Cyber-Fox Trading, Inc. (“Cyber-Fox”), submits its customer statement concerning ownership of pool account metal (the “Statement”) pursuant to and in accordance with the Order Approving Uniform Procedures for Resolution of Ownership Disputes [doc. 395] dated January 11, 2019 (the “Procedures Order”).

A. Incorporation of Prior Cash Collateral Objection

Cyber-Fox incorporates its limited objection and reservation of rights (the “Limited Objection”) [doc. 195] to the Debtors’ Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to Use Cash Collateral, (II) Granting Adequate Protection the Secured
Parties, (III) Scheduling a Final Hearing and (IV) Granting Related Relief. Pursuant to the Procedures Order, the Limited Objection serves as Cyber-Fox’s customer statement. This statement supplements the Limited Objection, which together constitute Cyber-Fox’s customer statement.

B. Supplement to Customer Statement

1. Customer and Counsel

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2. Description of Assets

27,079.242 oz. of 0.999+% silver in the pool account.

3. Claims Against Debtors

Cyber-Fox submitted a reclamation demand on November 12, 2018 for 1,003.299 ounces of silver. Cyber-Fox is not aware of any other claims against the Debtors.

4. Governing Law. Florida

5. Summary of Claim

Cyber-Fox holds a Secondhand Dealer license in Florida. Cyber-Fox purchases gold and silver from jewelry shops, pawn shops and auction sites. The company has been doing business with RMC since 2007. An armored car would pick up Cyber-Fox’s metals weekly or monthly and deliver them to RMC for processing, refining and assaying. Once refined, Cyber-Fox could have metal returned in the form of refined metal or have ounces of refined metal
added to its pool account until initiating a sale based on a fixed price, requesting metal in physical form, or providing RMC with further instructions.

Cyber-Fox has let its silver accumulate over the past several years and thus, as of the petition date, had 27,079.242 ounces in its Silver Pool Account. The silver was refined at RMC, and Cyber-Fox paid refining fees to have this done. Cyber-Fox had not initiated a sale to RMC. Instead, RMC had physical possession of the metal but not title. It could only do with the metal what Cyber-Fox directed to be done. At no time did Cyber-Fox give RMC authority to use its metal as collateral for loans.

Cyber-Fox reported its pool account of silver as inventory to the IRS on its yearly tax returns.

The following legal principles support Cyber-Fox’s claim of ownership.

(i) **RMC is a Bailee.** Whether the debtor has sufficient interest in property such that it becomes “property of the estate” under § 541 of the Bankruptcy Code is determined by applicable state law. *Musso v. Ostashko*, 468 F.3d 99, 105 (2d Cir. 2006) (citing *Butner v. United States*, 440 U.S. 48, 55 (1979)). In Florida, bailment is defined “as a delivery of personalty for some particular purpose, or on mere deposit, upon a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it, or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be.” *Monroe Sys. for Bus., Inc. v. Intertrans Corp.*, 650 So.2d 72, 75 (Fla. 3d DCA 1994); see also *O’Brien v. Stermer*, 98 So. 1245, 1248 (Fla. 3d DCA 2012); *Reel Therapy Charters, Inc. v. Marina Mgmt.*, 2003 U.S. Dist. LEXIS 25155 (N.D. Fla. 2003). See also *Herrington v. Verrilli*, 151 F. Supp. 2d 449, 457 (S.D.N.Y. 2001) (“A ‘bailment’ is defined as ‘a delivery of personalty for some particular purpose, or on mere deposit, upon a contract … , that after the purpose has been fulfilled, it will be redelivered to the person who delivered it, or otherwise dealt with according

A contract for bailment requires that there be a mutual agreement between the parties for a bailment and that, further, there be an actual physical delivery of the items to be bailed into the hands of the bailee. In re International Gold Bullion Exchange, Inc., 53 B.R. 57 (Bankr. S.D.Fla. 1985). “In general, knowingly taking property into possession or control is a sufficient acceptance, provided there is a delivery for the purpose of creating a bailment.” Deatrick Leasing Corp. v. Rand’s Paint and Body Shop, Inc., 247 So.2d 532 (Fla. 3d DCA 1971).

“The issue of whether a contract represents a bailment or a sale is not an uncommon problem in industries, such as refining, where a company must make arrangements with another entity to process its raw materials.” In re Handy & Harman Ref. Grp., Inc., 271 B.R. 732, 736 (Bankr. D. Conn. 2001).

In determining whether a contractual arrangement is a bailment or a sale, courts look beyond whether the arrangement is labeled as a purchase or sale agreement and consider factors evidencing the parties’ intent to create a bailment, including whether (i) the bailor retains the right to return goods prior to processing or the return of the finished product, (ii) the contract provides that the bailor retains title to the raw materials and finished product, (iii) the risk of loss remains with the bailee while the goods are in its possession, (iv) the contract does not set a purchase price for raw materials prior to processing and only sets a certain price after processing, (v) the goods are segregated from the bailee’s other property, (vi) the goods are not recorded as the bailee’s inventory, and (vii) the bailor’s accounting records do not reflect an account receivable owed by the bailee. See, e.g., In re Sitkin Smelting and Refining, Inc., 639 F.2d 1213, 1216-
17 (5th Cir. 1981); see also In re Medomak Canning Co., 25 UCC Rep. Serv. 437, 444-49 (D. Me. 1977) (in determining that a contract for the processing of raw materials into canned pork and beans was a bailment rather than a sale, the bankruptcy court focused on “the intentions and circumstances of the parties” rather than “a provision in the contract designating the transaction a “purchase” by” the processor).

