

Janet M. Weiss
Jessica D. Mikhailevich
DORSEY & WHITNEY LLP
51 West 52nd Street
New York, New York 10019
Telephone: (212) 415-9200
Facsimile: (212) 953-7201
Email: weiss.janet@dorsey.com
Email: mikhailevich.jessica@dorsey.com

Attorneys for Premier Gold Mines Limited

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:)	Chapter 11
)	
REPUBLIC METALS REFINING)	Case No. 18-13359 (SHL)
CORPORATION, <i>et al.</i> , ¹)	
)	(Jointly Administered)
Debtors.)	Related Docket Nos. 10 and 78
)	

**STATEMENT OF CLAIMED OWNERSHIP
AND CLAIMS OF PREMIER GOLD MINES LIMITED**

Premier Gold Mines Limited (“Premier Gold”) files this Statement of Claimed Ownership And Claims (the “Customer Statement”) pursuant to §2 of the Order Approving Uniform Procedures For Resolution Of Ownership Disputes dated January 11, 2019 [Docket No. 395] (the “Uniform Procedures”). Premier Gold reserves the right to amend this statement, file additional claims and/or assert additional legal theories and/or supporting facts.

I. Contact Information for Customer and Counsel

Customer Contact Information

Steve Filipovic
Suite 200, 1100 Russell Street
Thunder Bay, ON P7B 5N2

¹ 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), and Republic Carbon Company, LLC, 5295 Northwest 163rd Street, Miami Gardens, FL 33014 (5833).

Direct Dial: 807 346 1396
Fax: 807 346 1381
Email: SFilipovic@premiergoldmines.com

Attorney Contact Information

Janet M. Weiss
Dorsey & Whitney LLP
51 West 52nd Street
9th Floor
New York, NY 10019

Direct Dial: 212-415-9357
Fax: 646-219-2048
Email: weiss.janet@dorsey.com

II. Customer Assets

Republic Metals Corporation (“RMC”) converted 7,734.459 troy ounces of gold and 34,087.650 troy ounces of silver owned by Premier Gold Mines Limited (“Premier Gold”).

Because the Interim Cash Collateral Orders (as defined below) authorized the sale of refined metals and other materials, Premier Gold is asserting claims for the cash equivalent of such amounts of refined metals, which is in excess of \$10,500,000, using the market price for silver and gold on Thursday, January 17, 2019. Premier Gold reserves the right to update this calculation.

III. Customer Claims

Premier Gold filed a reclamation claim dated November 20, 2018 (the “Reclamation Claim”) making a demand for return of any remaining dore (“Dore”) delivered by Premier Gold and for refined gold and silver derived from such Dore (the “Refined Metals,” and together with Dore, the “Refined Metal Assets”).

Pursuant to (a) Section 8(e) of the Interim Order Pursuant To 11 U.S.C. §§ 105, 361, 362, 363, 503 And 507 (I) Authorizing The Debtors To Use Cash Collateral, (II) Granting Adequate Protection To The Secured Parties, (III) Scheduling A Final Hearing And (IV) Granting Related Relief dated November 8, 2018 (the “First Interim Cash Collateral Order”) [Docket No. 54], (b) Section 3(a) of (i) the Order Continuing Final Hearing On Debtors’ Motion For An Order (I) Authorizing The Debtors To Use Cash Collateral, (II) Granting Adequate Protection To The Secured Parties, (III) Scheduling A Final Hearing And (IV) Granting Related Relief dated December 10, 2018 [Docket No. 277] (the “Second Interim Cash Collateral Order”) and (ii) the Third Interim Order Continuing Final Hearing On Debtors’ Motion For An Order (I) Authorizing The Debtors To Use Cash Collateral, (II) Granting Adequate Protection To The Secured Parties, (III) Scheduling A Final Hearing And (IV) Granting Related Relief dated January 4, 2019 [Docket No. 373] (the “Third Interim Cash Collateral Order,” and collectively, the “Interim Cash Collateral

Orders”), the Bankruptcy Court for the Southern District of New York (the “Bankruptcy Court”) authorized the Debtors to sell the so-called “inventory,” which, upon information and belief, included assets of Premier Gold. Such claims may be entitled to priority pursuant to §503(b), including §503(b)(9), and/or other sections.

