

CANADA

SUPERIOR COURT
(Commercial Division)

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N°: 500-11-040900-116

**IN THE MATTER OF THE
COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985,
c. C-36, AS AMENDED**

KITCO METALS INC.

Petitioner

-and-

RICHTER ADVISORY GROUP INC.

Monitor

-and-

**HERAEUS METALS NEW YORK
LLC**

Respondent

**PLEA OF HERAEUS METALS NEW YORK LLC IN CONTESTATION OF
THE APPLICATION FOR AN ORDER FORCING HERAEUS METALS NEW
YORK LLC TO RETURN CERTAIN ASSETS OF PETITIONER'S POOL
ACCOUNT CUSTOMERS**

**IN CONTESTATION OF THE APPLICATION FOR AN ORDER FORCING
HERAEUS METALS NEW YORK LLC TO RETURN CERTAIN ASSETS OF
PETITIONER'S POOL ACCOUNT CUSTOMERS, THE RESPONDENT, HERAEUS
METALS NEW YORK LLC, PLEADS AS FOLLOWS:**

1. It denies paragraphs 3, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 25 of the Application;
2. It ignores paragraphs 11, 23 and 24 of the Application;
3. It admits paragraphs 1, 2 and 4 of the Application;

4. On the same day it filed its proof of claim, Heraeus Metals New York LLC (“**Heraeus**”) entered into an agreement with Kitco Metals Inc. (“**Kitco**”) whereby Heraeus reserved its rights with respect to the 908 toz withheld by it. Heraeus’ position is also supported by a letter filed in support of its proof of claim referring to the 908 toz being held as collateral. At the time Heraeus filled up its proof of claim, it did so with the understanding that the debate about its alleged security would be postponed to a later date;

RE-ESTABLISHING THE FACTS AND FOR FURTHER PLEA, THE RESPONDENT RESPECTFULLY SUBMITS THE FOLLOWING :

5. Kitco is alleging that the 908 toz of rhodium that Heraeus has been retaining is in fact the sole property of Kitco’s pool account customers and therefore should be returned for the benefit of its customers. Heraeus disagrees with that assertion;
6. In October 2008, Kitco opened one rhodium pool account #320847 at Heraeus New York. Kitco bought rhodium for its own account, titled “Kitco Metals Inc.”, and all invoices were paid directly by Kitco Metals Inc.;
7. Kitco never represented to Heraeus that the rhodium was for the benefit of its customers or that all or some should be segregated from its own pool of rhodium;
8. The initial deposit of rhodium to Kitco’s account was made through a transfer to Heraeus from Johnson Matthey, another major metals trader, from its Kitco International Limited (“**KIL**”) pool account. The Johnson Matthey KIL account was not a trust account and did not reference any customer metal;
9. Two years later, as of November 4, 2010, the only active external Kitco accounts with which Heraeus transacted were a metals pool account at Johnson Matthey and a bank account at HSBC. Both of these accounts were in the name of Kitco Metals Inc. and neither account were “in trust for customers”;
10. In fact, Kitco specifically recognized that these external accounts were “in favor of Kitco” and not “in favor of third party”;
11. On November 23, 2010, Kitco sold 4,000 toz from its pool account to Heraeus, order #1448258, for a market price of approximately US\$9.2 million paid by Heraeus. If this had truly been metal held in trust for its customers, Kitco would not have sold the metal for its account and it would have requested that the funds be transferred to a separate segregated bank account. In receiving this payment, Kitco did not distinguish between Kitco and customer account, if any;

