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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11 Case No.:
REPUBLIC METALS REFINING CORPORATION, et al.,[1]	:	18-13359 (SHL)
	:	(Jointly Administered)
Debtors.	:	

SUPPLEMENTAL CUSTOMER STATEMENT OF COEUR MEXICANA S.A. DE C.V., COEUR ROCHESTER, INC., AND WHARF RESOURCES (U.S.A.), INC.

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 38th 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).

Coeur Mexicana S.A. de C.V. ("**Coeur Mexicana**"), Coeur Rochester, Inc. ("**Coeur Rochester**"), and Wharf Resources (U.S.A.), Inc. ("**Wharf**")[2] (collectively, "**Coeur**"), hereby submit this Supplemental Customer Statement in response to the *Omnibus Response of the Senior Lenders to Customer Statements Pursuant to Order Approving Uniform Procedures for Resolution of Ownership Disputes* [Dkt. 637] (the "**Senior Lenders' Response**") and the *Debtors' Omnibus Response to Customer Statements Pursuant to the Order Approving Uniform Procedures for Resolution of Ownership Disputes* [Dkt. 648] (the "**Debtors' Response**") pursuant to the *Order Approving Uniform Procedures for Resolution of Ownership Disputes* [Dkt. No. 395] (the "**Order**").

Coeur's Supplemental Customer Statement incorporates by reference as if fully set forth herein (a) the *Statement of Claimed Ownership and Claims of Coeur Mexicana S.A. de C.V., Coeur Rochester, Inc., and Wharf Resources (U.S.A.), Inc.* [Dkt. No. 470] (the "**Customer Statement**") and (b) the *Objection of Coeur Mining, Inc., Coeur Mexicana S.A. de C.V., Coeur Rochester, Inc. and Wharf Resources (U.S.A.), Inc. to (A) Debtors' Motion for Entry of Final Order (i) Authorizing the Debtors to Use Cash Collateral, (ii) Granting Adequate Protection to the Secured Parties, and (iii) Granting Related Relief; and (B) Joint Supplement of the Debtors and the Senior Lenders to the Cash Collateral Motion* [Dkt. No. 146] (the "**Objection**").[3]

[2] On February 15, 2019, the Debtors filed a motion seeking authority to approve a settlement with Wharf [Dkt. No. 632] (the "**Wharf Settlement**"), which motion is scheduled to be heard on March 21, 2019 [Dkt. No. 653]. Wharf's inclusion in this Supplemental Customer Statement is intended to be applicable solely in the event that the Court does not approve the Wharf Settlement.

[3] Capitalized terms used but not defined herein shall have the meanings assigned to such terms in the Order, Objection, and/or Customer Statement, as applicable.

A. Coeur is Not Bound by RMC's "Standard Terms and Conditions."

1. In their responses, both the Senior Lenders and the Debtors argue that RMC's "Standard Terms and Conditions" establish that the transactions between RMC and Coeur constituted purchase and sale transactions, rather than a bailment. But there is no indication that either Coeur Mexicana or Coeur Rochester signed RMC's Standard Terms and Conditions.[4] And *even if they had*, the individual negotiated agreements governing the relationships between the Debtors and Coeur (the "**Coeur Agreements**")—each of which include language clearly establishing bailments, *see infra*—would control.

2. First, based on a review of their files, neither Coeur Mexicana nor Coeur Rochester believe that they signed the Standard Terms and Conditions. Indeed, while the Debtors note that "most" Customers signed RMC's Standard Terms and Conditions, *see* Dkt. 648 ¶ 48, they do not assert that either Coeur Mexicana or Coeur Rochester signed those terms. Likewise, the Senior Lenders do not identify either Coeur Mexicana or Coeur Rochester as a Customer who "acknowledge[d] that they do not have additional contracts with Debtors" aside from the Standard Terms and Conditions. [Dkt. 637 ¶ 65 n.18.] Accordingly, the Standard Terms and Conditions do not apply to Coeur.