IV. Brief Statement of Legal Basis for Ownership Assertion

Premier Gold reserves the right (i) to brief and supplement its legal arguments and (ii) to provide additional facts at the briefing stage of the Uniform Procedures.² However, below is a brief statement of the legal arguments supporting Premier Gold’s assertion that it owns the Refined Metal Assets in the amounts set forth above.

a. **Bailment:** Courts have consistently held that the intent of the parties in the applicable agreement is the controlling factor to determine ownership of assets – not whether the assets have been commingled.³ The agreement between RMC⁴ and Premier Gold (the “Tolling Agreement”) and the course of dealing between the parties established that the Refined Metal Assets were continuously owned by Premier Gold. As such, the transactions between the parties constituted bailments. Whether the governing law is Florida or Ontario, Canada, the law of bailments is substantially the same and holds that the Refined Metal Assets are owned by Premier Gold.⁵

b. A bailment is defined as:

[the] delivery of personal property by one person (the bailor) to another (the bailee) who holds the property for a certain purpose under an express or implied in fact contract. Unlike a sale or gift of personal property, a bailment involves a change in possession but not in title.⁶

A bailment is also distinguished from a sale because “. . . after such 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.”⁷ The Tolling Agreement and course of dealing establish that RMC provided solely refinery services. The transactions never constituted sales.⁸ The terms never included a sales price and no consideration was ever paid by RMC.

² While challenges to the validity and priority of the lenders’ liens may exist, this issue is not the subject of the Uniform Procedures.

³ *In re Zwagerman*, 115 B.R. 540, 552-53 (Bankr. W.D. MI. 1990).

⁴ While this Customer Statement refers to RMC, other debtor entities may hold the Refined Metal Assets or their proceeds. Therefore, the claims herein are asserted against all Debtors in the above-captioned cases.

⁵ For example, the leading case in Ontario on bailment, *Punch v Savoy’s Jewellers Ltd.* (1986), 54 O.R. (2d) 383 (C.A.), indicates the general definition of bailment under Ontario law: “Bailment has been defined as the delivery of personal chattels on trust, usually on a contract, express or implied, that the trust shall be executed and the chattels be delivered in either their original or an altered form...” (para. 17), which is consistent with the cases cited in this Customer Statement.

⁶ *In re Enron Corp.*, 2003 Bankr. Lexis 2262, * 7 (Bankr. S.D.N.Y. 2003).

⁷ *Tinplate Purchasing Corp. v. Tuteur & Co.*, 204 N.Y.S.2d 809, 813 (Sup. Ct. Kings County 1960 modified, 212 N.Y.S.2d 303 (2d Dep’t 1961), *rev’d on other grounds*, 223 N.Y.S.2d 495 (1961)).

Any notion that RMC paid for the Dore with the Refined Metals is nonsensical, because RMC did not own the Refined Metals. Further, RMC provided invoices to Premier Gold solely for refinery services.

Bailments of Fungible Property: Commingling Does Not Change the Nature of the Bailment for Fungible Goods. While Premier Gold has no knowledge whether the Debtors commingled Premier Gold’s Refined Metal Assets, if such commingling occurred, courts that have addressed commingling of fungible product, such as refined metals, have held that a bailment is not destroyed by such commingling. For example, in *Enron*,⁸ the Bankruptcy Court for the Southern District of New York (Gonzalez, J.) considered whether the commingling of natural gas deposited by Enron in a pipeline owned by Columbia Gas Transmission Corporation (“Columbia Gas”) defeated the bailment alleged by Enron. Pursuant to the contract, Enron was entitled to delivery of gas in the future at specified dates and locations. There was no dispute that the natural gas returned to Enron was not the identical gas deposited by it. The court held that the “commingling of fungible goods is not categorically antithetical to a bailment,”⁹ and ultimately held that a bailment was created with respect to the natural gas deposited. In a case relied on by Enron, the Third Circuit similarly held that commingling of natural gas supplied by multiple parties did not defeat a finding that the gas was held as a bailment.¹⁰ Citing an Eighth Circuit decision, the court in *Enron* concluded that “. . . the rule requiring return of the identical item has been liberalized in the case of bailment of fungible goods.”¹¹ Further, courts have held that liens cannot be granted to lenders by a debtor where the debtor’s interest in the property is limited to possession under a bailment.¹² The determination whether an agreement constitutes a bailment is an issue of fact.¹³

