

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:	:	Chapter 11
	:	Case No. 18-13359 (SHL)
MIAMI METALS I, INC., <i>et al.</i> , ¹	:	
	:	(Jointly Administered)
Debtors.	:	
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BUCKET 1 CUSTOMERS’ JOINT RESPONSE TO DEBTORS’ AND THE SENIOR LENDERS’ JOINT STATEMENT OF MUTUAL UNDISPUTED FACTS

Pursuant to Rule 7056-1(c) of the Local Rules for the United States Bankruptcy Court for the Southern District of New York, the Bucket 1 Customers² respectfully submit the following joint responses to Debtors’ and the Senior Lenders’³ *Joint Statement of Mutual Undisputed Facts Pursuant to S.D.N.Y Local Bankr. Rule 7065-1* [doc. 939] (the “Joint Statement”).⁴

¹ The debtors (“Debtors”) in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, include: Miami Metals I, Inc. (f/k/a Republic Metals Refining Corporation), 15 West 47th Street, Suites 206 and 209, New York, NY 10036 (3194); Miami Metals II, Inc. (f/k/a Republic Metals Corporation), 12900 NW 38th Avenue, Miami, FL 33054 (4378); Miami Metals III LLC (f/k/a Republic Carbon Company, LLC), 5295 Northwest 163rd Street, Miami Gardens, FL 33014 (5833); Miami Metals IV LLC (f/k/a J & L Republic LLC, 12900 NW 38th Avenue, Miami, FL 33054 (7604); Miami Metals V LLC (f/k/a R & R Metals, LLC), 12900 NW 38th Avenue, Miami FL 33054 (7848); Miami Metals VI (f/k/a RMC Diamonds, LLC), 12900 NW 38th Avenue, Miami, FL 33054 (1507); Miami Metals VII (f/k/a RMC2, LLC), 12900 NW 38th Avenue, Miami, FL 33054 (4696); Miami Metals VIII (f/k/a Republic High Tech Metals, LLC), 13001 NW 38th Avenue, Miami, FL 33054 (6102); 12900 NW 38th Avenue, Miami, FL 33054 (1507); 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, Delegacion Cuauhtemoc, Mexico DF 6000 (2942).

² The Bucket 1 Customers participating in and joining in this Joint Response are set forth in Schedule 1.

³ The “Senior Lenders” are Cooperatieve Rabobank U.A., New York Branch; Brown Brothers Harriman & Co.; Bank Hapoalim B.M.; Mitsubishi International Corporation; ICBC Standard Bank Plc; Techemet Metal Trading LLC; Woodforest National Bank and Hain Capital Investors Master Fund, Ltd..

⁴ Although a response pursuant to Local Bankruptcy Rule 7056-1(c) would ordinarily include an affidavit to provide evidentiary support for the responses, such is not practicable in the instant case. The Joint Statement is directed to 26 separate and unrelated Customer parties, all with some overlapping and some wholly unique facts and circumstances. The Customers anticipate that each will provide its own evidence to support its opposition to summary judgment at the time the Customers individually join the Customers’ joint opposition to the motion for summary judgment.

A. The Chapter 11 Cases

1. On November 2, 2018, Debtors Miami Metals I, Inc. (f/k/a Republic Metals Refining Corporation), Miami Metals II, Inc. (f/k/a Republic Metals Corporation), and Miami Metals III LLC (f/k/a Republic Carbon Company, LLC) each filed voluntarily petitions for relief under Chapter 11 of the United States Bankruptcy Code (the “Bankruptcy Code”), initiating these Chapter 11 Cases. [ECF No. 1]. On November 21, 2018, Miami Metals VIII LLC (f/k/a Republic High Tech Metals, LLC), Miami Metals VI LLC (f/k/a RMC Diamonds, LLC), Miami Metals VII LLC (f/k/a RMC2, LLC), Miami Metals IV LLC (f/k/a J & L Republic LLC), Miami Metals V LLC (f/k/a R & R Metals, LLC), Republic Trans Mexico Metals, S.R.L., and Republic Metals Trading (Shanghai) Co., Ltd. filed voluntarily petitions for relief under the Bankruptcy Code, initiating their Chapter 11 Cases. (The petition dates of November 2, 2018 and November 21, 2018 shall be collectively referred to hereafter as the “Petition Date”).