3. However, even if the Coeur entities had signed the Standard Terms and Conditions, those provisions would not apply here. The first sentence of the Standard Terms and Conditions specifically states that its terms govern the parties' relationship *only* in situations where the parties were not subject to separate agreements: "*Unless otherwise stipulated*, these Standard Terms and General Operating Conditions 'Standard Terms' are applicable . . ."

[4] On information and belief, Wharf was the only Coeur entity which signed the Standard Terms and Conditions. As noted above, this Supplemental Customer Statement is only intended to apply to Wharf in the event that the **Wharf Settlement** is not approved by the Court.

(emphasis added) [Dkt. 637 ¶ 64]. The Standard Terms and Conditions are merely a "catch-all," designed to govern a business relationship where individual negotiated agreements didn't exist. That does not apply to Coeur.

4. Moreover, each Coeur Agreement contains a merger clause manifesting the parties' intent that the Coeur Agreement would constitute the entire understanding of the parties' rights and obligations and that they would not be bound by any prior agreements between the parties.[5] *See, e.g.*, *Roberts v. Edith Roman Holdings, Inc.*, 2011 WL 2078223, at *3 (S.D.N.Y. May 19, 2011) ("New York law gives full effect to merger clauses."); *Environmental Servs., Inc. v. Carter,* 9 So. 3d 1258, 1265 (Fla. Dist. Ct. App. 2009) ("[T]he existence of a merger clause . . . is a highly persuasive statement that the parties intended the agreement to be totally integrated . . . ."). Therefore, even if the Standard Terms and Conditions were signed prior to the Coeur Agreements (and Coeur has found no evidence to suggest that they were signed), those Standard Terms would be superseded by the Coeur Agreements.[6]

5. In any event, even if the generalized Standard Terms and Conditions somehow applied to Coeur, the more specific provisions of the Coeur Agreements—to the extent they are in conflict—would control. *See, e.g.*, *In re Arcapita Bank B.S.C.(c)*, 520 B.R. 15, 26 (Bankr. S.D.N.Y. 2014) ("When general and specific provisions of a contract are inconsistent [] the specific provision controls.").

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[5] *See* Rochester Agreement § 15.3 ("This letter agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and cancels and supersedes any prior understandings and agreements between the parties with respect thereto."); Mexicana Agreement § 13 ("This Agreement sets out the entire agreement between Parties, supersedes all prior agreements and understandings . . .").

[6] In addition, since Coeur did not sign the Standard Terms and Conditions, the Coeur Agreements apply because those agreements can only be amended or modified by an *executed* written agreement between the parties. *See* Rochester Agreement § 15.4 ("This letter agreement may be amended, modified or supplemented only by the written agreement of the parties."); Mexicana Agreement § 19 ("This Agreement may not be amended or modified except by instrument in writing executed on behalf of each of the Parties hereto.")

6. The Coeur Agreements include certain relevant provisions that differ from the Standard Terms and Conditions. For example:

a. The Standard Terms and Conditions provide that "risk of loss of material will pass from Customer to RMC upon delivery to and acceptance at RMC's refinery, ***unless otherwise agreed***." (emphasis added) [Dkt. 637 ¶ 65]. In the Coeur Agreements, the parties expressly agreed that: "Once the Material has been picked up by the Carrier at the Mine, and the Carrier has signed a receipt for the Material evidencing same, all risk of loss and damage to the Material shall pass from the Seller to the Purchaser. Title to the Material shall pass to the Purchaser as soon as the Purchaser has completed the Purchase Obligations."[7] The more specific provisions in the Coeur Agreements control.

b. Although the Standard Terms and Conditions maintain that Customers will indemnify and hold harmless RMC from any adverse claims, the Coeur Agreements provide that RMC agrees to indemnify and hold harmless Coeur.[8] The provisions in the Coeur Agreements control.

c. Although the Standard Terms and Conditions state that payment is due upon the rendering of an invoice, the Coeur Agreements provide for payment to RMC within 10 or 14 working days after receipt of the Material or invoice.[9] Again, the provisions in the Coeur Agreements control.

