

RICH MICHAELSON MAGALIFF, LLP  
335 Madison Avenue, 9<sup>th</sup> Floor  
New York, NY 10017  
646.453.7851  
Howard P. Magaliff

*Attorneys for North American Bullion Exchange, LLC*

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

-----	X	
In re:	:	Chapter 11
	:	Case No. 18-13359 (SHL)
REPUBLIC METALS REFINING	:	
CORPORATION, <i>et al.</i> , <sup>1</sup>	:	(Jointly Administered)
	:	
Debtors.	:	
-----	X	

**NORTH AMERICAN BULLION EXCHANGE, LLC’S CUSTOMER STATEMENT CONCERNING OWNERSHIP OF PREPAID FABRICATED METAL**

North American Bullion Exchange, LLC (“NABX”), submits its customer statement concerning ownership of prepaid fabricated metal (the “Statement”) pursuant to and in accordance with o the *Order Approving Uniform Procedures for Resolution of Ownership Disputes* [doc. 395] dated January 11, 2019 (the “Procedures Order”).

**A. Customer and Counsel**

North American Bullion Exchange, LLC  
1429 42<sup>nd</sup> St S  
Fargo, ND 58103  
701.204.0424  
Christopher Olson, President

<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: Republic Metals Refining Corporation, 15 West 47th Street, Suites 206 and 209, New York, NY 10036 (3194), Republic Metals Corporation, 12900 NW 38th Avenue, Miami, FL 33054 (4378), Republic Carbon Company, LLC, 5295 Northwest 163rd Street, Miami Gardens, FL 33014 (5833), Republic High Tech Metals, LLC, 13001 NW 38 Avenue, Miami, FL 33054 (6102), RMC Diamonds, LLC, 12900 NW 38th Avenue, Miami, FL 33054 (1507), RMC2, LLC, 12900 NW 38th Avenue, Miami, FL 33054 (4696), J & L Republic LLC, 12900 NW 38th Avenue, Miami, FL 33054 (7604); R & R Metals, LLC, 12900 NW 38th Avenue, Miami, FL 33054 (7848), 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).

Rich Michaelson Magaliff, LLP  
335 Madison Avenue, 9<sup>th</sup> Floor  
New York, NY 10017  
646.453.7851  
Howard P. Magaliff, Esq.

**B. Description of Assets**

10,000 1-oz reverse proof generic buffalo rounds – prepaid

**3. Claims Against Debtors**

NABX filed claim # 48 as an unsecured claim for \$146,100 representing the value of the prepaid rounds in RMC’s possession. NABX is not aware of any other claims against the Debtors.

**4. Governing Law. Florida**

**5. Summary of Claim**

NABX placed a trade and paid in full for 10,000 1-oz reverse proof generic buffalo rounds. The Debtors issued four UPS tracking numbers for shipment of the product, each consisting of five boxes, for a total of 20 boxes. The Debtors represented that 10 of the boxes would be delivered by November 5, 2018, and 10 of the boxes would ship when the rounds became available.

Unlike the processing of unrefined metal from mines and scrap suppliers, the retail precious metals industry deals in fabricated product. It is industry practice to “hedge” metal orders that are bought or sold to eliminate price exposure to the volatility of precious metals prices. When inventory is bought or sold, the parties that trade with each other enter into a contract for purchase with each party simultaneously transferring hedging risk to the other at the moment of contract. Title is transferred at the moment of payment (*i.e.* good funds received). This practice is further acknowledged and codified in Republic’s Standard Operating Terms & Conditions, where it states: “*Until such time [that payment is made], RMC shall be deemed to retain*

*title to and a security interest in all material covered by any RMC invoice to secure the payment of the same.*” This implies that after such time as payment is made, RMC shall not be deemed to retain title, which is perfectly consistent with industry practice.

The following legal principles support NABX’s claim of ownership.

(i) Buyer in the Ordinary Course. Under Florida law, a buyer in the ordinary course of business (“BOIC”), like NABX, has a special property interest in prepaid goods that have been “identified” to the party’s contract – *i.e.*, goods that have been “*shipped, marked or otherwise designated by the seller as goods to which the contract refers.*” Fla. Stat. Ann. § 672.501 (West) (emphasis added); *see also id.* § 671.201 (defining “buyer in ordinary course of business”). Even where delivery has not been completed, where the goods at issue have nevertheless been *identified* to the contract, a buyer in the ordinary course takes free of any security interest created by the seller. *See* Fla. Stat. Ann. §§ 679.307, 679.320, 672.401, 672.501; *Kit Car World, Inc. v. Skolnick*, 616 So.2d 1051 (Fla. Ct. App. 1993); *Matter of Polar Chips Int'l, Inc.*, 40 B.R. 586, 588-90 (Bankr. S.D. Fla. 1984) (outlining the buyer-in-ordinary-course doctrine); *Matter of Int’l Gold Bullion Exch., Inc.*, 53 B.R. 660, 664 (Bankr. S.D. Fla. 1985)) (making clear that “identification” of the gold at issue would have secured the buyer priority over the rights of a judgment creditor).<sup>2</sup>

