

KLESTADT WINTERS JURELLER
SOUTHARD & STEVENS, LLP
200 West 41st Street, 17th Floor
New York, NY 10036
Telephone: (212) 972-3000
Facsimile: (212) 972-2245
Sean C. Southard
Counsel to 7645635 Canada Inc.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----X	
In re	:
	:
	:
MIAMI METALS I, INC., <i>et. al.</i> , ¹	:
	:
	:
	:
Debtors.	:
	:
	:
-----X	

Chapter 11
Case No. 18-13359 (SHL)
(Jointly Administered)

**7645635 CANADA INC. O/A OTTAWA GOLD BUYER’S JOINDER
TO JOINT OPPOSITION OF BUCKET ONE CUSTOMERS AND
STATEMENT IN OPPOSITION TO THE DEBTORS’ AND
SENIOR LENDERS’ MOTION FOR SUMMARY JUDGMENT**

765635 Canada Inc. o/a Ottawa Gold Buyer (“Ottawa Gold Buyer”), hereby submits this joinder to Joint Memorandum of Law of Bucket 1 Customers in Opposition to the Debtors’ and Senior Lenders’ Joint Motion for Summary Judgment (the “Opposition Memorandum”) and statement in opposition to (the “Joinder”) the Debtors’ and Senior Lenders’ Joint Motion for

¹ 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, LLC), 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 38th 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, Delegacion Cuauhtemoc, Mexico DF 6000 (2942).

Summary Judgment as to Bucket 1 Customers (the “Motion”). In support of the Joinder, Ottawa Gold Buyer respectfully states as follows:

JOINDER

1. The customers identified as Bucket 1 Customers have filed a (i) Joint Memorandum of Law of Bucket 1 Customers in Opposition to the Debtors’ and Senior Lenders’ Joint Motion for Summary Judgment (the “Opposition Memorandum”) [Docket No. 1080] and (ii) Bucket 1 Customers’ Joint Response to Debtors’ and the Senior Lenders’ Joint Statement of Mutual Undisputed Facts (“Response to Undisputed Facts”) [Docket No. 1081]. Ottawa Gold Buyer joins the arguments set forth in both the Opposition Memorandum and Response to Undisputed Facts, except to the extent otherwise set forth herein, and otherwise asserts the following positions.

FACTS AND ARGUMENTS POTENTIALLY UNIQUE TO OTTAWA GOLD BUYER

2. Attached as Exhibit “D” to the Amended Declaration of Scott Avila in Support of Debtors’ and Senior Lenders’ Joint Motion for Summary Judgment as to Bucket 1 Customers with Exhibits A through F (the “Avila Declaration”)[Docket No. 1005] is what is according to the Debtors and Senior Lenders a list of the True and Correct Copies of Standard Terms Executed by the Bucket 1 Customers. Included in this Exhibit “D” is the RMC2 LLC (“RMC2”) Standard Terms and General Operating Conditions that Ottawa Gold Buyer supposedly agreed to (the “Terms and Conditions”).

3. Initially, as discussed in the Declaration of Russel Sparks in Opposition to Joint Motion of Debtors and Senior Lenders for Summary Judgment as to Bucket 1 Customers (the “Sparks Declaration”)², Ottawa Gold Buyer is unclear as to which, if not both, of the Debtors, Republic Metals Corporation (“RMC”) or RMC2, LLC (“RMC2”), Ottawa Gold Buyer actually

² The Sparks Declaration is being filed contemporaneously with the Joinder.

did business with. Various written documents issued by Debtors suggested that RMC2 was merely a business division of RMC. Indeed, the header of the very terms and conditions that the Debtors and Senior Lenders claims binds Ottawa Gold Buyer states that RMC2 is “A Division of Republic Metals Corporation. *See* Avila Declaration, Exhibit D, p. 4.

4. The Terms and Conditions attempt, in a standard “battle of the forms way”, to indicate that with respect to “any and all business dealings” between RMC2 and Ottawa Gold Buyer, the Terms and Conditions “override any and all provisions, terms and stipulations in *Customer* purchase orders, sale orders and/or any other *Customer* Documents.” Avila Declaration, Exhibit D, p. 4 (Emphasis added).

5. It is important to note however, that this limitation or attempted prohibition does not, by its own terms, apply to RMC2’s own conflicting provisions, terms and stipulations that may be contained in the other commercial documents that it generates in connection with its interactions with Ottawa Gold Buyer.

6. This is relevant due to certain language in commercial documents and course of dealing outside the “Standard Terms” which evidence the clear intention by Ottawa Gold Buyer and the Debtors that a bailment relationship should be created unless and until valuation and pricing were agreed upon and confirmed with payment.

7. As seen in the documents attached to the Sparks Declaration as Exhibit “A” (the “Customer and Commercial Invoicing Documents”), a number of terms clearly indicate the intention that a bailment be created between Ottawa Gold Buyer and the Debtors. The Customer and Commercial Invoicing Documents have a section labeled “Purpose of Shipment.” Sparks Declaration, Exhibit A, p. 6. This section states that the materials shipped to the Debtors were

shipped for “melt, assay, refining & valuation.” *Id.* Further, the “Payment Terms” indicate that payment would be “Upon receipt, analysis & valuation” *Id.* (emphasis added).