B. The Agreements Between Coeur And RMC Constituted Bailments.

7. As set forth more fully in the Customer Statement and Objection, each of the Coeur Agreements is indicative of a bailment and, therefore, the Materials are not property of the Debtors' estates. It is clear from the unambiguous terms of each Coeur Agreement that title never transferred to RMC with respect to all or a portion of the Materials because the Coeur Agreements required RMC to complete certain "purchaser obligations" before title would transfer, and many of these obligations—including the requirement to pay Coeur—were never

[7] *See* Rochester Agreement § 2.2; Mexicana Agreement § 4.1.

[8] *See* Rochester Agreement § 9.3; Mexicana Agreement § 11.2.

[9] *See* Rochester Agreement § 6.3 (payment within 14 working days after receipt of an invoice); Mexicana Agreement § 7 (payment within 10 working days after receipt of the Material).

completed.[10] Neither the Debtors nor the Senior Lenders dispute this point; in fact, the Debtors acknowledge that the Coeur Agreements "contemplate[] that title to the materials passed to the Debtors when Debtors completed their purchaser obligations." [Dkt. 648 ¶ 57]. The Debtors further acknowledge that "the [Coeur Agreements] are clear and unambiguous." [Dkt. 648 ¶ 60].

8. Courts consider a number of factors in determining whether a contract represents a bailment or a sale, but the overriding consideration that guides the analysis is the intent of the parties as determined by the "instrument as a whole." *Consol. Accessories Corp. v. Franchise Tax. Bd.*, 161 Cal. App. 3d 1036, 1040 (2d Dist. Ct. App. 1984) ("In determining which event occurred, bailment or contract of sale, the intent of the parties is controlling.") (citations omitted); 5 Fla. Jur. 2d Bailments § 4 ("Frequently, a particular transaction has elements characteristic of both a bailment and a sale, and the guide in any given case in determining the nature of the transaction is the expressed or presumed intention of the parties.").

9. The Coeur Agreements and the course of dealing between Coeur and the Debtors clearly contemplate the parties' intent to create a bailment as opposed to a purchase and sale. The purpose of the Coeur Agreements was not to sell the Materials to RMC, but rather to obligate RMC to refine the Materials so that they could be handled according to Coeur's direction. Indeed, Coeur elected whether RMC would return the metals on a toll basis, sell them to a third party at Coeur's direction, or purchase the materials itself.[11] *See, e.g.*, *GMC v. Bristol*

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[10] The Mexicana Agreement provides that "title to the Material shall pass to the Purchaser as soon as the Purchaser has completed the Purchaser Obligations," which include, *inter alia*, obligations to "purchase the Material and/or perform the services required to be performed by the Purchaser." Mexicana Agreement §§ 4.1; 1.4. The Mexicana Agreement further provides that "in no event shall title to the Gold Stream Material pass to the Purchaser." *Id*. § 4.1. Similarly, the Rochester Agreement provides that "[t]itle to the Material shall pass to the Purchaser as soon as the Purchaser has completed the Purchaser Obligations," Rochester Agreement § 2.2, and that RMC is obligated to transfer payment to Coeur "[u]pon fixing of the metal and deduction of the applicable charges." *Id.* § 6.3.

[11] *See* Rochester Agreement § 6.3 ("[I]f [Coeur] decides to operate on a toll basis, the metal(s) due from each lot of Material shall be transferred to [Coeur's] designated metal account(s) . . . ."); Mexicana Agreement § 8(b).

