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Minas de Oro Nacional, S.A. de C.V., and  
Minera Santa Rita S. de R.L. de C.V.*

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

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<i>In re:</i>	:	Chapter 11
	:	Case No. 18-13359 (SHL)
REPUBLIC METALS REFINING	:	(Jointly Administered)
CORPORATION, <i>et al.</i> ,	:	Related Doc. No. 395
Debtors. <sup>1</sup>	:	
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**CUSTOMER STATEMENT OF 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.**

Alamos Gold Inc. and its subsidiaries, Minas de Oro Nacional, S.A. de C.V.  
 (“MON”) and Minera Santa Rita S. de R.L. de C.V. (“MSR”) (collectively, “Alamos”), as  
creditors in the above-captioned chapter 11 cases (collectively, the “Chapter 11 Cases”),  
hereby file this Statement of Claimed Ownership and Claims (the “Customer Statement”)  
pursuant to the *Order Approving Uniform Procedures for Resolution of Ownership*

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<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtors’ tax identification number, are as follows: 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); and Republic Carbon Company, LLC, 5295 Northwest 163rd Street, Miami Gardens, FL 33014 (5833).

*Disputes* (the “Order”) entered on January 11, 2019 [Docket No. 395] and respectfully state as follows:

### **PRELIMINARY STATEMENT**

The Debtors do not have title to carbon fines that were shipped to the Debtors by Alamos because (1) Alamos retains title to those materials and (2) the materials are segregated, identifiable, and not commingled with other property of the Debtors’ estates. As described more fully below, pursuant to the terms of the agreements between Alamos and the Debtors and the course of dealing between the parties, Alamos retained title to carbon fines provided by Alamos to the Debtors for processing and refining. The segregated materials should be returned to Alamos.

Alamos also shipped doré to the Debtors for refining, for which the Debtors acted as Alamos’ bailee. Alamos had the sole authority to direct the transfer or sale of the doré and at no point in the refining process did title to the doré transfer to the Debtors.

### **BACKGROUND**

#### **A. Procedural Posture**

1. On November 2, 2018, Debtors filed the *Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to Use Cash Collateral, (II) Granting Adequate Protection the Secured Parties, (III) Scheduling a Final Hearing and (IV) Granting Related Relief* (the “Initial Cash Collateral Motion”) [Docket No. 10]. On November 13, 2018, Debtors filed the *Joint Supplement of the Debtors and the Senior Lenders to the*

*Cash Collateral Motion* (the “Supplement”, and together with the Initial Cash Collateral Motion, the “Cash Collateral Motion”) [Docket No. 78].

2. Alamos filed a limited objection to the Cash Collateral Motion on (the “Objection”) [Docket No. 121] and the Affidavit of Grace Tang related thereto [Docket No. 228] (the “Tang Affidavit”). Approximately 40 of the Debtors’ customers filed similar objections (the “Customer Objections”).

3. Alamos also filed a Notice of Reclamation Demand [Docket No. 116].

4. In order to streamline the process for resolving the objections, on January 11, 2019, the Court entered the Order, which authorized uniform procedures for resolving Ownership Disputes (defined therein) arising out of the Customer Objections.

**A. Statement Pursuant to Section 2(c)(i) of the Order**

5. *Name, address and telephone number of Customer*

Alamos Gold Inc., Minas de Oro Nacional, S.A. de C.V., Minera Santa Rita S. de R.L. de C.V.

Brookfield Place  
181 Bay Street, Suite 3910  
Toronto, Ontario, M5J 2T3  
(416) 368-9932  
Attn: Nils Englestad and Grace Tang

6. *Name, address and telephone number of counsel for Customer*

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**B. Statement Pursuant to Section 2(c)(ii) of the Order - Description of the Assets in which the Customer claims an ownership interest, including quantity**

7. The Debtors are currently in possession of eight containers of carbon shipped by Alamos (the “Carbon Containers”).<sup>2</sup> The Debtors are also in possession of metals from one shipment of doré, number 301 (the “Doré Shipment”). Of the refined doré that was transferred to Alamos’ pool account, Alamos was unable to direct the transfer of approximately 2% of those metals to its customers because of the commencement of the Chapter 11 Cases.<sup>3</sup> See Exhibit A for a more particularized description of the materials and quantities.