8. Further, page 4 of the Customer and Commercial Invoicing Documents contains an “Extra Notes” section which states “2 boxes to be refined together PLEASE REFINE LOT SEPARATELY.” *Id.*, p. 4. This is a clear indication that there was no intended sale, but rather the purpose of the shipment was for refinement. Additional evidence that the purpose of the transaction was refinement can be found in the “Special Instructions” section on page 5 of the Customer and Commercial Invoicing Documents which states “Approx 70% pure scrap gold and bullion to be refined.” *Id.*, p. 5.

9. Finally, according to the “Insurance” section on the page 6 of the Customer and Commercial Invoicing Documents, insurance was “Covered by RMC2 LLC.” *Id.*, p. 6. RMC2 covering the insurance and thus bearing the risk of loss weighs in favor of a bailment relationship as opposed to a sale transaction between Ottawa Gold Buyer and the Debtors.

10. Even if the Court were to just focus on the standard Terms and Conditions to which Ottawa Gold Buyer is allegedly bound, the same expressly consider and provide for a bailment relationship in the “Insurance, Delivery, Weighing and Sampling” section. *See* Avila Declaration, Exhibit D, p. 4. As stated therein, the terms governing risk of loss and insurance are clearly consistent with a bailment relationship. *See Id.* (“Risk of loss of material will pass from Customer to RMC2 upon delivery to an acceptance at RMC2’s refinery, unless otherwise agreed to in writing. Upon receipt by RMC2 of metal sent by Customer for refining and acceptance by RMC2, RMC2 shall bear the responsibility of insurance for loss or damage to such metal while at RMC2”).

11. On the following page, the Terms and Conditions state “RMC2’s acknowledgment or receipt of Customer material shall not constitute an agreement as to the quality, weight,

aesthetics or description stipulated by the Customer.” Avila Declaration, Exhibit D, p. 5. This language clearly indicates that a sale was not intended on delivery of the materials and that any materials terms of any sale transaction were not yet agreed to between Ottawa Gold Buyer and the Debtors when the materials had been delivered.

12. Additionally, on the same page, the Terms and Conditions state that “RMC2 shall not provide Customers with metal pool accounts. Incoming material must be priced prior to shipment and/or at the time of settlement.” *Id.* This language also suggests a bailment relationship upon delivery and also shows that the material terms of a sale transaction were not hashed out at the time of delivery of the materials. Notably, this language also indicates that the customers of RMC2 were not given metal pool accounts, a fact directly at odds with arguments of Debtors and Senior Lenders.

13. The following page of the Terms and Conditions states that a “Customer has the following options when fixing material with RMC2.” Avila Declaration, Exhibit D, p. 6. This language indicates that control over pricing and consummation of any actual sale remained with Ottawa Gold Buyer not the Debtors and again indicates that at the time the materials were received by the Debtors the material terms of a sale were not yet determined.

14. Additionally, on the same page, the Terms and Conditions provide that “Upon commencement of a trade with RMC2, Customer shall receive an e-mail from RMC2 confirming the trade details.” *Id.* It is submitted that only this later email, after valuation of the materials was agreed upon, would there be a memorialization that the parties have “entered into a written, legally binding contract for the sale/purchase of precious materials contained within the confirmation e-mail.” *Id.* Again, the very terms and conditions that the Debtors attempt to rely upon exclusively refer to and require extrinsic documents to confirm completion of a sale transaction.

15. Under certain circumstances, an advance of funds can take place prior to actual sale, but that did not always happen as provided by the terms “At RMC2’s discretion and at Customer’s request, RMC2 will advance funds to Customer prior to final settlement.” *Id.* This language is further evidence that the control over pricing and consummation of any actual sale remained with Ottawa Gold Buyer and that the material terms of any sale transaction were not yet determined at the time the Debtors took possession of materials shipped to them by Ottawa Gold Buyer.

16. According to the chart of advances owed by the Debtors attached to Ottawa Gold Buyer’s Customer Statement as Exhibit “B”, there is a total of \$229,645.09 in advances owed to Ottawa Gold Buyer on account of RMC Lot Numbers RL161461 and RL161711. Therefore, at the very least, because Ottawa Gold Buyer has not received these payments from the Debtors, title to the materials identified by RMC Lot Numbers RL161461 and RL161711 should remain with Ottawa Gold Buyer.

17. Finally, even with the Court only considering the so-called “Standard Terms and Conditions”, it is not clear which of the many sets of such documents would govern Ottawa Gold Buyer.

18. Business records produced in discovery clearly indicate that RMC was the importer of record on materials supplied by Ottawa Gold Buyer which are the subject of the customer claim, but RMC2 claims to be counter party. If Ottawa Gold Buyer’s materials were imported by RMC, no sale could have taken place under the terms and conditions with RMC2.

19. Even Debtors’ counsel has acknowledged in papers filed with this Court that they are not sure exactly who did business with Ottawa Gold Buyer. *See* Debtors’ Omnibus Response

to Customer Statements [Docket No. 648], Exhibit D, p. 9 (“Toronto customer, first shipped to RMC2, then to RMC”).

20. Such a statement seems inconsistent with the shipping and importation records that clearly establish RMC was the importer of record. RMC could not import goods if they were first shipped to RMC2.

Dated: New York, New York
May 20, 2019

KLESTADT WINTERS JURELLER
SOUTHARD & STEVENS, LLP

By: /s/Sean C. Southard
Sean C. Southard
200 West 41st Street, 17th Floor
New York, NY 10036
Tel: (212) 972-3000
Fax: (212) 972-2245
Email: ssouthard@klestadt.com
Counsel to 7645635 Canada Inc.