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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:	:	Chapter 11
	:	Case No. 18-13359 (SHL)
REPUBLIC METALS REFINING	:	
CORPORATION, <i>et al.</i> , ¹	:	(Jointly Administered)
	:	
Debtors.	:	
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**MINAS DE OROCO RESOURCES, S.A. DE C.V.’S
CUSTOMER STATEMENT CONCERNING OWNERSHIP OF METAL**

Minas de Oroco Resources, S.A. de C.V. (“Minas”), submits its customer statement concerning ownership of metal in the Debtors’ possession (the “Statement”) pursuant to and in accordance with the *Order Approving Uniform Procedures for Resolution of Ownership Disputes* [doc. 395] dated January 11, 2019 (the “Procedures Order”).

A. Incorporation of Prior Cash Collateral Objection

Minas incorporates its limited objection and reservation of rights (the “Limited Objection”) [doc. 158] to the *Debtors’ Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to Use Cash Collateral, (II) Granting Adequate Protection the Secured Parties,*

¹ 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).

(III) Scheduling a Final Hearing and (IV) Granting Related Relief. Pursuant to the Procedures Order, the Limited Objection serves as Minas' customer statement. This statement supplements the Limited Objection, which together constitute Minas' customer statement.

B. Supplement to Customer Statement

1. Customer and Counsel

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2. Description of Assets

20,176.98 grams of gold

25,480.69 grams of silver

The Assets have a total value as of the dates of delivery of \$817,843.15

3. Claims Against Debtors

Minas submitted a reclamation demand on November 19, 2018 for (i) 7,904.84 grams of gold and 10,071.25 grams of silver that were delivered to the Debtors in the ordinary course of business and were received by the Debtors on October 29, 2018, and (ii) 12,272.14 grams of gold and 15,409.44 grams of silver that were delivered to the Debtors in the ordinary course of business and were received by the Debtors on October 30, 2018. If the Court determines that title transferred to RMC, Minas will have an administrative claim for the value of the

metals pursuant to § 503(b)(9) of the Bankruptcy Code. Minas is not aware of any other claims against the Debtors.

4. **Governing Law.** Florida

5. **Summary of Claim**

Minas delivered the gold and silver to RMC to be refined. After refining, Minas could either sell the metals or have them returned. Copies of the relevant documents are attached as Exhibit 1.

The following legal principles support Minas' claim of ownership.

(i) **RMC is a Bailee.** Whether the debtor has sufficient interest in property such that it becomes “property of the estate” under § 541 of the Bankruptcy Code is determined by applicable state law. *Musso v. Ostashko*, 468 F.3d 99, 105 (2d Cir. 2006) (citing *Butner v. United States*, 440 U.S. 48, 55 (1979)). In Florida, bailment is defined “as a delivery of personalty for some particular purpose, or on mere deposit, upon a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it, or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be.” *Monroe Sys. for Bus., Inc. v. Intertrans Corp.*, 650 So.2d 72, 75 (Fla. 3d DCA 1994); *see also O'Brien v. Stermer*, 98 So. 1245, 1248 (Fla. 3d DCA 2012); *Reel Therapy Charters, Inc. v. Marina Mgmt.*, 2003 U.S. Dist. LEXIS 25155 (N.D. Fla. 2003). *See also Herrington v. Verrilli*, 151 F. Supp. 2d 449, 457 (S.D.N.Y. 2001) (“A ‘bailment’ is defined as ‘a delivery of personalty for some particular purpose, or on mere deposit, upon a contract ... , that after the purpose has been fulfilled, it will be redelivered to the person who delivered it, or otherwise dealt with according to that person’s directions’”); *In re Warde Elec. Contracting, Inc.*, 308 B.R. 659, 664

(S.D.N.Y. 2004) (“[P]roperty held by a debtor as bailee ... is not included in property of the estate.”); *In re S.W. Bach & Co.*, 435 B.R. 866, 878 (Bankr. S.D.N.Y. 2010) (observing that property held as part of bailment is not part of debtor’s bankruptcy estate).

A contract for bailment requires that there be a mutual agreement between the parties for a bailment and that, further, there be an actual physical delivery of the items to be bailed into the hands of the bailee. *In re International Gold Bullion Exchange, Inc.*, 53 B.R. 57 (Bankr. S.D.Fla. 1985). “In general, knowingly taking property into possession or control is a sufficient acceptance, provided there is a delivery for the purpose of creating a bailment.” *Deatrick Leasing Corp. v. Rand’s Paint and Body Shop, Inc.*, 247 So.2d 532 (Fla. 3d DCA 1971). “The issue of whether a contract represents a bailment or a sale is not an uncommon problem in industries, such as refining, where a company must make arrangements with another entity to process its raw materials.” *In re Handy & Harman Ref. Grp., Inc.*, 271 B.R. 732, 736 (Bankr. D. Conn. 2001).

