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

In re:	)	Chapter 11
	)	
MIAMI METALS I, INC., <i>et al.</i> <sup>1</sup>	)	Case No. 18-13359 (shl)
	)	
Debtors.	)	(Jointly Administered)
	)	

**REPLY IN SUPPORT OF DEBTORS' EMERGENCY MOTION  
(I) TO ENFORCE AUTOMATIC STAY AGAINST FUNDACION RAFAEL DONDE  
I.A.P., (II) TO HOLD FUNDACION RAFAEL DONDE I.A.P. IN CONTEMPT OF  
COURT, (III) FOR AN AWARD OF SANCTIONS AGAINST FUNDACION  
RAFAEL DONDE I.A.P., AND (IV) FOR RELATED RELIEF**

*Relates to Docket No. 1003*

Miami Metals I, Inc., *et al.*, as debtors and debtors-in-possession (collectively the "Debtors") in the above-captioned Chapter 11 cases (the "Chapter 11 Cases"), by and through their undersigned counsel, file their reply in support of their Emergency Motion (I) to Enforce the

<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, include: Miami Metals I, Inc. (f/k/a Republic Metals Refining Corporation), 15 West 47th Street, Suites 206 and 209, New York, NY 10036 (3194); Miami Metals II, Inc. (f/k/a Republic Metals Corporation), 12900 NW 38th Avenue, Miami, FL 33054 (4378); Miami Metals III LLC (f/k/a Republic Carbon Company), 5295 Northwest 163rd Street, Miami Gardens, FL 33014 (5833); Miami Metals IV LLC (f/k/a J & L Republic LLC), 12900 NW 38th Avenue, Miami, FL 33054 (7604); Miami Metals V LLC (f/k/a R & R Metals, LLC), 12900 NW 38th Avenue, Miami, FL 33054 (7848); Miami Metals VI (f/k/a RMC Diamonds, LLC), 12900 NW 38th Avenue, Miami, FL 33054 (1507); Miami Metals VII (f/k/a RMC2, LLC), 12900 NW 38th Avenue, Miami, FL 33054 (4696); Miami Metals VIII (f/k/a Republic High Tech Metals, LLC), 13001 NW 38 Avenue, Miami, FL 33054 (6102), 12900 NW 38th Avenue, Miami, FL 33054 (1507); 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).

Automatic Stay Against Fundacion Rafael Donde I.A.P. ("Donde"), (II) to Hold Donde in Contempt of Court, (III) for an Award of Sanctions Against Donde, and (IV) for Related Relief [Docket No. 1003] (the "Motion") and in response to Donde's Objection to the Motion [Docket No. 1035] (the "Objection")<sup>2</sup>. In support of the Motion and this Reply, the Debtors incorporate herein the Declaration of Alejandro Catala Pursuant to Federal Rule of Civil Procedure 44.1 [ECF No. 1072] (the "Catala Declaration"), and state as follows:

### **PRELIMINARY STATEMENT**

Donde willfully violated the automatic stay and this Court's Order Approving Uniform Procedures for Resolution of Ownership Disputes (the "Uniform Procedures Order") [ECF No. 395] by commencing a proceeding against RTMM seeking to recover a pre-petition claim. Donde attempts to justify the filing of a criminal complaint against RTMM, Joseph Liberman, and Jason Rubin (the "Criminal Complaint"), by relying on 11 U.S.C § 362(b)(1)'s exception to the automatic stay for the commencement and continuation of a criminal action. Donde's reliance is misplaced. Section 362(b)(1) does not apply to the proceeding initiated by Donde in Mexico wherein Donde seeks: (i) a determination as to the ownership of the Disputed Assets (i.e. the very subject of the Uniform Procedures Order); (ii) to collect on a pre-petition claim related to the Disputed Assets; and (iii) to seize RTMM's bank accounts in Mexico.

Donde can and should be required to withdraw the Criminal Complaint and pardon the parties. Donde would like this Court to believe the Criminal Complaint is solely in the hands of the Mexican prosecutor. Such is not the case. The Debtors dealt with a similar issue earlier in the bankruptcy. Upon this Court's approval, RTMM settled the dispute and EZPawn withdrew its

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<sup>2</sup> The Debtors dispute and refute the numerous allegations and assertions set forth in the Background section of Donde's Objection. The Debtors do not believe such allegations are relevant to Donde's violation of the automatic stay and violation of this Court's Uniform Procedures Order. Rather, most of the allegations pertain to the customer ownership dispute, which Donde agreed is subject to the Uniform Procedures Order.