CUSTOMERS’ RESPONSE No. 1: The matters asserted in No. 1 concern matters of court record in these chapter 11 bankruptcy cases, and the Customers refer the Court to the record, which speaks for itself.

2. The Debtors are debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in the Chapter 11 Cases.

CUSTOMERS’ RESPONSE No. 2: The matters asserted in No. 2 concern matters of court record in these chapter 11 bankruptcy cases, and the Customers refer the Court to said record, which speaks for itself.

3. On November 19, 2018, the Office of the United States Trustee for the Southern District of New York appointed the Official Committee of Unsecured Creditors in these cases. [ECF No. 113].

CUSTOMERS' RESPONSE No. 3: The matters asserted in No. 3 concern matters of court record in these chapter 11 bankruptcy cases, and the Customers refer the Court to said record, which speaks for itself.

4. On March 7, 2019, the Debtors closed on the sale of substantially all of their assets to Asahi Holdings, Inc. ("Asahi") [ECF No. 713]. The Debtors are continuing to liquidate their remaining physical assets. [ECF Nos. 219, 286, 358, and 563].

CUSTOMERS' RESPONSE No. 4: Undisputed.

B. The Senior Lenders' Relationship with the Debtors

5. As of the Petition Date, the Senior Lenders were collectively owed (and continue to be owed) over \$177 million by the Debtors under certain credit agreements, master netting agreements and lease agreements (collectively, the "Credit and Lease Agreements").² First Interim Order (as defined below), ECF No. 54 at Schedule 2. The obligations under the Credit and Lease Agreements are secured by valid and perfected liens on substantially all of the Debtors' assets, including the Debtors' inventory and the proceeds thereof (other than Debtors Republic Metals Trading (Shanghai) Co., Ltd. and Republic Trans Mexico Metals, S.R.L.). *Id.* at ¶ F (vi).

CUSTOMERS' RESPONSE No. 5: The Customers respond that the Credit and Lease Agreements are written contracts and as such speak for themselves. Customers do not have sufficient information to agree that such funds were owed under the Agreements as of the Petition Date or that said liens are valid and perfected on substantially all of the Debtors' assets including its inventory and the proceeds thereof. Further, any claim of the Senior Lenders remains subject to any of the Customers' claims for reclamation or subordination or any potential claims against Senior Lenders being investigated by the Committee. To the extent Debtors and Senior Lenders contend in No. 5 that the Senior Lenders' liens cover goods that Customers de-

livered to Debtors where title to such goods did not pass to Debtors or the goods are subject to a constructive trust, No. 5 is disputed.

6. The Senior Lenders are parties to that certain Second Amended and Restated Intercreditor Agreement, dated February 19, 2016 (as amended from time to time the “Intercreditor Agreement”), which governs the respective rights and interests of the Senior Lenders in the assets of Debtor Miami Metals II, Inc. (f/k/a Republic Metals Corporation (“RMC”). *Id.* at ¶ F(iii). RMC executed the Intercreditor Agreement. *Id.*

CUSTOMERS’ RESPONSE No. 6: The Customers respond that the Intercreditor Agreement is a written contract and as such speaks for itself.

C. The Interim Cash Collateral Orders and the Ownership Disputes

7. On the Petition Date, the Debtors filed the *Motion For Entry of Interim and Final Orders (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* (the “Initial Cash Collateral Motion”) [ECF No. 10].

CUSTOMERS’ RESPONSE No. 7: The factual matters asserted in No. 7 concern matters of court record in these chapter 11 bankruptcy cases, and the Customers therefore refer the Court to the record, which speaks for itself.

8. On November 8, 2018, the Court entered its first *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* (the “First Interim Order”) [ECF No. 54].

CUSTOMERS’ RESPONSE No. 8: The matters asserted in No. 8 concern matters of court record in these chapter 11 bankruptcy cases, and the Customers therefore refer the Court to the record, which speaks for itself.

9. Pursuant to the First Interim Order, among other things, the Senior Lenders consented to the Debtors' use of their cash collateral to fund the costs and expenses of administering the chapter 11 cases, and the Senior Lenders were granted superpriority claims and adequate protection liens on substantially all of the Debtors' assets to protect against any diminution in value of their collateral. *Id.* at ¶ 8(b).

CUSTOMERS' RESPONSE No. 9: The matters asserted in No. 9 concern matters of court record in these chapter 11 bankruptcy cases, and the Customers therefore refer the Court to the record, which speaks for itself.