In determining whether a contractual arrangement is a bailment or a sale, courts look beyond whether the arrangement is labeled as a purchase or sale agreement and consider factors evidencing the parties’ intent to create a bailment, including whether (i) the bailor retains the right to return goods prior to processing or the return of the finished product, (ii) the contract provides that the bailor retains title to the raw materials and finished product, (iii) the risk of loss remains with the bailee while the goods are in its possession, (iv) the contract does not set a purchase price for raw materials prior to processing and only sets a certain price after processing, (v) the goods are segregated from the bailee’s other property, (vi) the goods are not recorded as the bailee’s inventory, and (vii) the bailor’s accounting records do not reflect an account receivable owed by the bailee. *See, e.g., In re Sitkin Smelting and Refining, Inc.*, 639 F.2d 1213, 1216-17 (5th Cir. 1981); *see also In re Medomak Canning Co.*, 25 UCC Rep. Serv. 437, 444-49 (D.

Me. 1977) (in determining that a contract for the processing of raw materials into canned pork and beans was a bailment rather than a sale, the bankruptcy court focused on “the intentions and circumstances of the parties” rather than “a provision in the contract designating the transaction a “purchase” by” the processor).

Viewed in light of these factors, it is clear that RMC is a bailee for Minas’ metals. The risk of loss remains with RMC, as bailee while the goods are in its possession. The standard terms and conditions provide: “Risk of loss of material will pass from Customer to RMC upon delivery to and acceptance at RMC’s refinery, unless otherwise agreed.” There is nothing in the written contract between the parties – the terms and conditions – that gives RMC the right to use Minas’ metals for any purpose.

(ii) The Metal Is Identifiable. The Uniform Commercial Code provides in part: ““Goods”” means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid” Fla. Stat. Ann. § 672.105(1). “An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined.” *Id.* § 672.105(4). *See, e.g., Eighty-Eight Oil Co. v. Charter Crude Oil Co. (In re Charter Co.)* 54 B.R. 91 (Bankr. N.D. Fla. 1985) (fungible crude oil can be the subject of reclamation); *In re Wheeling-Pittsburgh Steel Corp.* 74 B.R. 656, 658 (Bankr. W.D. Pa. 1987) (“Fungible goods may be reclaimed if the seller can trace the goods from its possession into an identifiable mass that contains goods of like kind and grade.”).

Under the terms and conditions, customer metals in RMC’s possession are maintained in an identifiable mass containing goods of like kind and grade. The terms and conditions provide, in the section “RMC Purchases, that “[r]eturnable metals shall be in the form of fine gold bars ... or fine silver bars.” Thus, Minas’ metals, though fungible, belong to Minas.

(iii) The Debtors Do Not Have Any Equitable Interest. Possession by itself is insufficient to vest RMC with legal and equitable title. *See* 11 U.S.C. § 541(d). Minas has not conferred upon RMC the right to sell or otherwise dispose of the goods. In this regard, RMC acts more as an escrow agent or bailee. *See Papi Express, Inc. v. Dosal Tobacco Corp.*, 677 So.2d 1314, 1315 (Fla. 3d DCA 1996) (bailment encompasses “delivery of personalty for some particular purpose, or on mere deposit, upon a contract ... that after the purpose has been fulfilled it shall be redelivered to the person who delivered it, or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be.”), quoting *Monroe Sys. for Bus. Inc. v. Intertrans Corp.*, 650 So.2d 72, 75-76 (Fla. 3d DCA 1994, *review denied*, 659 So.2d 1087 (Fla.1995)).

Courts also recognize constructive trusts over property, particularly where there is wrongdoing or equity otherwise warrants. *See, e.g., In re AE Liquidation, Inc.*, 426 B.R. 511 (Bankr. D. Del. 2010) (where debtor stated to customers that their deposits were segregated and not being spent pending a hold on the customers’ product, then debtor subsequently filed for bankruptcy, customers stated sufficient facts to support a claim for a constructive trust; moreover “imposition of a constructive trust does not depend on the parties’ intent ... [r]ather it is an equitable remedy available in the event of wrongdoing by the defendant.”); *Quinn v. Phipps*, 93 Fla. 805, 814 (Fla. 1927) (“A constructive trust is one raised by equity in respect of property which has been acquired by fraud, or where, though acquired originally without fraud, it is against equity that it should be retained by him who holds it. Constructive trusts arise purely by construction of equity independently of any actual or presumed intention of the parties to create a trust and are generally thrust on the trustee for the purpose of working out the remedy. They are said

to arise from actual fraud, constructive fraud and from some equitable principal independent of the existence of any fraud.”).

Dated: New York, New York
January 18, 2019

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By:

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