---

<sup>2</sup> Numerous courts across the country have held that, so long as the goods at issue have been paid for and identified, a buyer in the ordinary course takes free of any security interest created by the seller even if there has not yet been a completed “sale” or physical transfer of possession. *See, e.g., In re Tacoma Boatbuilding Co.*, 158 B.R. 19, 23 (S.D.N.Y. 1993) (buyer who had not taken possession was nevertheless a BIOC where ships it had ordered had been made according to its specifications; a “purchaser who received neither delivery or title has nevertheless been determined to be a BIOC,” and “[t]he general policy ‘is to resolve all doubts in favor of identification.’”); *Daniel v. Bank of Hayward*, 425 N.W.2d 416, 418-23 (Wis. 1988) (purchasers who made down payment but did not take title to vehicle became BIOC who could prevail over security interest of dealer’s financier once vehicle was identified to the contract); *Big Knob Volunteer Fire Co. v. Lowe & Moyer Garage, Inc.*, 487 A.2d 953, 957-59 (Pa. Sup. Ct. 1985) (buyer attained BIOC status when seller painted buyer’s name on the fire truck at issue, even though title had not passed and delivery had not been made); *see also, e.g., In re Havens Steel Co.*, 317 B.R. 75 (Bankr. W.D. Mo., 2004); *In re Western Iowa Limestone, Inc.*, 538 F.3d 858 (8th Cir. 2008); *Integrity Ins. Co. v. Marine Midland Bank-Western*, 90 Misc.2d 868 (N.Y. Sup. Ct. 1977); *In re*

(ii) Title Passed to NABX.

Under RMC's Standard Operating Terms and Conditions, title to the assets legally transferred to NABX upon payment. The Terms and Conditions provide, at paragraph 18:

All RMC charges are payable upon the rendering of an invoice. Acceptance of check, draft, credit card payments(s), or any remittance except legal tender (cash) shall not constitute payment until such payment processes are completed and any pay period to contest any charges reflected on this invoice have expired. *Until such time, RMC shall be deemed to retain title to and a security interest in all material covered by any RMC invoice to secure the payment of the same.*"

RMC's invoices similarly provide that until payment in legal tender has occurred, "Republic Metals Corporation shall be deemed to retain title to and a security interest in all goods covered by this invoice to secure the return of metal or the payment of this invoice." If RMC "retain[ed] title to" the material "[u]ntil" NABX paid the invoices in full, it follows that once invoices were paid in full, title transferred to NABX.

Thus, once NABX's payment processes were complete and indefeasible – which occurred when NABX completed its pre-petition wire transfer on October 22, 2018 for the 10,000 1-oz coins – title to the finished goods passed to NABX. *See Fla. Stat. § 672.401(1)* ("[T]itle to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.").

(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)*. NABX has not conferred upon RMC the right to sell or otherwise dispose of the goods for which it paid. In this

---

*Sunbelt Grain WKS, LLC*, 427 B.R. 896, 902-06 (D. Kan. 2010); *Serra v. Ford Motor Credit Co.*, 463 A.2d 142, 147-48 (R.I. 1983) (similarly recognizing that "identification" of goods can establish constructive possession, and thus BIOC status, prior to delivery). Indeed, "[i]nstead of focusing on passage of title (delivery), courts and commentators increasingly favor identification as the critical moment that determines when a buyer becomes a buyer in ordinary course." *Big Knob*, 487 A.2d at 957-58 (citing numerous cases and authorities).

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

**[concluded on next page]**

to arise from actual fraud, constructive fraud and from some equitable principal independent of the existence of any fraud.”).

Dated: New York, New York  
January 18, 2019

RICH MICHAELSON MAGALIFF, LLP  
Counsel for North American Bullion  
Exchange, LLC  
By:

/s/ Howard P. Magaliff  
HOWARD P. MAGALIFF  
335 Madison Avenue, 9<sup>th</sup> Floor  
New York, NY 10017  
646.453.7851  
*hmagaliff@r3mlaw.com*