10. On November 13, 2018, the Debtors and the Senior Lenders filed the *Joint Supplement of the Debtors and the Senior Lenders to the Cash Collateral Motion* (together with the Initial Cash Collateral Motion, the "Cash Collateral Motion") [ECF No. 78]. The Court subsequently entered five additional interim cash collateral orders (collectively, the "Interim Cash Collateral Order") [ECF Nos. 277, 373, 538, 675 and 864].

CUSTOMERS' RESPONSE No. 10: The matters asserted in No. 10 concern matters of court record in these chapter 11 bankruptcy cases, and the Customers therefore refer the Court to the record, which speaks for itself.

11. Numerous customers and/or suppliers of the Debtors (the "Customers") objected to the Cash Collateral Motion and the Inventory Payments on the basis that the Debtors' inventory and its cash proceeds (the "Disputed Assets") belonged to the Customers and were not property of the Debtors' bankruptcy estates, giving rise to the current disputes concerning the ownership of the Disputed Assets (the "Ownership Disputes"). Following extensive negotiations among the Debtors, the Senior Lenders, and the Customers, the Court entered an Order Approving Uniform Procedures for Resolution of Ownership Disputes ("Uniform Procedures Order") [ECF No. 395].

CUSTOMERS' RESPONSE No. 11: The matters asserted in No. 11 concern matters of court record in these chapter 11 bankruptcy cases, and the Customers therefore refer the Court to the record, which speaks for itself.

D. The Uniform Procedures

12. The Debtors reviewed more than 50 Statements of Claimed Ownership and Claims ("Customer Statements") filed by the Customers pursuant to the Uniform Procedures Order. The Senior Lenders and the Debtors filed their responses to the Customer Statements on February 18, 2019 and February 19, 2019, respectively [ECF Nos. 637, 648], after which more than 20 Customers filed an amendment and/or supplement to their Customer Statement.

CUSTOMERS' RESPONSE No. 12: The matters asserted in No. 12 concern matters of court record in these chapter 11 bankruptcy cases, and the Customers therefore refer the Court to the record, which speaks for itself.

13. At the March 21, 2019 status conference, the Debtors and the Senior Lenders identified several buckets of customers and legal issues and proposed a briefing schedule as to two buckets of claims that can be adjudicated as a matter of law. The Court set a briefing deadline for the Debtors and Senior Lenders to brief the legal issues relating to the Bucket 1 Customers. The Court also permitted briefing on Bucket 2, but cautioned that this would depend on how many settlements the Debtors and Senior Lenders would be able to negotiate with Customers in Bucket 2 ("Bucket 2 Customers"). The Debtors and Senior Lenders have resolved, subject to Court approval, all but one claim of a Bucket 2 Customer which is less than \$20,000.⁴ The Court set aside May 20, 2019 and May 21, 2019 for oral argument on the Bucket 1 and (possibly) Bucket 2 legal issues.

CUSTOMERS' RESPONSE No. 13: The matters asserted in No. 13 concern matters of court record in these chapter 11 bankruptcy cases, and the Customers therefore refer the Court to the record, which speaks for itself.

14. Discovery is ongoing under the Amended Uniform Procedures Order.

CUSTOMERS' RESPONSE No. 14: Undisputed.

E. The Debtors' Refining Process

15. Prior to the Petition Date, the Debtors refined precious metals, primarily gold and silver. Declaration of Scott Avila, as Chief Restructuring Officer, in Support of Joint Motion for Summary Judgment (the "Avila Decl.") ¶ 5. Customers from all over the United States and the Western Hemisphere shipped unrefined material, primarily containing gold and silver, to the Debtors for refining. *Id.* The Debtors refined this material and produced refined silver and gold bars and casting grains. Based on demand, the refined gold and silver was either sold or sent to the mint for the production of "value added" minted and casted products of various designs and sizes. *Id.*

CUSTOMERS' RESPONSE No. 15: The Customers do not dispute that the Debtors refined precious metals, primarily gold and silver; that Customers shipped unrefined material to Debtors for refining; nor that Debtors refined the materials and produced bars and casting grains. However, the Customers dispute that any sale of such refined materials was based on "demand" rather than, or as opposed to, an express agreement negotiated and reached with each Customer on a lot-by-lot basis; the Customers further dispute No. 15 to the extent Debtors and the Senior Lenders contend, or attempt to contend, that the mere delivery of precious metal bearing goods by Customers to Debtors for refining automatically resulted in any sale of such goods to Debtors absent the Customer's intent and express agreement to sell the goods to Debtors.

