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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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

7645635 Canada Inc. o/a Ottawa Gold Buyer (“Ottawa Gold Buyer”), and Pollock-Cameron Investments Corporation o/a Vancouver Gold Buyer (“Vancouver Gold Buyer”, and together with Ottawa Gold Buyer, the “Customers”), by and through their counsel, Klestadt Winters Jureller Southard & Stevens, LLP, hereby file this Customer Statement pursuant to the

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<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).

*Order Approving Uniform Procedures for Resolution of Ownership Disputes* [Doc. No. 395], dated January 11, 2019 (the “Procedures Order”), and in support of the same state as follows:

### **PRELIMINARY DESCRIPTION OF CLAIMS**

Customers have been transacting business with one or more of the above-captioned debtors (the “Debtors”) since approximately 2011. During this time, the Customers shipped raw materials including certain specific lots of gold, silver, platinum, and palladium (the “Materials”) to one or more of the Debtors for refinement. Customers assert that title of the Materials never transferred from the Customers to any of the Debtors as the Materials were held by one or more of the Debtors, subject to a bailment relationship and that the Materials should now be returned to the Customers. The Materials are not property of the Debtors’ estates and the Debtors did not have the right to sell, transfer, dispose of or encumber the Materials in any way. If the Debtors are found to hold title to the Materials or to have improperly converted the Materials in violation of applicable law notwithstanding these arguments, Customers should be entitled to imposition of a constructive trust. If no trust is imposed, Customers also assert priority claims for the Materials delivered to and received by the Debtors within twenty days before the commencement of these cases.<sup>2</sup>

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<sup>2</sup> The Customers make this Customer Statement in support of their claims and attempt to summarize the legal theories of recovery that they are presently aware of. For the avoidance of doubt, this Customer Statement is made without the benefit of discovery or information sharing by the Debtors and/or their lenders which discovery may lead to other identifiable claims and/or theories of recovery. As such, all rights of the Customers are expressly reserved pending completion of discovery to assert additional basis of claims or theories of recovery and to supplement this Customer Statement with more formal legal briefing. Moreover, all rights and remedies against non-debtor parties, including agents of the Debtors, are expressly reserved.

## BACKGROUND AND PROCEDURAL HISTORY

1. These jointly administered chapter 11 cases (the “Chapter 11 Cases”) were first commenced on November 2, 2018, when a number of Debtors filed voluntary chapter 11 petitions (the “Petition Date”).

2. Pursuant to 11 U.S.C. §§ 1107 and 1108, the debtors continue to operate their businesses as debtors-in-possession. No trustee or examiner has been appointed in these cases, though the Office of the U.S. Trustee has moved this Court for the appointment of an examiner raising concerns about the competing claims to property by customers and the need for an investigation into the same.

3. The Customers made demand to reclaim the Materials by letter dated November 14, 2018 and thereafter filed notice of the same with this Court on November 21, 2018 [Doc. No. 136].

4. In relation to the Debtors motion seeking entry of the *Interim Order Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 503 and 501 (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* [Doc. No. 10] (the “Interim Cash Collateral Motion”), several customers of the Debtors objected to various relief sought and the instant dispute between the Debtors and the Customers was recorded.<sup>3</sup>

5. Substantially similar issues involving title to and ownership interests in property impact a number of other similarly situated customers who also shipped raw materials to the

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<sup>3</sup> Customers filed an objection to Interim Cash Collateral Motion through prior counsel on November 23, 2018 [Doc. No. 174].

Debtors pre-petition for refinement. On January 11, 2019, this Court signed the Procedures Order, such that these disputes could be resolved in a more orderly fashion.

6. This filing is intended to comply with the requirements of the Procedures Order on behalf of the Customers.

7. Ottawa Gold Buyer is a Canadian entity with a principal place of business located at Ottawa, ON K2S0T1 with telephone number of (613) 979-4653. Vancouver Gold Buyer is Canadian entity with a principal place of business located at 254 W. Broadway, Vancouver, BC V5Y1P6 with a telephone number of (604) 876-4653.

8. A specific description of the Materials can be found annexed hereto as **Exhibit A**. The aggregate value of the Materials for the Customers (broken down individually) is: (i) Ottawa Gold Buyer: \$229,645.09, and (ii) Vancouver Gold buyer: \$250,072.45.

## **DESCRIPTION OF CLAIMS AND SUMMARY OF LEGAL BASIS**

### ***I. The Transactions and General Course of Dealing***

9. The Debtors received the Customer's Materials which give rise to their claims herein prior to the First Petition Date. Upon information and belief, certain of the Materials in question may have already been refined by the Debtors as of the First Petition Date, though certain of the Materials were not yet refined and remained segregated.<sup>4</sup> At all relevant times, Customers assert that the Materials were identifiable.

10. As to the Materials in question, the Debtors issued advance payment for a portion of the subject lots in advance of refinement. However, concerning certain of the other lots, no advance payments were issued to Customers on account of the Materials.

### ***II. The Materials are Not Property of the Debtors***

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<sup>4</sup> Counsel to the Debtors confirmed in writing that as of November 15, 2018, at least 2 lots of Customer's Materials were still segregated and not yet refined.

11. The Materials are not property of the Debtors' estates and the Debtors did not have the right to sell, transfer, dispose of or encumber the Materials in any way.