12. At the same time it sold 4,000 toz to Heraeus, Kitco committed to repurchase the same quantity back from Heraeus in 60 days at a fixed price. Together, these two transactions constituted a common type of financing arrangement called a "forward contract". This contract was rolled over several times in 2011 at Kitco's request until June 2011 when, without any warning to Heraeus, Kitco filed for bankruptcy protection;
13. As it is customary with financing contracts of that nature, Heraeus (Gerry Dawson) requested collateral for its open forward contract entered with Kitco and KIL, and Kitco (Tim O'Dwyer) verbally agreed to leave 913 toz of rhodium in its pool account. A few weeks later, Kitco requested that Heraeus transfer 5 toz of this collateral to an account at a Heraeus affiliate. The 5 toz was to be processed by the Heraeus affiliate into a rhodium-based product for shipment to a customer. This is how the 908 toz holding came into being;
14. During the second quarter of 2011, there was a significant decrease in the market price of rhodium. In May, Heraeus therefore requested, and on May 26, 2011, Kitco wired from its own bank account US\$1,500,000 to Heraeus as additional security for the forward contracts with Kitco/KIL which, at that time, amounted to approximately US\$4,360,000;
15. It is only in December 2010 that Kitco first requested establishment of an account named "Kitco in trust for customers" and began pressing Heraeus on this issue in February 2011. Heraeus never agreed to the written request made on December 8, 2010 (R-2);
16. From February 15, 2011, the head trader at KIL also requested that Heraeus agree to segregate customer funds at KIL, demonstrating that this had not been done up until that date. Heraeus (Dave Gallagher and Gerry Dawson) verbally refused on two occasions;
17. Eventually, one Heraeus clerk in California did re-title Kitco's metal processing operational account at Heraeus Metal Processing LLC (Heraeus' California precious metal processing plant) which led to an automatic computerized standardization of all electronic forms bearing the name of Kitco, including the trading account at Kitco Metals New York LLC. The re-titling was of a clerical nature and did not reflect an acceptance by Heraeus of any substantive change to the original relationship with Kitco;
18. Kitco admitted in August 2011 that the renaming of the accounts was in fact purely cosmetic as "we sometimes have to transfer between all our accounts, operational, or in-trust and we are at liberty to do so as all these accounts are Kitco holdings";

19. Despite any re-titling of account, Kitco's customer rhodium, if any, was therefore not kept at all times segregated from Kitco's operational accounts and, as such, never remained trust property held on behalf of customers;
20. In any event, had Heraeus accepted to transfer precious metal from a Kitco's pool account to a trust account for customer pool, Heraeus would not have and did not renounce to its previously constituted collateral, and the reshuffling of the accounts would not have impacted Heraeus ongoing holding of the 908 toz as collateral;
21. Heraeus is not aware of any Kitco customer inquiries about any of the 908 toz, nor has it heard of any customer complaints about this metal being tied up at Heraeus since 2011;
22. If Kitco has already repaid its customers on these ounces, these ounces would be owned by Kitco once again;
23. In retrospect, it appears that when created, the Kitco rhodium account was a Kitco proprietary account, and Kitco only requested that it be changed to a customer trust account when Kitco began to have problems with the Quebec Revenue Agency and anticipated a bankruptcy filing;

FOR THESE REASONS, MAY IT PLEASE THIS HONOURABLE COURT TO :

GRANT the present Plea;

DISMISS the Application for an order forcing Heraeus Metals New York LLC to return certain assets of Kitco Metals Inc.'s pool account customers;

DECLARE that the 908 troy ounces of rhodium presently held by Heraeus Metals New York LLC is retained as collateral for its claims against Kitco Metals Inc. and/or Kitco International Limited;

THE WHOLE with costs.

Montreal, January 13, 2017

Stikeman Elliott LLP
STIKEMAN ELLIOTT LLP
Lawyers for Respondent

SUPERIOR COURT
(Commercial Division)

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HERAEUS METALS NEW YORK LLC

Respondent

BS0350

File: 131022-1001

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IN CONTESTATION OF THE APPLICATION
FOR AN ORDER FORCING HERAEUS METALS
NEW YORK LLC TO RETURN CERTAIN
ASSETS OF PETITIONER'S POOL ACCOUNT
CUSTOMERS

ORIGINAL

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