16. Following the final assays for the raw materials delivered to the Debtors, the precious metal content of each shipment was finalized. Remaining balances known as “pool balances” were paid to customers on an agreed upon settlement date or when the customer requested payment. *Id.* at ¶ 6. The customers, including Bucket 1 Customers, could elect that the Debtors make payment for raw materials either by check or wire transfer or the issuance of a “metal credit” to the customer’s designated “Loco London” metal account, less, in each case, applicable refining and/or retention charges. *Id.* The customers could also request payment in the form of refined metal of like kind and quantity. Customers could request an “advance” payment on a shipment. The Debtors typically paid advances in an amount equal to approximately 95% to 98% of the estimated metal value of the applicable shipment in one or more payments of metal credits or U.S. dollars, less refining and/or retention charges. *Id.*

CUSTOMERS’ RESPONSE No. 16: The Customers dispute the contention that pool balances were paid to Customers as described in No. 16 insofar as a given Customer’s pool balance reflected the quantities of the various precious metals owned by Customers and held for Customer by Debtors. The Customers dispute the contentions regarding the Customers’ election rights as to “payment for raw materials” to the extent the Debtors and Senior Lenders contend that every delivery of precious metal bearing goods by a Customer to Debtors constituted a sale of such goods to Debtors.

17. After raw materials were received by the Debtors, they were assigned lot numbers, weighed, melted, sampled for assay testing and put into the refining process, generally on the same day. *Id.* at 7. With the exception of Peace of Mined™ customers (discussed below), during the refining process the individual customer lots were commingled with other customer lots. During the refining process the commingled lots were further commingled with “clean up bars” (*i.e.*, residual material that comes out of the refining process) to create “house

bars,” which were then put through various additional refining processes, including the dissolving of the material. *Id.* The dissolve process was a procedure by which material was dissolved in acid to create a solution, analogous to dissolving sugar in hot water (the “Dissolution Process”). *Id.* The refining process produced metal billets, bars, and sacks of grain that each weighed approximately fifty pounds (the “Refined Product”). The Refined Product was then transferred to the vault and then sold or transferred to the mint for the production of various minted products, coins, cast bars, *etc.* (the “Minted Products”). *Id.*

CUSTOMERS’ RESPONSE No. 17: The Customers do not dispute the general description of the refining process set forth in No. 17; however the Customers dispute the contentions in No. 17 to the extent the Debtors and the Senior Lenders contend that Debtors had the right to move a Customer’s goods from assay testing into refining absent the Customer’s express agreement, negotiated and reached on a lot-by-lot basis, to do so. The Customers also dispute the contention regarding the sale or transfer of Refined Product to the mint to the extent the Debtors and Senior Lenders contend that there could or was any such sale of a given Customer’s refined metal absent such Customer’s express agreement, negotiated and reached on a case by case basis, for such sale.

18. The Debtors could not identify the raw materials delivered by customers after they were commingled with other lots for refining and during and after the Dissolution Process. Nor could the Debtors identify what raw materials or lots were included in Refined Product or Minted Product. *Id.* at p. 8.

CUSTOMERS’ RESPONSE No. 18: The Customers dispute the contentions in No. 18 to the extent the Debtors and Senior Lenders contend that the raw material delivered by a customer could not be identified as the goods of that customer after comingling but before the

goods were actually put into the refining process; the contentions in No. 18 are otherwise not disputed.

F. The Debtors' Peace of Mined™ Program

19. As advertised on the Debtors' website, the Debtors offered a "Peace of Mined" service to Customers for traceable closed-circuit single-batch refining at an additional cost. Avila Decl. ¶ 9. Customers paying for the Peace of Mined service could ensure that their metals were never commingled at any point during the refining process. *Id.* The Peace of Mined Terms provide, in pertinent part:

In order to create a 100% traceable product, Republic Metals' Peace of Mined™ refining circuit uses a proprietary process that allows for batch refining. Unlike electrolytic refining, batch refining allows for material to freshly enter a clean circuit during the refining process, and at no point come in contact with any other-sourced metal. In the Peace of Mined™ refining circuit, the designated material is the only material present, and all of that material is removed at termination of the process, so there are no leftovers in the circuit-it can in no way be commingled with metal originating from other sources.