Indus. Corp. (In re Bristol Indus. Corp.), 690 F.2d 26, 31 (2d Cir. 1982) (concurring opinion) (noting that debtor's lack of a unilateral right to purchase subject materials was indicative of a bailment in favor of supplier/customer); *In re Haase*, 224 B.R. 673, 678 (C.D. Ill. 1998) (finding bailment where cattle were delivered to debtor for the special purpose of fattening them for the market).

10. Further, at all times, Coeur bore the risk of ownership of the Materials. Coeur retained the risk of a decline in market value until title transferred—Coeur paid RMC a fixed payment for refining services at a price unrelated to the market and in the event Materials were sold to RMC, the price was set only *after* processing, assay, and the completion of RMC's obligations under the Coeur Agreements. Coeur maintained the risk and title over the Materials during the refining process. *See, e.g.*, *In re Bristol Indus.*, 690 F.2d at 30–31 (concurring opinion) (finding persuasive evidence that a contract for conversion of scrap metal to alloy strips created a bailment based on, among other things, the fact that the supplier/customer "bore all the risks associated with price fluctuations of scrap metal, since these were not reflected in the conversion price paid" to the debtor). Title remained with Coeur and did not pass to Debtors until the Purchaser Obligations were complete.[12]

11. Moreover, and contrary to the Senior Lenders' and Debtors' suggestions, courts focus on substance and course of dealings over form in determining whether a bailment has been created. *In re STN Enterprises, Inc*., 47 B.R. 315, 318 (Bankr. Vt. 1985) (finding a bailment and noting that "matters of form are of slight significance so far as the validity of a bailment contract is concerned."). To that end, courts are not bound to interpret a contract as a purchase and sale

Further, pursuant to the terms of the Rochester Agreement, at Coeur's direction the refined Materials were scheduled to be delivered by RMC to third parties to whom Coeur had sold those Materials.

[12] *See, e.g.*, Rochester Agreement § 2.2; Mexicana Agreement § 4.1.

simply because "purchaser" and "seller" labels are used by the parties in an agreement. *See, e.g.*, *JP Morgan Chase Bank, NA v. AVCO Corp. (In re Citation Corp.*), 349 B.R. 290, 296–97 (Bankr. N.D. Ala. 2006) (concluding that an agreement creates a bailment, not a consignment, even though the agreement repeatedly used the word "consign"). The definitions used in the Coeur Agreements are not determinative of the relationship between Debtors and Coeur, and the course of dealings and intent of the parties control.

C. Commingling Is Not a Valid Defense To Coeur's Ownership Claims

12. Contrary to the Debtor's contention, the fact that the Debtors claim to have commingled the Materials with other Customers' goods does not defeat Coeur's bailment claims. Indeed, as Judge Gonzalez of this Court explained, "courts have recognized that a bailment is not destroyed where fungible goods are commingled." *In re Enron Corp.*, 2003 WL 23965469, at *3 (Bankr. S.D.N.Y. Jan. 22, 2003) (citing *Nat'l Corp. Housing P'Ship v. Liberty State Bank*, 836 F.2d 433, 436 (8th Cir. 1988) ("*Enron*")); *see also id.* (holding that the fact natural gas had been commingled in pipelines "would be insufficient, as a matter of law to destroy an otherwise valid bailment"). Other courts have agreed. In *In re Fuel Oil Supply and Terminaling, Inc.*, 72 B.R. 752, 758 (S.D. Tex. 1987) (rev'd on other grounds, 837 F.2d 224 (5th Cir. 1988)), for instance, the court found that a contract governing the transfer of gasoline created a bailment because it related to fungible property and, "as in the majority of situations involving fungible goods, the commodity is placed in another's receptacle where the similar commodities belonging to others are deposited."

