

Robert Fleischer  
Kellianne Baranowsky  
**GREEN & SKLARZ LLC**  
700 State St, Suite 100  
New Haven, CT 06511  
Telephone: 203-285-8545  
Fax: 203-691-5454

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

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

**CUSTOMER STATEMENT OF CLAIMED OWNERSHIP  
INTEREST AND CLAIMS BY FCP DIAMONDS, LLC**

Pursuant to the Court's *Order Approving Uniform Procedures For Resolution Of Ownership Disputes*, entered in the above-captioned chapter 11 cases on January 11, 2019 (ECF No. 395) (the "Order"), FCP Diamonds, LLC ("FCP"), by its undersigned attorneys, hereby submits its Statement of Claimed Ownership And Claims.

**I. Information Required By Order, Section 2(c)(i).**

***The customer:***

FCP Diamonds, LLC  
846 Newport Avenue  
Pawtucket, RI (USA)  
Telephone: (781) 799-4878  
FCP is identified in Debtors' records as customer no. R2942.

***Counsel for the customer:***

Robert M. Fleischer  
Kellianne Baranowsky  
Green & Sklarz LLC  
700 State Street, Suite 100  
New Haven, CT 06511  
Telephone: (203) 285-8545

**II. Description of Assets in Which Customer Claims  
Ownership Interest (Order, Section 2(c)(ii)).**

FCP claims ownership of gold and precious stones, having an aggregate value of \$268,396.36, delivered by FCP and received by Debtors<sup>1</sup> in 13 separately designated lots. Descriptions of each such lot, including the lot number assigned to each lot by the Debtors, the date it was received by Debtors, the value of each lot, and a description of the goods in each lot, including applicable quantities, are set forth in Exhibit “A” hereto.

**III. FCP’s Claims Against Debtors (Order, Section 2(c)(iii)).**

On November 14, 2018, FCP made a timely reclamation demand upon Debtors pursuant to Section 546(c) of Title 11 of the United States Code (the “the Bankruptcy Code”) and Fla. Stat. § 672.702. Also on November 14, 2018, FCP filed notice of its reclamation demand in Debtor Republic Metals Refining Corporation’s (“RMRC”) bankruptcy case. See ECF No. 80. FCP incorporates herein all the matters set forth in, and annexed to, its notice of reclamation.

FCP has an administrative expense claim against Debtors pursuant to Section 503(b)(9) of the Bankruptcy Code for goods delivered to and received by Debtors within 20 days before the commencement of Debtors’ bankruptcy cases. RMRC filed its chapter 11 bankruptcy petition on November 2, 2018 (the “Petition Date”). The goods contained in the lots designated by Debtors as Lot nos. R161688, R161689, R161690, R161731, R161732, R161733, R161743, R161744, and R161745 were delivered to Debtors after October 13, 2018 and prior to the Petition Date. The aggregate amount owed to Debtors for these lots is \$242,389.77.

FCP might have additional claims against Debtors (and possibly the Senior Lenders and various individuals) based on tort theory arising from the Debtors’ failure to inform FCP, or misleading FCP, as to Debtors’ true financial condition at a critical point in time. Debtors

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<sup>1</sup> Except to the extent that a term is otherwise defined herein, defined terms shall have the definitions assigned to such terms in the Order Approving Uniform Procedures For Resolution Of Ownership Disputes entered on January 11, 2019 (ECF No. 395).

resolved to file bankruptcy on October 18, 2018. See ECF No. 1, p. 6 of 15 (resolution of Debtors' board of directors to file a petition under chapter 11 of the Bankruptcy Code, signed by Debtors' board members on October 18, 2018). To the extent Debtors knowing or intentionally allowed customers such as FCP to continue to deliver goods to Debtors at a point in time when Debtors were insolvent and were already contemplating bankruptcy, while knowing that the customers were unaware of Debtor insolvency and bankruptcy plans, FCP may have tort and equity based claims that would prevent Debtors from acquiring title to the goods that FCP delivered to Debtors. Likewise, evidence of affirmative steps taken by the Debtors designed or intended to defeat or undermine customers' reclamation rights or their rights under Section 503(b)(9), if revealed in discovery or otherwise, would give rise to such claims. FCP reserves its rights to assert such claims as and when additional information is disclosed or discovered.

#### **IV. Summary of Legal Basis For Ownership Claims (Order, Section 2(c)(iv).**

Pursuant to industry custom and practice, and pursuant to the custom and practice followed by the FCP and the Debtors in their dealings with each other, FCP continued to own goods it shipped to Debtors until FCP and Debtors reached an agreement to settle the value of those goods. This was never a passive process - FCP and Debtors always exchanged and compared assay values for each lot of precious metal bearing material delivered by FCP to Debtors. Unless and until FCP and Debtors affirmatively and expressly agreed on the settlement of each lot, FCP retained the right to retrieve the goods back from Debtors. With respect to the lots identified in Exhibit "A," FCP and Debtors never reached agreement to settle any of those lots. Consequently, title to the goods contained in those lots never passed to Debtors.