Id.

CUSTOMERS' RESPONSE No. 19: Insofar as the Debtors and Senior Lenders do not specify the time period during which the "Peace of Mined" service was advertised on Debtor's website, the Customers dispute that said service was advertised at all relevant times, but do not dispute that the service was, at some point in time, advertised. Further, the Customers dispute the contentions in No. 19 to the extent the Debtors and Senior Lenders contend, or attempt to contend, that Customers were aware of, or should have been aware of, the Peace of Mined program, or that the Peace of Mined program was appropriate for each of the Bucket 1 Customers. The Customers are not able to agree to the description or characterization of the Peace of Mined program as most, if not all, of the Customers learned of the Peace of Mined program for the first time by way of the motion for summary judgment and its related documents. The Cus-

tomers do not otherwise dispute the quotation from the Peace of Mined terms set forth in Statement No. 19.

20. None of the Bucket 1 Customers elected or paid for the Peace of Mined serviced. *Id.* at ¶ 10.

CUSTOMERS' RESPONSE No. 20: Undisputed, except that to the extent the Debtor's and Senior Lenders contend that the Customers were actually made aware of the Peace of Mined service and that the Customers made affirmative decisions not to purchase that service, No. 19 is disputed.

G. The Debtor's Standard Terms and Conditions

21. As part of the Debtors' new customer onboarding process, the Debtors had a practice of having each new customer execute their Standard Terms (as defined below). Avila Decl. ¶ 11.

CUSTOMERS' RESPONSE No. 21: Insofar as the Debtors and Senior Lenders fail to specify the date Debtors implemented the "new customer onboarding process" and the "practice of having each new customer [execute] their Standard Terms", No. 21 is disputed. No. 21 is further disputed insofar as Customers executed different versions of the so-called Standard Terms, and some Customers never executed any version of the Standard Terms.

22. Sixteen of the Bucket 1 Customers executed the Standard Terms and General Operating Conditions of RMC ("RMC Standard Terms"). *Id.* at ¶ 12. Six of the Bucket 1 Customers executed the Standard Terms and General Operating Conditions of RMC2 ("RMC2 Standard Terms") and together with RMC Standard Terms, the "Standard Terms". *Id.*

CUSTOMERS' RESPONSE No. 22: The Customers do not dispute that certain of the Customers executed certain Standard Terms, but deny the general applicability of this statement to all Customers. Moreover, the Standard Terms executed by certain Customers vary.

23. The Debtors' Standard Terms govern the relationship between the Debtors and the Bucket 1 Customers and evidence a purchase and sale relationship. True and correct copies of the governing Standard Terms executed by the Bucket 1 Customers are attached to the Avila Declaration as Composite Exhibit D. A schedule listing the version (RMC Standard Terms or RMC² Standard Terms) executed by Bucket 1 Customers is attached to the Avila Declaration as Exhibit E. A schedule of Bucket 1 Customers that have not produced an executed copy of the Standard Terms is attached to the Avila Declaration as Exhibit F. The Debtors have been unable to locate an executed copy of Standard Terms for these customers.

CUSTOMERS' RESPONSE No. 23: Insofar as, and to the extent that, the Customers and Debtors engaged in a regular and persistent course of conduct that varied from the Standard Terms and Conditions, No. 23 is disputed. The Customers do not dispute that the copies of executed Standard Terms referenced in No. 23 and annexed to the Avila Declaration are true and accurate copies of Standard Terms executed at various points in time by certain Customers.

24. The Standard Terms provide as to pool account metal balances that it is merely a ledger and if metals are returned to a customer, the returned metals will be "like kind" metals from "common inventory," specifically providing as follows:

A pool account is a ledger account representing the amount of returnable metal owed to Customer (if account reflects a positive balance), or the amount of metal owed to RMC (if the account reflects a negative balance). Precious metals are fungible; therefore any unit of material is equivalent to another of like kind, i.e. similar quality and/or value, and is deemed adequate payment for purposes of outstanding Pool Accounts. Returnable metal represented in a Customer Pool Account does not pertain to specific, segregated, or identifiable metal; rather it represents a future obligation of RMC to return common inventory of gold, silver, platinum, palladium, or platinum group metals. RMC reserves the right to return precious metals to Customer of like kind representing the ounces of precious metals owed to Customer.