Mexican criminal complaint and pardoned the parties. Donde must cease violating the stay and the Uniform Procedures Order and do the same here.

Donde further attempts to justify its actions by claiming that it was fulfilling its duties under Mexican law. The Debtors submit Donde fulfilled its duties by participating in the Uniform Procedures Order and filing claims in the bankruptcy case. The Debtors dispute Donde's interpretation of Mexican law in that the omission of reporting a crime does not make the person who commits the omission responsible for the crime. Nonetheless, even assuming such a duty exists and requires the action taken, Donde should have sought stay relief from this Court to file the Criminal Complaint and, if such relief was denied, Donde would have satisfied any duties. Donde failed to do this. Rather, Donde chose to file the Criminal Complaint five months after the commencement of these Chapter 11 cases, in willful violation of the automatic stay and this Court's Uniform Procedures Order.

### **REPLY**

#### **A. The Pertinent Facts Are Not In Dispute.**

1. A simple review of the few pertinent facts without Donde's sophist coating belie their narrative. Donde does not dispute: (i) it is a voluntary participant under the Uniform Procedures Order, which will determine the customer ownership issues; (ii) it filed the Criminal Complaint<sup>3</sup>, and (iii) its counsel appeared at RTMM's offices and sought information from RTMM regarding the Disputed Assets.

2. Despite Donde's claims that the Criminal Complaint is not an act to collect a debt and is not a parallel proceeding as to the ownership issue, the face of the Criminal Complaint states otherwise. Donde alleges in the Criminal Complaint ownership of the Disputed Assets, an issue

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<sup>3</sup> The Debtors dispute any commission of a crime, as all transactions between RTMM and Donde were commercial and, therefore, any dispute with Donde is civil in nature.

the public prosecutor will have to determine. *See* Criminal Complaint and Catala Declaration, ¶8. In fact, Donde's alleged ownership of the Disputed Assets is the very basis for the claims under Mexican law. If successful, Donde would be entitled to the return of the Disputed Assets or the economic recovery related to the Disputed Assets. *See* Catala Declaration at ¶6, pp. 6-7. In addition, Donde explicitly seeks to seize the accounts of RTMM. *See* Criminal Complaint.

3. Counsel for Donde, Alejandro Jaimes Gutierrez ("Jaimes"), after filing the Criminal Complaint, states in his April 15, 2019 Letter attached as exhibit "B" to the Motion (the "April 15 Letter") that he visited RTMM's premises and demanded turnover of the Disputed Assets.

4. Jaimes, in the April 15 Letter then goes on to state that "FDR (Donde) intends to continue to pursue all of its rights and remedies in each available forum, including the Mexico criminal proceeding...." April 15 Letter p. 2.

5. Donde had control over initiating the Criminal Complaint and has the ability to conclude the matter by pardoning the defendants.

**B. Donde Willfully Violated the Automatic Stay.**

6. Donde's actions against RTMM in Mexico constitute willful violations of the automatic stay. The Criminal Complaint and Jaimes' visit to RTMM fall within the acts prohibited by sections 362(a)(1), (3), and (6) of the Bankruptcy Code. "The automatic stay ensures an orderly distribution of the debtor's assets, preventing one creditor from moving ahead of others in order to receive a higher distribution." *See In re Pearce*, 400 B.R. 126, 132 (Bankr. N.D. Iowa 2009). Donde's attempt to recover its alleged pre-petition claims against RTMM, to seize property of the estate, and obtain possession of, or exercise control over, the Disputed Assets are the very acts the automatic stay was designed to prevent. Accordingly, Donde willfully violated the automatic stay.

**C. The Exception Under Section 362(b)(1) Does Not Apply.**

7. Section 362(b)(1) does not apply when a criminal prosecution is motivated by an intent to collect on a debt. *Id.* Pursuant to the Criminal Complaint, Donde seeks to recover the Disputed Assets or the economic recovery related to the Disputed Assets. *See* Catala Declaration at ¶¶ 5-6. Further, Donde requests to seize the accounts of RTMM. *See* Criminal Complaint. Donde's Criminal Complaint is motivated by an intent to collect its alleged debt.