**C. Pursuant to Section 2(c)(iii) of the Order – Description of all claims that the Customer is aware of as of the date of the Customer Statement (non-binding)**

8. Summary:

Containers 1-2<sup>4</sup>: unsecured claim for 20% outstanding payment of metals from Container 1 in the amount of \$156,620.43 and from Container 2 in the amount of \$145,143.80, for the aggregate amount of **\$301,764.23**, for the metals as set forth in Exhibit A (**note amount may fluctuate based upon silver market price**);

Containers 3-8<sup>5</sup>: reclamation demand for the metals as set forth in Exhibit A and claim for the amounts of the carbon as set forth therein (**note amount may fluctuate based upon gold and silver market price**);

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<sup>2</sup> GSTU7531030 (Container #1), CLHU4750659 (Container #2), MSCU5817999 (Container #3), MSCU 4838615 (Container #4), TTNU4253221 (Container #5), TRLU4873860 (Container #6), MSCU8481341 (Container #7), and CARU9773801 (Container #8)

<sup>3</sup> Dore Shipment #301

<sup>4</sup> GSTU7531030 and CLHU4750659

<sup>5</sup> Containers labeled MSCU5817999 (Container #3), MSCU 4838615 (Container #4), TTNU4253221 (Container #5), TRLU4873860 (Container #6), MSCU8481341 Container #7), and CARU9773801 (Container #8)

Containers 7-8<sup>6</sup>: administrative priority claim for **\$203,082.26** for the metals as set forth in Exhibit A (**note amount may fluctuate based upon gold and silver market price**);

Doré Shipment #301: outstanding payment in the amount of **\$87,078.33** for the metals as set forth in Exhibit A (**note amount may fluctuate based upon gold and silver market price**).

**D. PURSUANT TO SECTION 2(C)(IV) OF THE ORDER – A SUMMARY OF THE LEGAL BASIS FOR THE CUSTOMER’S OWNERSHIP CLAIM**

**I. Factual Background**

**A. The Carbon**

1. The Carbon Containers are governed by a December 14, 2016, carbon purchase contract between Alamos and Debtor Republic Metals Corporation (“RMC”) (the “Carbon Purchase Contract”). Alamos’ and the Debtors’ course of dealing was to operate at all times pursuant the terms of the Carbon Purchase Contract. When a carbon container arrived at the carbon processing facility, a third party, Semiesa, would represent Alamos to observe the weighing and sampling procedures. Once the weighing and sampling were completed, the Debtors would notify Alamos of the provisional assay - the estimated gold and silver to be processed from the carbon. After Alamos agreed to the provisional assay, the Debtors would make a provisional payment of 80% of the agreed market price to Alamos.

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<sup>6</sup> MSCU8481341 (Container #7) and CARU9772801 (Container #8)

2. The Carbon Purchase Contract expressly states that title remains with Alamos until the provisional assays/weights are agreed upon and provisional payment of 80% of the agreed market price is paid by or on behalf of RMC to Alamos: “Title & Risk – Title and risk shall pass from seller to buyer once pricing, provisional assays / weights are agreed and provisional payment has been made.” (Carbon Purchase Contract at 1.)

3. The Carbon Purchase Contract also states that “ALAMOS has the right to have, at their own expense, a representative at the Weighing and Sampling procedures.” (Carbon Purchase Contract at 2.).

4. Alamos retains title to Containers 3-8. Containers 3-8 arrived at the Debtors’ facility on dates ranging from October 2, 2018 through November 12, 2018. With respect to each of Containers 3-8, weighing and sampling procedures have not occurred, the representative of Alamos has not observed any procedures, the provisional assays/weights have not been delivered or agreed upon and neither the 80% provisional payment or the final payments based on final assay reports have been made.<sup>7</sup>

5. On November 19 and 20, 2018, Alamos instructed the Debtors not to process or commingle the goods in Containers 3-8. (Tang Declaration [Docket No. 228] at ¶ 10.)

6. Also on November 19, 2018, Alamos filed a Notice of Reclamation Demand with respect to Containers 3-8. [Docket No. 116.]