- c. **Refined Metals Are Not Property of the Debtors’ Estates:** Section 541(a) provides that a bankruptcy estate is comprised of property wherever located in which the debtor holds legal or equitable title. 11 U.S.C. §541(a)(1). “Property interests are created and defined by state law.” See *Canney v. Merchs. Bank (in Re Frazer)*, 284 F.3d 3 (2d Cir. 2002) (quoting *Butner v. United States*, 440 U.S. 48 (1979)).
- d. It is black letter law that a borrower cannot grant a lien on property it does not own. Therefore, because the Refined Metal Assets were held as bailments, the lenders could not receive enforceable liens on such property.

⁸ *Enron*, 2003 Bankr. Lexis 2262, * 7.

⁹ *Enron*, 2003 Bankr. Lexis 2262, *11.

¹⁰ *Public Service Electric & Gas Co. v. Federal Power Commission*, 371 F.2d 1 (3d Cir. 1967).

¹¹ 2003 Bankr. Lexis 2262, *9-10 (quoting *National Housing P’ship v. Liberty State Bank*, 836 F.2d 433, 436 (8th Cir. 1988).

¹² *In re Sitkin Smelting & Refining, Inc.*, 639 F.2d 1213 (5th Cir. 1981); *JP Morgan Chase Bank, NA. v. AVCO Corp. (In re Citation Corp.)*, 349 B.R. 290 (Bankr. N.D.AL. 2006).

¹³ 5 *Fla. Jur.2d* Bailments §27; 8A *Am.Jur.2d* Bailments §265.

V. Governing Law

The Tolling Agreement is governing by the law of Ontario, Canada. RMC's refinery is located in Florida. Therefore, the law of either jurisdiction may be applicable.

VI. Additional Information

The Course of Dealing Establishes That No Sale Was Intended. Premier Gold's course of dealing with RMC establishes that Premier Gold did not sell any Dore or Refined Metals to RMC. Premier Gold delivered Dore, which contains silver and gold metals, to RMC by secure transport provided by the Brinks Corporation. The Dore was loaded at a mine owned by an affiliate of Premier Gold, located in Mexico, and delivered to RMC's Florida refinery by secure transport provided by the Brinks Corporation. The Dore was clearly marked as belonging to Premier Gold, with the imprint of "PMR" on the Dore bars. The delivery of the Dore was accompanied by an accounting of the weight and purity of each Dore bar, along with the number of ounces of gold and silver that would be derived from refining the Dore. Upon receipt by RMC of the Dore, RMC sent an email to Premier Gold confirming receipt.

RMC's refinement process takes eight (8) business days or less. RMC typically made an initial deposit of gold and silver resulting from the refinement process (the "Provisional Amount") in Premier Gold's Scotia Mocatta account on the eight (8th) day after delivery of the Dore. RMC performed its own assay to determine the purity of the Dore. If the purity varied from the assay submitted by Premier Gold, then RMC and Premier Gold would reach an agreement as to the final purity percentages or would submit samples for further assay. Differences between assays were typically minor, and Premier Gold and RMC often agreed to split the difference. RMC would transfer additional Refined Metals to Premier Gold's Scotia Mocatta account as a result of this process.