8. The Criminal Complaint filed by Donde is unique to Mexican law. In Mexico there are two types of criminal actions: "querellas," which are brought by aggrieved parties against a defendant and which require the victim's willingness to prosecute, and criminal proceedings "de oficio," which are prosecuted directly by the state and do not require a victim's participation because they involve a larger harm to society. The Criminal Complaint is a "querella," which by definition requires Donde's willingness to prosecute.

9. To the extent section 362(b)(1) contemplates the protection of a foreign government's interest, Donde's Criminal Complaint is not an action where Mexico's "interest in administering [its] criminal justice system" is involved. *Pearce*, 400 B.R. at 132. Section 362(b)(1)'s exception therefore does not apply to the Criminal Complaint and, hence, Donde violated the stay and continues to violate the stay as a result.

**D. Donde Is Also Violating the Uniform Procedures Order.**

10. Donde's arguments that the Criminal Complaint in Mexico and the ownership dispute before this Court are not parallel proceedings is disingenuous. For Donde to be successful in its Criminal Complaint, the Mexican court must make a finding that the Disputed Assets belong to Donde. In the Criminal Complaint, Donde asserts multiple times that the Disputed Assets "belong to the Institution" and refers to "the gold and silver bars that belong to my client." Criminal

Complaint [Docket No. 1034-1]. The determination of ownership, as explained further in the Catala Declaration, is therefore a necessary finding to establish an abuse of trust under Mexican law. *See* Catala Declaration at ¶8.

11. This Court spent a considerable amount of time in setting the ground rules for customers with ownership claims against the estate, to litigate those claims before this Court through a voluntary process – the Uniform Procedures Order. Donde decided to participate in that process, thereby agreeing to forego seeking that relief elsewhere. Donde has now initiated a parallel proceeding regarding the Disputed Assets in Mexico. If the Court were to allow customers to initiate similar proceedings in foreign jurisdictions, it would erode this Court's authority over the assets of this estate.

**E. Donde Can Dismiss the Criminal Complaint.**

12. The Court should direct Donde to remedy its violations of the automatic stay and the Uniform Procedures Order by directing Donde to dismiss the Criminal Complaint and pardon the defendants thereto.

13. As referenced earlier, Donde has the ability to pardon the defendants and stop the "querella" proceedings from moving forward. RTMM, prior to the Court's entry of the Uniform Procedures Order, settled with EZ Pawn, a Mexican customer. Prior to the settlement, EZ Pawn had filed its own "querella." As part of the settlement, EZ Pawn agreed to dismiss its "querella" by pardoning RTMM.

14. Donde admits that this is possible, by stating "it is the public prosecutor's decision, subject to the Foundation's pardon rights, whether to cease further prosecution." *See* Objection, ¶44. The Catala Declaration is further consistent with this point as well: Donde can pardon the Defendants and move to dismiss its "querella." *See* Catala Declaration, ¶6, pp. 6-7.

**F. The Court Should Award Sanctions Against Donde.**

15. The Debtors renew and incorporate their request for monetary sanctions against Donde, as set forth in the Motion and further supported herein. Donde willfully and intentionally violated the automatic stay, and the Debtors are entitled to monetary sanctions as a result for, at a minimum, the bankruptcy estate's fees and costs incurred in defending the Criminal Complaint, and preparing and bringing the Motion and this Reply. The Debtors estimate their fees and costs total a minimum of \$45,000, and request the Court award sanctions in that amount. The Debtors will provide an evidentiary support of such fees and costs as the Court may require.

**CONCLUSION**

WHEREFORE, for the reasons set forth above, in the Motion, and in the Catala Declaration, the Debtors respectfully request the Court enter an Order (i) enforcing the automatic stay against Donde; (ii) deeming any postpetition actions by Donde to recover on claims against the Debtors, or obtain possession of, or exercise control over the Disputed Assets and property of the Debtors' estates null and void and of no effect; (iii) holding Donde in contempt of Court for Donde's repeated, ongoing violations of the automatic stay and the Court's Uniform Procedures Order through and until the Criminal Complaint is withdrawn and the parties pardoned; (iv) prohibiting Donde from taking any further action to recover on claims against the Debtors or to obtain possession of, or exercise control over property of the Debtors' estates, including the Disputed Assets, outside the Bankruptcy Court; (v) awarding the Debtors monetary sanctions against Donde; and (vi) granting such other and further relief as requested herein or as the Court otherwise deems necessary and appropriate.

Dated: May 15, 2019

AKERMAN LLP

By: /s/John E. Mitchell

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