7. Alamos subsequently determined that two of those containers, identified as MSCU8481341 and CARU9772801 (“Containers 7 and 8”), arrived at the Debtors’ facility

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<sup>7</sup> The Debtors are currently in possession of two other carbon containers – GSTU7531030 and CLHU4750639 (“Containers 1-2”). Containers 1-2 have been provisionally assayed and the 80% provisional payment to Alamos has been made.

on November 12, 2018, after the petition date. Accordingly, Alamos has an administrative priority claim with respect to Containers 7 and 8.

8. On December 5, 2018, counsel for the Debtors confirmed to Alamos that Containers 3-8 remains at the Debtors' Miami location and represented that they would remain segregated pending resolution of Alamos's claim.

9. Therefore, Containers 3-8 have not been commingled, remain identifiable and are property of Alamos.

**B. The Doré**

10. The Doré Shipment is governed by the July 12, 2016, toll agreement between MSR, a subsidiary of Alamos, and RMC (the "Toll Agreement"). Pursuant to the Toll Agreement, the Debtors would process the metals, after which Alamos would sell the refined product to a third party. Title to the metals remained with Alamos until Alamos authorized the sale of the product to a third party. At no time in the process did title ever transfer to the Debtors nor were the metals sold to the Debtors.

11. Under the plain language of the Toll Agreement, the Debtors never take title to the material and the metals. The Toll Agreement states:

Title to all Material and recoverable metals produced therefrom (without duplication) shall reside with the Customer at all times under this Agreement, except, in respect of any of the recoverable metal which are transferred to an account other than Customer's at the Customer's direction, title to such recoverable metal shall pass to such third party.

Toll Agreement, ¶ 28.

12. The Doré Shipment arrived at the Debtor's facility on or about August 21, 2018. Final assays were agreed upon on October 3, 2018. Pursuant to the terms of the Toll

Agreement, 6 business days after the shipment arrives at the Debtors, Alamos was entitled to transfer up to 98% of the metal to Alamos' counterparties. Toll Agreement, ¶¶ 4 and 8.2. Alamos provided instructions on August 30, 2018, for the transfer of 98% of the gold ounces based on the provisional assay to Alamos' counterparties. Debtors transferred the remaining ounces of metals into Alamos' pool account based on the final assay. However, Alamos could not direct the transfer of those metals to Alamos' counterparties because of the commencement of the Chapter 11 Cases. Because Alamos retained title to the metals under the terms of the Toll Agreement, and because Alamos has not authorized the sale of the product to a third party, the remaining portion of the Doré Shipment #301 is not property of the estate.

## II. LEGAL ARGUMENT

### A. The Debtors Do Not Have Title by the Plain Terms of their Agreements with Alamos

1. The commencement of a bankruptcy case creates an estate consisting of “[a]ll legal or equitable interests of the debtor in property as of the commencement of the case.” 11 USC § 541. “The party seeking to include property in the estate bears the burden of showing that the item is property of the estate.” *In re TMT Procurement Corp.*, 765 F. 3d 512, 528 (5th Cir. 2014) (quoting *In re Klein-Swanson*, 488 B.R. 628, 633 (8th Cir. B.A.P. 2013)).

2. The debtor's rights cannot be expanded beyond what existed at the commencement of the case. 4 Norton Bankruptcy Law and Practice § 61:4[17] (3d Ed. rev. 2018). “[I]tems in the possession of the debtor may become property of the estate only to the extent of the debtor's property interest in those items.” *In re Morgansen's Ltd.*, No. 04-CV-

0268 (ADS), 2005 WL 2370856, at \*6 (E.D.N.Y. Sept. 27, 2005) (quoting 5 Collier on Bankruptcy, § 541.06[1-a] (15th Ed. rev. 1999)). Thus, “a critical component of determining what interests in [] property will comprise property of the estate . . . [is] to examine whether the debtor owns the property absolutely, conditionally, or merely through some lesser relationship, such as a bailment, agency, or consignment, whereby the goods actually belong, save for the debtor’s right to possession, completely to another.” 5 Collier on Bankruptcy, § 541.06[1].