12. As stated above, to the extent that the Customers' Materials, are, or were, in the possession of the Debtor, they were held by the Debtor pursuant to a bailment and thus title to the Materials remained with the Customers at all times.

13. The Debtors were required to, and they did so acknowledge, that the Materials were owned by Customers.

14. Depending upon the results of discovery, Customers believe that the laws of either Canada or the United States may govern the issue of whether a bailment relationship was created between the Debtors and Customers. If U.S. law applies, then Florida law would likely govern.

15. Here, the circumstances surrounding Customers' delivery of the Materials clearly evidences the intention of the Customers and the Debtors to create a bailment. As a result, title to the Materials remained with the Customers at all times and the Materials should not be considered property of the Debtors' bankruptcy estates.

16. Customers retained the right to return of the Materials prior to processing or the return of the finished product. The Debtors have an acknowledged obligation to return precious metal of "like kind" to Customers upon their demand. This is consistent with a bailment relationship regarding a fungible commodity.

17. The Debtors have also acknowledged that although they may have possession of the Customers' Materials, title to the same remains with Customers until consideration for the Materials has been paid. Therefore, and at the very least, for the lots upon which Customers received no advance, title to the Materials in question should remain with Customers. A list of the lots that Customers have not received advances on can be found annexed hereto as **Exhibit B**.

18. Another fact weighing in favor of a bailment between Customers and the Debtors is that the risk of loss and responsibility for the Materials was transferred to the Debtors upon their taking possession of the Materials.

19. Additionally, weighing in favor of a bailment is the fact that there was no purchase price agreed upon prior to processing of the Materials but rather pricing was fixed after refinement of the same.

20. Also weighing in favor of a bailment between the Customers and Debtors is the fact that throughout the course of their relationship, the Customers accounting records never reflected an account receivable owed by the Debtor with respect to the Materials sent for refinement.

21. Although it seems possible that at least some of the Customers' Materials were not segregated from other goods in the Debtor's possession, courts have addressed the commingling of fungible products and have held that a bailment relationship is not destroyed by such commingling.

22. As such, even though the Materials sent by the Customers may not have been segregated from other goods sent by similarly situated customers, this comingling of materials should not stop the Court from ruling that the Debtor held the Customers' Materials subject to a bailment.

23. With respect to the other potentially relevant bailment factors, including the treatment of the Materials on the books and records of the Debtors, this will need to be determined following a review of the Debtors' books and records and past practices (to be conducted during the upcoming discovery process). However, even to the extent that this or other factors may weigh in favor of a sale rather than a bailment, no single factor is determinative of the relationship. On

balance, the factors in the instant situation indicate the parties' intent to create a Bailor-Bailee relationship.

***III. If the Materials Were Converted Or Debtors Unjustly Enriched, Then A Constructive Trust Should Be Imposed.***

24. If the Debtors are found to hold title to the Materials, then Customers assert that could only have occurred if the Debtors (and/or their lenders) were unjustly enriched or the Debtors improperly converted the Materials in violation of Customer's rights and/or applicable law. Under either scenario, Customers should be entitled to imposition of a constructive trust.

25. Customers should be equitably restored to the property interests they maintained prior to the wrongdoing of the Debtors or their agents to avoid the unjust enrichment of the Debtors and/or their lenders. Here, there is was confidential relationship between the Debtors and Customers, transactions involving the Materials induced by that relationship, and breach of the confidence which damaged Customers. The circumstance clearly calls for imposition of a constructive trust.

26. Depending upon the results of discovery, Customers believe that the law of either Canada or the United States may govern the issue of whether a constructive trust should be imposed in favor of the Customers and whether the Debtors converted the Materials or otherwise were unjustly enriched. If U.S. law applies, then either New York or Florida law would likely govern.

***IV. Customers Are Entitled to Priority Claims In Relation to the Materials***

27. If no trust is imposed, Customers also assert priority claims under 11 U.S.C. §503(b)(9) for the Materials delivered to and received by the Debtors within twenty days before the commencement of these cases. If the Debtors transferred the Materials between one another

during this period, an effective sale and delivery may have occurred by one Debtor acting as agent for the other. Such a sale and delivery within the applicable twenty-day period will give rise to a priority claim under 11 U.S.C. §503(b)(9).

28. Further, upon information and belief and with all rights reserved pending the completion of discovery, Customers believe that facts will be established concerning unity of control over the Debtors' operations and commingling of resources and corporate affairs. As such, Customers assert that some or all of the Debtors may be determined to be liable for the obligations of some or all of the other Debtors under theories of alter ego liability.

WHEREFORE, the Court should enter an order (i) directing the Debtors to return the Materials to the Customers, or in the alternative Customers should be paid amount equal to the value of the Materials, (ii) in the alternative, imposing a constructive trust over funds of the Debtors equal to the value of the Materials, (iii) in the alternative, allowing priority claims in favor of the Customers in amount equal to the value of the Materials received within twenty days prior to the First Petition Date, (iv) together with such other and further relief as this Court deems just and proper.

Dated: New York, New York  
January 18, 2019

KLESTADT WINTERS JURELLER  
SOUTHARD & STEVENS, LLP

*/s/Sean C. Southard*

By: \_\_\_\_\_

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