13. The Debtors acknowledge that the Materials are fungible. *See* [Dkt. 648 ¶ 82 ("Precious metals are fungible goods.")]. Nonetheless, they rely on inapposite decisions[13] and baldly claim, without any legal citation, that "the case law is clear that when the article returned is not identical or a part of what was originally delivered" there cannot be a bailment. [Dkt. 648 ¶¶ 81–84.] Unable to effectively distinguish relevant cases such as *Enron*, the Senior Lenders argue—in reliance on case law from the 1800s—that such cases are inapplicable because the fungible commingled goods at issue were "merely stored and not altered in any manner." [Dkt. 637 ¶ 76.] But this is a distinction without a difference. *Enron* and similar cases draw no dividing line between altered or unaltered commingled fungible goods. Nor should they. It defies logic that the commingled natural gas stored in *Enron* would constitute a bailment even though it could not be segregated, but had it been altered (perhaps by converting the product from gaseous to liquid form, or vice versa), that fact alone would have converted the transfer of commingled property from a bailment into a sale. *See, e.g.*, *In re Enron Corp.,* 2003 WL 23965469, at *3 (Bankr. S.D.N.Y. Jan. 22, 2003) *citing Nat'l Corp. Housing P'ship v. Liberty State Bank,* 836 F.2d 433, 436 (8th Cir. 1988) ("[T]he rule requiring return of the identical item has been liberalized in the case of bailment of fungible goods."). The same rationale should apply here, where the doré was transformed from solid, to liquid, to solid once again. Moreover, the Senior Lenders' attempt to distinguish *Enron* and similar cases is inconsistent with their own authorities, which state clearly that the basic rules for determining whether a transaction is a bailment or a sale remain the same regardless of whether the subject property has been altered or transformed. [Dkt. 637 ¶¶ 71–74]. The Senior Lenders cite no authority and provide no

[13] For example, the Debtors cite to *U.S. v. Eurodif*, 555 U.S. 305 (2009), involving uranium enrichment contracts, which does not concern a bailment at all.

rationale for why this distinction, which has no relevance in general bailment analysis, should be relevant in cases involving fungible goods.[14]

D. Reservation of Rights and Conclusion.

14. The filing of this Supplemental Customer Statement is not intended to be and should not be construed as a waiver of, or admission with regard to, any rights, claims, or defenses held by Coeur. Coeur reserves the right to modify and/or further supplement this Supplemental Customer Statement and to assert additional or alternative legal theories in support of its ownership claims as it receives additional information and pursuant to the terms of the Order.

15. For all of the foregoing reasons, and the reasons set forth in Coeur's Objection and Customer Statement, this Court should find that the Materials are the property of Coeur and not property of the Debtors' estates, and grant such other and further relief as the Court deems just and proper.

[14] The Senior Lenders' and Debtors' arguments that a constructive trust is "unwarranted" and that the Customers purportedly failed to perfect required security interests in their goods are similarly misplaced. [Dkt. 637 ¶¶ 77–83; Dkt. 648 ¶¶ 89–90]. As an initial matter, the Senior Lenders' suggestion that the Customers' sole recourse would be to seek a constructive trust against inventory or proceeds is both unsupported and without merit. Further, the cases on which the Senior Lenders and Debtors purport to rely to argue against a constructive trust are inapposite. For example, in *In re Miss. Valle Livestock, Inc*., 745 F.3d 299 (7th Cir. 2014), the court found that "it appears likely a constructive trust . . . was in some amount proper," but it remanded the case because of the difficulty in tracing the cash proceeds at issue.

With respect to the Senior Lenders' and Debtors' claims under certain provisions of the UCC, those provisions apply only to the sale of goods or security interests. As explained above, Coeur's Materials were delivered to RMC pursuant to a bailment, not a sale to RMC, and Coeur is seeking to establish its ownership of the Materials, not a security interest. The Debtors and Senior Lenders rely on Section 2-401 of the UCC to argue that provisions limiting title transfer are not enforceable, but because this provision only applies to a sale of goods, citing this as evidence that the relevant agreements constitute a sale rather than a bailment begs the question.

Dated: March 11, 2019
New York, New York

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