Viewed in light of these factors, it is clear that RMC is a bailee for the pool account metals.

1. At all times Cyber-Fox was entitled to the return of metals in the pool account, whether in the form of finished product or raw materials. RMC’s standard terms and conditions state: “Returnable metal represented in a Customer Pool Account does not pertain to specific, segregated, or identifiable metal; rather, it represents a future obligation of RMC to return common inventory of … metals. RMC reserves the right to return precious metals to Customer of like kind representing the ounces of precious metals owed to Customer.” If there is an obligation to return goods, the implication is that RMC does not own them. Even if the customer cannot identify specific pool account metals and RMC’s obligation is to return like-kind metals, RMC does not have any equitable interest in the pool account.

2. The risk of loss remains with RMC, as bailee while the goods are in its possession. The standard terms and conditions provide: “Risk of loss of material will pass from Customer to RMC upon delivery to and acceptance at RMC’s refinery, unless otherwise agreed.”

3. The contract does not set any price for metals in the pool account. To the contrary, the standard terms and conditions allow customers to leave their metals in the pool account un-priced: “Should Customer desire to leave ounces un-priced in Customer pool account, Customer must notify Republic in writing …”
4. Cyber-Fox reported its pool account of silver as inventory on its tax returns. Therefore, Cyber-Fox believes that the goods should not have been recorded as RMC’s inventory. Discovery will ascertain how RMC recorded the pool account metals for tax purposes.

5. Cyber-Fox’s accounting records do not reflect an account receivable owed by RMC.

6. There is nothing in the written contract between the parties – the terms and conditions – that gives RMC the right to use pool account metals for any purpose.

(ii) **The Pool Account Silver Is Identifiable.** RMC’s terms and conditions provide: “A pool account is a ledger account representing the amount of returnable metal owed to Customer … Precious metals are fungible; therefore any unit of material is equivalent to another of like kind.” The Uniform Commercial Code provides in part: “Goods” means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid ....” Fla. Stat. Ann. § 672.105(1). “An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined.” Id. § 672.105(4). See, e.g., *Eighty-Eight Oil Co. v. Charter Crude Oil Co. (In re Charter Co.*) 54 B.R. 91 (Bankr. N.D. Fla. 1985) (fungible crude oil can be the subject of reclamation); *In re Wheeling-Pittsburgh Steel Corp.* 74 B.R. 656, 658 (Bankr. W.D. Pa. 1987) (“Fungible goods may be reclaimed if the seller can trace the goods from its possession into an identifiable mass that contains goods of like kind and grade.”).

Under the terms and conditions, customer metals in RMC’s possession are maintained in an identifiable mass containing goods of like kind and grade. The terms and conditions provide, in the section “RMC Purchases, that “[r]eturnable metals shall be in the form of fine
gold bars … or fine silver bars.” Thus, Cyber-Fox’s metals in the pool account, though fungible, belong to Cyber-Fox.

(iii) The Debtors Do Not Have Any Equitable Interest. Possession by itself is insufficient to vest RMC with legal and equitable title. See 11 U.S.C. § 541(d). Cyber-Fox has not conferred upon RMC the right to sell or otherwise dispose of the goods. In this regard, RMC acts more as an escrow agent or bailee. See Papi Express, Inc. v. Dosal Tobacco Corp., 677 So.2d 1314, 1315 (Fla. 3d DCA 1996) (bailment encompasses “delivery of personalty for some particular purpose, or on mere deposit, upon a contract ... that after the purpose has been fulfilled it shall be redelivered to the person who delivered it, or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be.”), quoting Monroe Sys. for Bus. Inc. v. Intertrans Corp., 650 So.2d 72, 75-76 (Fla. 3d DCA 1994, review denied, 659 So.2d 1087 (Fla.1995).

Courts also recognize constructive trusts over property, particularly where there is wrongdoing or equity otherwise warrants. See, e.g., In re AE Liquidation, Inc., 426 B.R. 511 (Bankr. D. Del. 2010) (where debtor stated to customers that their deposits were segregated and not being spent pending a hold on the customers’ product, then debtor subsequently filed for bankruptcy, customers stated sufficient facts to support a claim for a constructive trust; moreover “imposition of a constructive trust does not depend on the parties’ intent … [r]ather it is an equitable remedy available in the event of wrongdoing by the defendant.”); Quinn v. Phipps, 93 Fla. 805, 814 (Fla. 1927) (“A constructive trust is one raised by equity in respect of property which has been acquired by fraud, or where, though acquired originally without fraud, it is against equity that it should be retained by him who holds it. Constructive trusts arise purely by construction of equity independently of any actual or presumed intention of the parties to create a trust and are generally thrust on the trustee for the purpose of working out the remedy. They are said
to arise from actual fraud, constructive fraud and from some equitable principal independent of the existence of any fraud.”

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