On October 15, 2018, RMC received the PMR-45 shipment of Dore. On the same day, Mark Wagenberg from RMC acknowledged receipt of the Dore by email to Gabe Viljakainen at Premier Gold. A copy of the email dated October 15, 2018 is attached hereto as **Exhibit A**. By an email dated October 16, 2018, Mark Wagenberg of RMC notified Gabe Viljakainen of Premier Gold of the Provisional Amount of gold and silver for PMR-45, and requested transfer instructions for delivery of the Refined Metals. A copy of the October 16, 2018 email is attached hereto as **Exhibit B**. On October 18, 2018, Gabe Viljakainen sent an email to Mark Wagenberg with instructions for delivery of the Provisional Amount of refined gold and silver derived from the Dore. A copy of the October 18, 2018 email is attached hereto as **Exhibit C**. On October 18, 2018, Mark Wagenberg sent an email to Premier Gold confirming receipt of the delivery instructions for shipment PMR-45. A copy of the email is attached hereto as **Exhibit D**. On October 19, 2018, Premier Gold separately notified Scotia Mocatta and its third party purchaser of the amounts of Refined Metals that RMC would transfer from shipment PMR-45. Copies of the emails are attached hereto respectively as **Exhibit E** and **Exhibit F**. However, RMC did not confirm the delivery date and transferred no Refined Metals on October 23, 2018. On October

23, 2018, Gabe Viljakainen informed RMC by two (2) separate emails that no Refined Metals were received by Scotia Mocatta. On October 23, 2018, Mike Waisome from RMC informed Gabe Viljakainen that he was waiting for internal confirmation of the delivery date. Copies of these emails are attached hereto as **Exhibit G**.

By October 24, 2018, Premier Gold still had no information regarding transfer of its Refined Metals for PMR-45. By email dated October 24, Gabe Viljakainen informed Mike Waisome of RMC that Premier Gold intended to deliver an additional shipment of Dore (“PMR-46”), which was expected to reach RMC on October 29, 2018. Mr. Viljakainen asked Mr. Waisome whether refinement of the shipment would be delayed. Within 26 minutes of the email, Mike Waisome responded that there would be no “halt” in refinement or transfer of the metals for the October 29, 2018 shipment. On October 26, 2018, Gabe Viljakainen again emailed Mike Waisome stating that he needed to finalize the delivery date for the Refined Metals from shipment PMR-45. Later that day, Mike Waisome informed Mr. Viljakainen that RMC was performing a physical inventory in connection with a sale of RMC, and this process was causing the delay in the delivery of the Refined Metals. Mr. Waisome stated that he was working to transfer the Refined Metals on Monday, October 29, 2018. On Monday, October 29, 2018, Mr. Viljakainen informed Mr. Waisome by email that Scotia Mocatta had not received the Refined Metals for PMR-45 and asked for an update. Mr. Waisome responded the same day that shipments would be made on October 30th and 31st and represented to Mr. Viljakainen that “. . . we will work to make it whole and cover those costs for you (that is the least that we can do.)” On October 30, 2018 and November 1, 2018, Mr. Viljakainen informed Mr. Waisome that Scotia Mocatta had not received the Refined Metals and inquired again about the delivery date. On November 1, 2018, Mike Waisome from RMC informed Premier Gold that he did not have information yet regarding the delivery date. Copies of the emails are attached hereto as **Exhibit H**.

Based on the representations of RMC, Premier Gold proceeded with the PMR-46 shipment of Dore, which RMC received on October 29, 2018. RMC did not acknowledge receipt of the shipment, however, the Brinks Corporation confirmed receipt of PMR-46 by RMC at its refinery. By telephone call, Mike Waisome advised Premier Gold to hold off sending delivery instructions for PMR-46. As late as November 8, 2018 (almost a week after the petition date), RMC continued corresponding with Premier Gold regarding the assay results on shipment PMR-46. Copies of the emails are attached hereto as **Exhibit I**.

Dated: New York, New York

January 18, 2019

DORSEY & WHITNEY LLP

By: /s/ Janet M. Weiss

Janet M. Weiss, Esq.

Jessica D. Mikhailevich, Esq.

DORSEY & WHITNEY LLP

51 West 52nd Street

New York, New York 10019

Telephone: (212) 415-9200

Facsimile: (212) 953-7201

Email: weiss.janet@dorsey.com

Email: mikhailevich.jessica@dorsey.com

Attorneys for Premier Gold Mines Limited