TEXAS PRECIOUS METALS LLC’S CUSTOMER STATEMENT
CONCERNING OWNERSHIP OF PREPAID FABRICATED METAL

Texas Precious Metals LLC ("TPM"), submits its customer statement concerning ownership of prepaid fabricated metal (the “Statement”) pursuant to and in accordance with the Order Approving Uniform Procedures for Resolution of Ownership Disputes [doc. 395] dated January 11, 2019 (the “Procedures Order”).

A. Incorporation of Prior Cash Collateral Objection

TPM incorporates its limited objection and reservation of rights (the “Limited Objection”) [doc. 156] to the Debtors’ Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to Use Cash Collateral, (II) Granting Adequate Protection the Secured Parties, (III)
Scheduling a Final Hearing and (IV) Granting Related Relief and the Joint Supplement of the Debtors and the Senior Lenders to the Cash Collateral Motion. Pursuant to the Procedures Order, the Limited Objection serves as TPM’s customer statement. This statement supplements the Limited Objection, which together constitute TPM’s customer statement.

B. Supplement to Customer Statement

1. Customer and Counsel

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2. Description of Assets

100 1-oz 1oz Texas Mint (custom branded) gold bars – prepaid, packaged, and serialized

500 1-oz reverse proof generic buffalo rounds – prepaid and packaged for shipment

3. Claims Against Debtors

At this time, TPM is not aware of any claims against the Debtors separate from the claim for return of the assets identified in B.2 above.

4. Governing Law. Florida

5. Summary of Claim

TPM placed a trade and paid in full for 100 1-oz Texas Mint Gold Bars and 500 1-oz Reverse Proof Generic Silver Buffalo Rounds. These products presently exist in RMC’s vaults, fabricated and segregated, and in the case of the rounds, packed for shipment. The 100
gold bars bear TPM’s unique trademarks, are packaged in TPM’s custom packaging and individually serialized, and are exclusive to TPM. RMC repeatedly committed to shipping these products at the closure of an expected Valcambi acquisition prior to filing the chapter 11 case.

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 TPM’s claim of ownership.

(i) **Buyer in the Ordinary Course.** Under Florida law, a buyer in the ordinary course of business (“BOIC”), like TPM, 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).⁴

(ii) **Title Passed to TPM.**

Under RMC’s Standard Operating Terms and Conditions, title to the assets legally transferred to TPM 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.”

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⁴ 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’s 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, 957-58 (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 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).
RMC “retain[ed] title to” the material “[u]ntil” TPM paid the invoices in full, it follows that once invoices were paid in full, title transferred to TPM.

Thus, once TPM’s payment processes were complete and indefeasible – which occurred when TPM completed its pre-petition wire transfer for the 100 1-oz bars and pre-petition ACH transfer for the 500 1-oz coins – title to the finished goods passed to TPM. 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). TPM has not conferred upon RMC the right to sell or otherwise dispose of the goods. In this 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 to arise from actual fraud, constructive fraud and from some equitable principal independent of the existence of any fraud.”).

(iv) **Trademark Violation.** Federal statutory protection is afforded to trademarks for the benefit of both the public and the trademark holder. *See Scarves by Vera, Inc. v. Todo Imports, Ltd.*, 544 F.2d 1167, 1172 (2d Cir. 1976) (trademarks protected to (1) secure to the owner the goodwill of his business, and (2) protect the public against spurious and falsely marked goods). The Debtors’ sale of TPM’s branded product would infringe its trademarks and service mark, in violation of the Lanham Act, 15 U.S.C. §§ 1114, *et. seq.* A plaintiff establishes trademark infringement by showing (1) that it owns a trademark, and (2) that a defendant (a) uses the mark without authorization; (b) in commerce; (c) in a manner likely to create consumer confusion. *See* 15 U.S.C. § 1114(a); *Petro Shopping Centers, L.P. v. James River Petroleum, Inc.*, 130 F.3d 88, 92 (4th Cir. 1997); cert. denied, 523 U.S. 1095 (1998); *Grey Computer*, 910 F. Supp. at 1085-86; *First Savings Bank v. First Bank Sys., Inc.*, 101 F.3d 645, 651 (10th Cir. 1996); *Universal Money Ctrs., Inc. v. AT&T Co.*, 22 F.3d 1527, 1529 (10th Cir.), cert. denied, 513 U.S. 1052 (1994).³

³ The undisputed evidence establishes each of the required elements. First TPM registered each of its marks at issue in the United States Patent and Trademark Office on the Principal Register. Such registration constitutes prima facie evidence of the validity of the trademarks, as well as of the facts stated in the relevant registration certificates. 15 U.S.C. §1057(b); *Brittingham v. Jenkins*, 914 F.2d 447, 452 (4th Cir. 1990); *Grey Computer*, 910 F. Supp. at 1086. These registrations are prima facie evidence of TPM’s exclusive right to the use of the marks for purposes of 15 U.S.C. §1114(1). *See* U.S.C. §1057(b); *Brittingham*, 914 F.2d at 452. The Debtors cannot contest the ownership and validity of TPM’s marks. The Debtors manufactured goods to TPM’s order,
The Debtors have previously recognized TPM’s ownership of its trademarks. Following Hurricane Harvey in 2017, TPM granted RMC a one-time royalty free license to use the mark to produce a charitable silver round, the proceeds of which would benefit victims of the hurricane. Pursuant to a Trademark License Agreement, RMC acknowledged and agreed:

Licensee recognizes the value of the goodwill associated with the Registered Marks, and acknowledges that the Registered Marks, and all rights therein and the goodwill appurtenant thereto, belong exclusively to TPM. Licensee agrees that it will not, during the term of this Agreement or thereafter, attack the title or any rights of TPM in and to the Registered Marks, and Licensee hereby agrees that Licensee shall not at any time acquire any rights in the Registered Marks by virtue of any use Licensee may make of the Registered Marks.

The Debtors have thus agreed that they cannot take any action that affects TPM’s title and right to its trademarks, which will be the result if the Debtors are permitted to sell TPM’s gold bars.

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