RMC Standard Terms at 3, Avila Decl. at Ex. B (emphasis added).

CUSTOMERS' RESPONSE No. 24: The Customers respond that the RMC Standard Terms speaks for itself and should be read in its entirety and against the actual course of conduct between the Customers and the Debtors. The Customers do not dispute that the quoted language appears in the RMC Standard Terms attached to the Avila Declaration at Exhibit B, but do dispute that the quoted language appears in the RMC2 Standard terms or appears in each of the Standard Terms that are attached to the Avila Declaration at Exhibit D. The Customers further dispute that this language appears in each and every version of the Standard Terms that may have been executed by certain Customers.

25. The Standard Terms are binding on the Bucket 1 Customers, clearly providing that:

Unless otherwise stipulated, these Standard Terms and General Operating Conditions "Standard Terms" are applicable to transactions and/or contracts between Republic Metals Corporation, "RMC", and Customer. "Customer" is defined as any business, corporation, company, person, entity, or anyone else transacting business with RMC in any manner whatsoever. Any contract or agreement entered into between Customer and RMC will operate as if the terms represented in these Standard Terms were made expressly a part thereof. *RMC's Standard Terms is the governing document with respect to any and all business dealings between RMC and Customer and shall override any and all provisions, terms, and stipulations in Customer purchase orders, sales orders and/or any other Customer documents.*

RMC's failure to object to any terms, provisions, and/or stipulations represented in any Customer documents that are at variance with RMC's Standard Terms shall not be deemed a waiver of the terms and conditions contained herein.

Id. at 1, Avila Decl. at Ex. B (emphasis added).

CUSTOMERS' RESPONSE No. 25: To the extent that any provision of the Standard Terms varies with the actual course of dealings and conduct between the Debtors and

any particular Customer, or varies from the language in the Standard Terms that were executed by certain Customers, the Customers dispute that the Standard Terms are binding on such Customer. Further, the Customers respond that the Standard Terms speaks for itself and should be read in its entirety and against the actual course of conduct between the Customers and the Debtors. The Customers do not dispute that the quoted language appears in the RMC Standard Terms (or RMC2 Standard Terms, as the case may be) attached to the Avila Declaration at Exhibit B, but do dispute that the quoted language appears in each of the Standard Terms that are attached to the Avila Declaration at Exhibit D.

26. The Standard Terms are binding on all Bucket 1 Customers upon receipt and Provide as follows: “[delivering material or doing business with RMC after having received the Standard Terms . . . deems that I have agreed to accept the Terms and General Operating Conditions contained herein regardless of whether I have signed [the Standard Terms].” *Id.* at 4, Avila Decl. at Ex. B.

CUSTOMERS’ RESPONSE No. 26: To the extent that any provision of the Standard Terms varies with the actual course of dealings and conduct between the Debtors and any particular Customer, or varies from the language in the Standard Terms that were executed by certain Customers, the Customers dispute that the Standard Terms are binding on such Customer. Further, the Customers respond that the Standard Terms speaks for itself and should be read in its entirety and against the actual course of conduct between the Customers and the Debtors. The Customers do not dispute that the quoted language appears in the RMC Standard Terms (or RMC2 Standard Terms, as the case may be) attached to the Avila Declaration at Exhibit B, but do dispute that the quoted language appears in each of the Standard Terms that are attached to the Avila Declaration at Exhibit D.

