UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
MIAMI METALS I, INC., *et al.,*	Case No. 18-13359 (SHL)
Debtors.	(Jointly Administered)
	Related to ECF No. 1121 and 1122

OMNIBUS OBJECTION OF CERTAIN CUSTOMERS TO DEBTORS' SETTLEMENT MOTIONS

Certain undersigned Customers (as defined in the Uniform Procedures Order)[1] (the "Customer Group") hereby submit this joint omnibus objection (the "Objection") to: (I) the *Debtors' Motion for Entry of an Order Under Bankruptcy Code Sections 105(a) and 363(b) Authorizing Debtors to Enter into and Perform Under Plan Support Agreement* [ECF No. 1121] (the "PSA Motion"); and (II) the *Joint Motion of Debtors, Official Committee of Unsecured Creditors, and Senior Lenders for Entry of an Order Approving Settlement Agreement Pursuant to Bankruptcy Rule 9019* [ECF No. 1122] ("Settlement Motion" and, together with the PSA Motion, the "Settlement Motions"),[2] by which the Debtors and certain parties in interest are seeking approval of certain settlements (the "Proposed Global Settlements"), filed by the above-captioned debtors (the "Debtors"), the Official Committee of Unsecured Creditors (the "Committee") and certain lenders (the "Lenders").[3] In support of the Objection, the Customer Group states as follows:

[1] *Order Approving Uniform Procedures for Resolution of Ownership* (as amended from time to time, the "Uniform Procedures Order") [ECF No. 913].

[2] Capitalized terms used but not defined herein shall have the meaning ascribed to them in the Settlement Motions or the Uniform Procedures Order, as applicable.

[3] The Lenders are Coöperatieve Rabobank U.A., New York Branch, Brown Brothers Harriman & Co., Bank Hapoalim B.M., Mitsubishi International Corporation, ICBC Standard Bank Plc, Techemet Metal Trading LLC,

OBJECTION

1. The Proposed Global Settlements are designed for the direct benefit of the Debtors, the Lenders, the estate professionals and, to a lesser extent, holders of administrative priority claims under section 503(b)(9) of the Bankruptcy Code. Notably missing from this group are those with Ownership Disputes, referred to in the Proposed Global Settlements as "Title Property Claims." While the parties' effort to settle is laudable, several provisions of the Proposed Global Settlements are inconsistent with applicable law and unacceptable and must be revised or denied.

A. The Terms of the Proposed Ownership Reserve Must Be Clarified

2. Although the Settlement Motions seek approval of the Proposed Global Settlements, such settlements are not truly global. Specifically, the class of interests which are not protected under the Settlement are those parties asserting Title Property Claims or Ownership Disputes, who do not have claims under section 503(b)(9) of the Bankruptcy Code, as well.

3. The Settlement Motions outline the key terms of the Proposed Global Settlement. Included among those terms is the Plan Support Agreement, which states that the parties to the Proposed Global Settlement will support a Plan which will provide for, among other things:

- "(d) The distribution of all remaining Cash Collateral to the Senior Lenders, other than cash held in the reserves set forth in the Plan, including without limitation, the Ownership Reserve (as defined in the Plan Support Agreement)"

- "(e) The preservation of claims by entities to ownership of precious metal or the proceeds thereof in the possession of the Debtors asserted pursuant to the Bankruptcy Court's Second Amended Order Approving Uniform Procedures for Resolution of Ownership Disputes [Dkt. No. 1056], as outlined in more detail in the Plan Support Agreement."

Woodforest National Bank, and Hain Capital Investors Master Fund, Ltd. as successor in interest to Bank Leumi USA.

4. A Plan Term Sheet is attached to the Plan Support Agreement and by reference incorporated therein and made a part thereof. The Plan Term Sheet defines the Ownership Reserve and states: "The Plan shall provide for the creation of a reserve comprised of the proceeds generated by the sale of precious-metal inventory other than any Undisputed Collateral."

5. There is no recitation as to the amount which is being held in the Ownership Reserve nor the potential additional amount to be deposited into that Ownership Reserve. For complete disclosure, those amounts must be stated. The Ownership Reserve is meant to be for the benefit of Title Property Claims.

6. There are conflicting definitions of what shall be contained in the Ownership Reserve. As stated above, it shall be comprised of proceeds generated by the sale of precious-metal inventory. At other places the Plan Term Sheet states that an Allowed Title Property Claim Holder "shall receive its Title Property from the Ownership Reserve". It is unclear, therefore, whether the Ownership Reserve will be comprised of cash or property or a combination thereof.[4]

7. Title Property Claims are defined as "Claims . . . by entities to ownership of precious metal or the proceeds thereof in the possession of the Debtors ('Title Property') asserted pursuant to the Bankruptcy Court's *Second Amended Order Approving Uniform Procedures for Resolution of Ownership Disputes* as amended from time to time, the 'Uniform Procedures' [Docket No. 1056]." Allowed Title Property Claim Holders are to receive its Title Property from the Ownership Reserve. As stated above, it must be clarified whether the Ownership Reserve consists of cash or physical property or both.