3. Here, the goods belong “completely to another.” *Id.* The Debtors did not take title to Alamos’ materials upon shipment and never took title to the Doré Shipment at any point in the refining process. Under the plain language of both of the Alamos’ agreements with the Debtors, as well as pursuant to their course of dealing, the Debtors do not have title to Containers 3-8 and the Doré Shipment.

4. The Toll Agreement is governed by the laws of Ontario, pursuant to its terms. The Carbon Purchase Contract does not contain a governing law clause. Alamos submits that under any potentially applicable governing law, the analysis would be same: whether under Ontario law or Florida law, courts interpret contractual terms in accordance with their plain and ordinary meaning. *See, e.g., Kel Homes, LLC v. Burris*, 933 So.2d 699, 702 (Fla. 2d DCA 2006) (the terms in a contract should be interpreted in accordance with their plain and ordinary meaning); *IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing*, 2017 ABCA 157 (CanLII) (the intent of the parties is determined by the words they used in the contract, along with objective evidence that the parties knew or reasonably out to have known at the time the parties formed the contract.).

5. Here, under the plain language of the Carbon Purchase Contract, Alamos has title to Containers 3-8. Alamos and the Debtors have consistently operated pursuant to the terms of the Carbon Purchase Contract. The Carbon Purchase Contract states that “title and risk shall pass from seller to buyer once pricing, provisional assays / weights are agreed and provisional payment has been made.” Alamos’ practice is to have a Semiesa representative in attendance at every provisional assay pursuant to the terms of the Carbon Purchase Contract, and no Semiesa representative has participated in a provisional assay of Containers 3-8. Containers 3-8 have not been provisionally assayed and the Debtors have not made the 80% provisional payment to Alamos. Counsel for Debtors have confirmed that Containers 3-8 are identifiable and remain segregated. Because the provisional assay has not occurred, the metal has not been refined and therefore has not been commingled. Accordingly, Alamos retains title to Containers 3-8.

6. Pursuant to the terms of the Toll Agreement, title to the Doré Shipment resides with Alamos. Alamos shipped the Doré Shipment to the Debtors pursuant to the terms of the Toll Agreement. The Toll Agreement expressly states that title to all material and recoverable metals produced therefrom “shall reside” with Alamos at all times, except at which point any recoverable metals are sold at Alamos’ direction to a third party.

7. Therefore, Containers 3 through 8 should be returned to Alamos pursuant to its Reclamation Demand. Alamos has an administrative priority claim with respect to Containers 7 and 8. And Alamos is entitled a pro-rata payment arising out of the processing of the materials in the Doré Shipment and the materials of other Customers. No liens should attach to said goods or any proceeds therefrom.

**B. The Doré Shipment Is a Bailment Pursuant to the Terms of the Tolling Agreement**

1. The Doré Shipment is a bailment. Alamos incorporates by reference the objections and pleadings of other similarly situated customers filed in these Chapter 11 Cases, including without limitation, the objections of Premier Gold Mines Limited [Docket No. 144]; Coeur Mining, Inc., [Docket No. 146]; Midwest Refineries [Docket No. 148]; Pretrium Exploration Inc. [Docket No. 161]; Yamana Gold Inc. [Docket No. 162]; and Brilliant Jewelers/MJJ Inc., [Docket No. 185]. Alamos reserves the right to supplement its bailment argument and make any other legal arguments at a later date.

2. Alamos reserves the right to supplement this response to argue that the Doré Shipment is a bailment under the laws of Ontario.

**C. Pursuant to Section 2(c)(v) of the Order – The state or other governing law the Customer contends governs the dispute and the basis for the same.**

1. The Toll Agreement is governed by the laws of Ontario, Canada, pursuant to its terms.

2. The Carbon Agreement does not contain a governing law clause. Alamos submits that the Carbon Agreement is governed either by the laws of Ontario, Canada or Florida. Alamos takes no position at this time regarding the governing law but reserves the right to supplement its response at a later date.

Alamos reserves the right to supplement this Customer Statement and to brief the  
legal arguments.

Dated: January 17, 2019  
New York, New York

Respectfully submitted,

*/s/ Alison D. Bauer*

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