections to the Debtors' Cash Collateral Motion. [ECF No. 193 at p. 6; ECF No. 208 at p. 15.]

Several courts have ruled that an examiner's investigation is not appropriate under the circumstances when a committee is able and capable of launching or is in the process of conducting an investigation, as is the case here. *See generally In re Sletteland*, 260 B.R. 657, 672 (Bankr. S.D.N.Y. 2001); *In re IdleAire Technologies Corp.*, No. 08-10960 (KG), Hr'g Tr. 45:21-46:8 (Bankr. D. Del. Jun. 13, 2008); *In re HSH Delaware GP LLC*, No. 10-10187-MFW, Hr'g Tr. 32:2-5 (finding it inappropriate to order an examiner to conduct an investigation that is already being conducted by other parties in the case).

In sum, if there is an investigation to be had, the UCC is the entity that should be conducting the investigation. The UCC has the means, proper motive, and incentive to conduct the investigation and is equipped with the proper tools to do so – it has competent advisors and dedicated members.

B. Appointment of an Examiner is Not in the Best Interests of Creditors and Other Interests of the Estate Under § 1104(c)(1)

Under § 1104(c)(1), the court must not only consider the interests of creditors, but also other interested parties, including the debtor. A party moving for the appointment of an examiner "must show that the appointment is in the interests of all those with a stake in the estate." *In re Sletteland*, 260 B.R. at 672 (emphasis added). Here, there is no benefit to the estates' interest holders.

Appointment of an examiner should be declined if it would entail undue delay in the administration of the estate and cause the debtor to incur substantial and unnecessary costs and expenses detrimental to the interests of creditors and parties in interest. *See In re Shelter Resources*

Corp., 35 B.R. at 305. *See also In re Dewey & LeBoeuf*, 478 B.R. at 639 (declining to appoint an examiner as appointment would derail the debtor's efforts).

Courts have also held that where other investigations have already taken place or where investigations were pending, and where independent oversight is in place, appointment of an examiner is neither necessary nor justified. *See, e.g., Id*. (denying movants' motion for the appointment of an examiner because the debtor and its professionals had already conducted an appropriate investigation into the matter); *In re Mechem Financial of Ohio, Inc.*, 92 B.R. 760, 761 (Bankr. N.D. Ohio 1988) (denying Trustee's motion for appointment of an examiner because debtor had hired a financial institution to act as an independent trustee, and the Trustee, together with the committee of unsecured creditors, provided oversight over the debtor's activities).

Here, a court-appointed CRO, Mr. Scott Avila, and an independent investigation being run by the UCC, provide the required independence and transparency that is appropriate to conduct the necessary investigations into any matters germane to these Chapter 11 Cases. Any appointment of an examiner would only result in an additional layer of costs and expenses being laid upon this estate, with no beneficial result.

Appointment of an examiner would also counteract the ongoing settlement discussions the Debtors are having with individual customers who have filed reclamation demand notices, as well as other claims to estate property. Courts generally do not favor appointment of an examiner if doing so would cause a delay in the administration of the estates and high costs. *In re Shelter Resources Corp.*, 35 B.R. at 305.

A new investigation by an examiner would also divert the Debtors and their professionals from their most important tasks – continuing to operate the business, proceeding with the sale process, and preparing a liquidating plan. Instead of being in the interests of the creditors, Debtors,

and other interests of the estate, the appointment of an examiner would be counterproductive to the Debtors' restructuring efforts, wasteful for the estate, and damaging to the creditors.

In sum, the Trustee has failed to show how the appointment of an examiner would be in the best interests of all parties in interest, including the Debtors. To the contrary, the appointment of an examiner would be duplicative and expensive. When the Court balances the costs of having an examiner conduct a redundant investigation into the ownership dispute against the potential corresponding benefits of such an investigation, it will find that the benefits do not outweigh the extraordinary costs of appointing an examiner.

CONCLUSION

WHEREFORE, the Debtors respectfully request that the Court deny the relief sought in the Motion and grant the Debtors such other and further relief as is just.

Dated: January 16, 2019

AKERMAN LLP

By: */s/Katherine C. Fackler*

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