[4] This Court's prior orders required proceeds of inventory sales (made over the objection of the Owners) be segregated and deposited subject to further Court order. Nothing in the Settlement Agreement resolves Ownership Disputes, and therefore no order on the proposed settlement should in any way alter the prior requirements.

8. Further, the Ownership Reserve is subject to dilution. The Plan Term Sheet provides that upon resolution of any Title Property Claim:

> The Allowed Title Property Claim Holder shall receive its Title Property from the Ownership Reserve; provided however, that an appropriate portion of the Title Property will be withheld from such recovery so as to satisfy the Holdback Amount until such time as (i) the amounts held in the Ownership Reserve exceed the aggregate face amount of the outstanding Title Property Claims, or (ii) all Title Ownership Claims have been resolved by the parties or adjudicated pursuant to a final order.

9. The Plan Term Sheet provides further that if there is insufficient assets in the Ownership Reserve, then each Allowed Title Property Claim shall receive only a *pro rata* share of the Ownership Reserve. There is no way to calculate the potential recovery to any Title Property Claimant without a disclosure of how much is currently in the Ownership Reserve and what is the totality of the current Title Property Claims.

10. Finally, within the body of Title Property Claimants are those companies or individuals whose Title Property Claim exists as a result of property leased to the Debtors. It is unclear whether or not the Ownership Reserve will contain sufficient funds to cover those claims which may not have anything to do with a sale of precious-metal inventory. A complete disclosure of the amount in the Ownership Reserve and the amount of the outstanding Title Property Claims would provide the information necessary for this class of Title Property Claimants to fully evaluate the effect of the Proposed Global Settlements on their interests and their anticipated return from this estate. Without this, the Proposed Global Settlements should be denied.

B. The Releases Contained in the Proposed Global Settlements Are Overbroad

11. The Proposed Global Settlements provide for a general release of all claims against the Lenders by the Debtors, the Committee, and the Estate. While the Settlement Motion provides in its discussion of the *Iridium* factors that the release "only bars third-party claims that are

derivative of the claims released by the estate and the Committee" (Settlement Motion ¶ 25), the Customer Group is concerned that the language used in other places in the Settlement Motions and written agreements is not so limiting and may encroach upon claims they may have against the Lenders or others who received proceeds of any transfer and sale of their metals pre-petition.

12. To the extent any Owner in the Customer Group is determined through the Ownership Procedures to have always held title to the metals held by the Debtors on each Owner's behalf, the Owners may hold claims—either as a group or individually—arising out of the Debtors' and Lenders' activities prepetition, including as a result of any improper use, sale, or transfer of their metals. While the Settlement Motions assert that the ownership disputes are preserved, and the "ownership reserve" is maintained, such reserve presumably only accounts for the metals held by the Debtors as of the Petition Date. The Owners are entitled to retain all rights to recover against any party who received any improper or otherwise fraudulent sale, liquidation or transfer of their property prepetition (or the proceeds thereof). The Owners—as well as, potentially, unsecured creditors—may also hold other individual claims against the Lenders or others that cannot and should not be released by this Settlement.

13. Further, the consideration being provided by the Lenders in the Proposed Global Settlements, in exchange for the broad releases, appears to be illusory. The only monetary consideration to be provided by the Lenders is a $7,500,000 "Settlement Payment", all carved out of purported cash collateral, which includes $5,500,000 for funding of a litigation reserve and another $2,000,000 reserve for allowed 503(b)(9) claims. But the waterfall structure proposed by the settlement insures that the Lenders are repaid the entirety of this "Settlement Payment" before any significant benefit is received by the unsecured creditors.

14. First, the Settlement Motions and Settlement Agreement states that the litigation reserve will initially be responsible for funding all professional fees and expenses of the Committee incurred after April 1, 2019 through the Effective Date. Based on the disclosed burn rate of the Debtors' professionals and others in this case, the litigation fund is likely to be significantly reduced even before litigation has begun. The $5.5 million is not a real number if it has already been reduced by fees incurred for the last two months, and the actual amount that will fund future litigation should be disclosed.