Under these circumstances, given the parties' failure to reach an express settlement, per their prior custom and practice, and industry custom and practice, Debtors' rights in the goods delivered by FCP never exceed the rights of a bailee. Mere possession of goods, as in a bailment,

is not sufficient under the UCC to establish "rights" of the debtor in the collateral. Welding Metals v. Foothill Capital Corp., No. 3:92-cv-00067 (WWE), 1997 U.S. Dist. LEXIS 7672, at \*18-19 (D. Conn. April 14, 1997). Courts considering contracts that have both sale and bailment characteristics, as is the case here, will examine the all the surrounding circumstances to determine if there was bailment. See United States v. Fleet Nat'l Bank (in re Handy and Harman Refining Group, Inc.), 271 B.R. 732, 736 (Bankr. D. Conn.) (holding that question whether Debtor's possession of U.S. Mint's coins was that of a bailee presented a question of fact). Until the parties expressly agreed to settle on the value of goods delivered by FCP to Debtors, Debtor had nothing more than naked possession of FCP's goods and the rights of a bailee and none more.

In addition to the foregoing, principles of equitable estoppel may apply to prevent the vesting of title in FCP's goods in Debtors. The doctrine of equitable estoppel has long been part of Florida common law jurisprudence and is appropriately applied when the particular facts in a case justify it. Steen v. Scott, 144 Fla. 702 (1940). As previously discussed, Debtors allowed, indeed encouraged, customers, including FCP, to continue to ship goods to Debtors entirely ignorant of the fact that Debtors were insolvent and had resolved to file bankruptcy. It also appears that the Debtors took steps to defeat customers' reclamation rights or administrative claim rights by comingling and processing customer goods before the parties had reached express agreements to settle the value of the goods - a clear departure from the Debtor's previous practices. These circumstances may well result in application of the doctrine of equitable estoppel to prevent the vesting of title to the goods in Debtors.

**V. Governing Law.**

Florida.

**IV. Reservation of Rights**

FCP expressly reserves its right to supplement this statement, and assert any additional claims, based on information subsequently disclosed or discovered in these bankruptcy cases, including information pertaining to the scope and validity of the liens asserted by the Senior Lenders. Furthermore, FCP submits this statement with full reservation of its rights to reclamation under § 546(c) and to a priority administrative expense claim under § 503(b).

Dated: New Haven, CT  
January 18, 2019

FCP DIAMONDS, LLC

By: /s/ Robert M. Fleischer  
Robert Fleischer  
Kellianne Baranowsky  
Green & Sklarz LLC  
700 State Street, Suite 100  
New Haven, CT 06511  
(203) 285-8545  
Fax: (203) 691-5454  
[rfleischer@gs-lawfir.com](mailto:rfleischer@gs-lawfir.com)  
[kbaranowsky@gs-lawfirm.com](mailto:kbaranowsky@gs-lawfirm.com)

*Attorneys for FCP Diamonds, LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was served by CM/ECF and/or mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

*/s/ Robert M. Fleischer*

Robert M. Fleischer

# EXHIBIT A

## GOODS OWNED BY FCP DIAMONDS, LLC

Debtor's Assigned Lot Number	Date Delivered to Debtor	Weight in grams	Value	Advance Amount	Balance owed	Lot Description
RL161624	10/5/2018	196.2	\$3,392.88	\$0	\$3,392.88	Stone recovery Lot
RL161667	10/12/2018	1369.1	\$21,582.72	\$19,000	\$2,582.72	Clean gold 8/9/10
RL161668	10/12/2018	5254.5	\$114,176.00	\$103,000	\$11,176.00	CleaN Gold 14k
RL161669	10/12/2018	1299.0	\$39,854.99	\$31,000	\$8,854.99	Clean Gold 16K+
RL161688	10/17/2018	324.3	\$5,266.02	\$4,000	\$1,266.02	Clean gold 8/9/10
RL161689	10/16/2018	1702.1	\$38,352.27	\$33,000	\$5,352.27	CleaN Gold 14k
RL161690	10/16/2018	523.3	\$17,063.29	\$12,000	\$5,063.29	Clean Gold 16K+
RL161731	10/19/2018	1057.9	\$16,967.44	\$0	\$16,967.44	Clean gold 8/9/10
RL161732	10/19/2018	3639.7	\$80,604.58	\$0	\$80,604.58	CleaN Gold 14k
RL161733	10/19/2018	1648.2	\$58,361.98	\$0	\$58,361.98	Clean Gold 16K+
RL161743	10/22/2018	495.0	\$7,837.06	\$0	\$7,837.06	Clean gold 8/9/10
RL161744	10/22/2018	2286.3	\$51,020.42	\$0	\$51,020.42	CleaN Gold 14k
RL161745	10/22/2018	556.4	\$15,916.71	\$0	\$15,916.71	Clean Gold 16K+