

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 NOBLE METAL SERVICES, INC.**

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"), Noble Metal Services, Inc. ("NMS"), by its undersigned attorneys, hereby submits its Statement of Claimed Ownership And Claims.

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

The customer:

Noble Metal Services, Inc.
7 Luigi Street
Cranston, RI 02920 (USA)
Telephone: (866) 695-4806
NMS is identified in Debtors' records as customer no. 3669

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)).**

NMS claims ownership in gold and silver in Debtor's possession. First, claims ownership of the metal in NMS's pool account. NMS's pool account has a balance of 715.464 oz of silver and 6 oz of gold. Second, NMS claims ownership of the goods having an aggregate value of \$280,752.36, delivered by NMS in 6 separately designated lots. Descriptions of each 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. NMS's Claims Against Debtors (Order, Section 2(c)(iii)).

On November 16, 2018, NMS 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 20, 2018, NMS filed notice of its reclamation demand in Debtor Republic Metals Refining Corporation's ("RMRC") bankruptcy case. See ECF No. 120. NMS incorporates herein all the matters set forth in, and annexed to, its notice of reclamation.

NMS 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 NMS as Lot nos. 220 and 222 were delivered to Debtors after October 13, 2018 and prior to the Petition Date. These lots are described in Exhibit "A." The aggregate amount owed to Debtors for these lots is \$110,443.89.

NMS has a claim against Debtors for the amount due and owing from the sale of metal to the Debtors. The total value of metal purchase by the Debtors but not paid for is \$137,169.00.

NMS 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 NMS, or misleading NMS, as to Debtors' true financial condition at a critical point in time. Debtors 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 NMS 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, NMS may have tort and equity based claims that would prevent Debtors from acquiring title to the goods that NMS 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. NMS 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 NMS and the Debtors in their dealings with each other, NMS continued to own goods it shipped to Debtors until NMS and Debtors reached an agreement to settle the value of those goods. This was never a passive process - NMS and Debtors always exchanged and compared assay values for each lot of precious metal bearing material delivered by NMS to Debtors. Unless and until NMS and Debtors affirmatively and expressly agreed on the settlement of each lot, NMS retained the right to retrieve the goods back from Debtors. With respect to the lots identified in Exhibit "A," NMS 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 NMS 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 NMS to Debtors, Debtor had nothing more than naked possession of NMS's goods and the rights of a bailee and none more.

NMS submits that Debtors served as a bailee even for the metal in NMS's pool account metal. Under the contractual terms and conditions between NMS and Debtors, Debtors were always under a clear and unambiguous obligation to return metal, of like kind, to NMS until NMS sold it to them. NMS incorporates the arguments asserted by other customers regarding ownership of pool account metals, including, but not limited to, the legal argument asserted by Cyber-Fox Trading, Inc. in its customer statement of ownership of pool account metal (ECF No. 441).

In addition to the foregoing, principles of equitable estoppel may apply to prevent the vesting of title in NMS'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 NMS, 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

NMS 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, NMS submits this statement with full reservation of its rights to reclamation under § 546(c) and to a priority administrative expense claim under § 503(b).

[signature block on following page]

Dated: New Haven, CT
January 18, 2019

NOBLE METAL SERVICES, INC.

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
kbaranowsky@gs-lawfirm.com

Attorneys for Noble Metal Services, Inc.

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

NOBLE METAL SERVICES, INC.

GOODS DELIVERED TO DEBTOR REPUBLIC METALS CORPORATION WITHIN 45 DAYS OF PETITION DATE

Debtor's Assigned Lot Number	NMS Lot No.	Date Delivered to Debtor	Fine Metal Weight in Troy Ounces	Value	Lot Description
L181175	210	9/18/2018	5225.504	\$77,441.97	War Time Nickle Bullion Bars
L181174	209	9/18/2018	3129.885	\$46,384.90	Silver Bullion Bars
L181172	207	9/18/2018	3708.25	\$54,956.27	Silver Bullion Bars
L181172	207	9/18/2018	7.549	\$9,301.12	Gold Bullion Bars
L181173	208	9/18/2018	5172.317	\$76,653.74	War Time Nickle Loose
L181171	205	9/18/2018	5311.156	\$78,711.33	Silver Bullion Bars
LITA9796	220	10/15/2018	2763.25	\$40,951.37	Silver Bullion Bars
LITA9796	220	10/15/2018	3.620	\$4,460.20	Gold Bullion Bars
LITA9796	222	10/15/2018	4388.146	\$65,032.32	Silver Bullion Bars
Sub-Total				\$453,893.21	
Less Advances Paid by RMC				<u>\$173,140.85</u>	
Total				\$280,752.36	