15. Second, the Lenders have ensured that the "Settlement Payment" will be paid back to them before any significant pay out to unsecured creditors. Specifically, from any recovery of the "Assigned Auditor Claims",[5] which appear to be the most valuable of the assigned claims, the Lenders are to be paid the first $2 million from any recovery (repaying the entirety of the carve-out for the "503(b)(9) fund"); then the Lenders are paid $5.5 million out of the next $11 million of recovery (assuring repayment of the entirety of the carve-out for the "Estate Litigation Fund"); and finally the Lenders are to share in any further recovery *pari passu* with other general unsecured creditors via an allowed deficiency claim.[6] This repayment structure ensures the Lenders are repaid all or a significant portion of the purported consideration for the settlement, to the detriment of general unsecured creditors.

16. As to the non-monetary consideration via assignment of claims, nowhere in the Settlement Motions is the value of potential claims discussed—either those against the Lenders or those being assigned by the Lenders. A realistic evaluation of the value provided under this

[5] These waterfall provisions appear to only relate to claims and causes of action against Maria I Machado, P.A., Maria Machado, Crowe LLP, and Eisner Amper LLP

[6] No estimate of the purported deficiency is disclosed in the papers, nor is an estimate of what percentage of the unsecured pool would be taken by this deficiency claim.

Settlement cannot be made without further disclosure. Indeed, as set forth above, it appears the Lenders reserve much of the value of assigned claims to themselves and only assign the right to prosecute them. In effect, the Lenders are extracting a highly valuable general release for little to no real consideration.

17. For these reasons, the Customer Group objects to the releases and the Proposed Global Settlements.

C. The Proposed Surcharge Is Inappropriate

18. The Proposed Global Settlements would transfer to the Litigation Trust the right to surcharge the costs associated with liquidating the assets of Customers who are *successful* in the Ownership Litigation. *See* PSA Mot. 10. This is both offensive and improper.

19. The power to surcharge is limited to "recover[ing] from property securing *an allowed secured claim* the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim." 11 U.S.C. § 506(c); *see also* Collier on Bankruptcy ¶ 506.05 (Richard Levin & Henry J. Sommer eds., 16th ed.) ("[I]n order for section 506(c) to apply, the relevant expense must relate to collateral that is the subject of an allowed secured claim."). The limited power to surcharge does not apply here—a Customer who is successful in its Ownership Dispute is the rightful *owner* of the subject property. Where a Customer is successful in its Ownership Dispute, it is not the holder of an allowed secured claim and the subject property is not property of the estates. Neither the Debtors nor the litigation trustee have the ability to surcharge property that is not property of the estates.

20. Moreover, even if the statute were applicable to this situation, the Customer Group does not consent and has not consented to the Debtors' proposed surcharge structure. Surcharging the Customers would be profoundly unfair—many Customers objected to the sale of assets subject

to the Ownership Disputes, arguing that they (the Customers) are the true owners of the now-liquidated property. To allow the Debtors or their assigns to surcharge the Customers who are *successful* in proving ownership and who opposed the misappropriation and/or liquidation of *their* assets is inconsistent with applicable law.

21. Finally, given the procedural context in which the parties to the Proposed Global Settlements request the right to surcharge, it appears that they improperly seek to shift the burden of establishing the propriety of a surcharge from the estates to the successful Customers. *See In re Ceron*, 412 B.R. 41, 48 (Bankr. E.D.N.Y. 2009) (holding that the *trustee* bears the burden to show the applicability of section 506(c) of the Bankruptcy Code). To the extent that the Debtors are permitted to transfer standing to surcharge to a liquidating trustee, the Court should make clear that such liquidating trustee bears the burden consistent with applicable law. Moreover, nothing herein should be interpreted to preclude a challenge from any Customer to a proposed surcharge at an appropriate time.

22. The Court should not approve the Proposed Global Settlements to the extent they include the current surcharge provisions.

RESERVATION OF RIGHTS AND JOINDER

23. Each of the undersigned Customers expressly reserves its rights to: (i) supplement this Objection at any time in writing and at the hearing on the same; (ii) object or respond to any disclosure statement and plan filed in these cases, notwithstanding any terms in the Proposed Global Settlements; (iii) seek any and all remedies under applicable law; (iv) challenge any classification of its claims in the unlikely event it is unsuccessful in the Ownership Disputes; and (v) raise different or further arguments in response to any additional arguments made by the Debtors, the Lenders, the Committee or any other party.

24. Moreover, the Creditor Group joins in any objections to either or both of the Settlement Motions, to the extent consistent with this Objection.

CONCLUSION

For the reasons set forth above, the Creditor Group respectfully requests that this Court deny the Settlement Motions to the extent set forth herein.

Dated: New York, New York
June 6, 2019

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