27. The Standard Terms demonstrate the nature of the Debtors and the Bucket

1 Customers' relationship as buyer and seller as follows:

- Warranty of Title: “Customer warrants to RMC that *it has good and marketable title* to said property, full authority *to sell and transfer* said property, and that *said property is sold* free of all liens, encumbrances, liabilities, and adverse claims of every nature and description whatsoever.” *Id.* at 1 (emphasis added).
- Indemnity: “Customer further warrants to RMC that it will fully, defend, protect, indemnify, and hold harmless RMC and its lawful successors and assigns from any adverse claim thereto.” *Id.*
- Risk of Loss: “Risk of loss of material will pass from Customer to RMC upon delivery to and acceptance at RMC’s refinery, unless otherwise agreed.” *Id.*
- Refining Charges: “All RMC [refining] charges are payable upon the rendering of an invoice. . . . 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 Standard Terms at 2 (emphasis added).
- RMC Purchases:
 - o “Customer warrants that any ***purchase or sale contract*** has been effectuated by Customer for the sole purpose of securing pricing ***for the ultimate sale or purchase of precious metals*** and has not been made for any speculative reason whatsoever.” *Id.* at 3 (emphasis added).
 - o “By agreeing to the terms and conditions contained herein, and receiving an e-mail confirming the details of Customer’s trade, ***Customer agrees that he has entered into a written, legally binding contract for the sale/purchase of precious metals*** contained within the confirmation e-mail. ***Customer further warrants that said contract is in compliance with the Florida Uniform Commercial Code § 672.201, § 668.003 (4) and § 668.004 and agrees to waive any defenses under Florida Uniform Commercial Code § 672.201.***” *Id.* at 3-4 (emphasis added).
- Parties: “***Both Parties agree that they are merchants as defined in the Uniform Commercial Code § 2-104(1).***” *Id.* at 4, *Avila Decl. at Ex. B (emphasis added).*

CUSTOMERS' RESPONSE No. 27: The Customers respond that the Standard Terms speaks for itself and should be read in its entirety and against the actual course of conduct and dealings between the Customers and the Debtors. The Customers do not dispute that the quoted language appears in the RMC Standard Terms (or RMC2 Standard Terms, as the case may be) attached to the Avila Declaration at Exhibit B, but do dispute that the quoted language appears in each of the Standard Terms that are attached to the Avila Declaration at Exhibit D. The Customers dispute that the quoted provisions mean that the Terms and Conditions demonstrate the relationship between the Customers and Debtors is that of seller and buyer. The Customers further dispute that this language appears in each and every version of the Standard Terms that may have been executed by certain Customers.

28. The Debtors also consigned metals to customers. The Standard Terms address these consignments and describe the relationship as a “consignment/bailment,” specifically addressing title and stating that the consigned property remains property of the Debtors as follows:

It is expressly agreed upon by both parties that any and all material shipped to Customer, and/or delivered to Customer, and/or released to customer on a *consignment/bailment basis remains property of RMC. ... Customer does not have legal title to such property. ...*)

Id., at 3, Avila Decl. at Ex. B (emphasis added).

CUSTOMERS' RESPONSE No. 28: The Customers respond that the Standard Terms speaks for itself and should be read in their entirety and against the actual course of conduct and dealings between the Customers and the Debtors. The Customers do not dispute that the quoted language appears in the RMC Standard Terms (or RMC2 Standard Terms, as the case may be) attached to the Avila Declaration at Exhibit B, but do dispute that the quoted language appears in each of the Standard Terms that are attached to the Avila Declaration at Exhibit D.

The Customers further dispute that this language appears in each and every version of the Standard Terms that may have been executed by certain Customers.

29. Finally, the Standard Terms contain a broad integration clause as follows:

Integration: This instrument contains the entire agreement between the parties relating to the rights granted and the obligations assumed, and incorporated all representations or modifications concerning this instrument whether arising from any usage or trade, course of dealing, accepted industry practice, course of performance, evidence of consistent additional terms, or otherwise.

Id. at 4, Avila Decl. at Ex. B.

CUSTOMERS' RESPONSE No. 29: The Customers respond that the Standard Terms speak for itself and should be read in its entirety and against the actual course of conduct and dealings between the Customers and the Debtors. The Customers do not dispute that the quoted language appears in the RMC Standard Terms (or RMC2 Standard Terms, as the case may be) attached to the Avila Declaration at Exhibit B, but do dispute that the quoted language appears in each of the Standard Terms that are attached to the Avila Declaration at Exhibit D. The Customers further dispute that this language appears in each and every version of the Standard Terms that may have been executed by certain Customers.

30. In addition to the Debtors' customary practice of having all new customers execute the Standard Terms, each metal report, invoice, sale/purchase order and other transaction confirmation issued by the Debtors also expressly stated that it was subject to the Standard Terms and included a reference to the versions posted on the Debtors' website. Avila Decl. ¶ 13.

CUSTOMERS' RESPONSE No. 30: The Customers do not dispute that various documents, such as metal reports, invoices, sale purchase orders and other transaction confirmation documents issued by Debtors contained boilerplate reference to the Standard Terms; howev-

er, to the extent that the course of dealings and conduct between the parties varied from the Standard Terms, Customers dispute that the Standard Terms alone and exclusively govern.

Dated: New York, New York
May 16, 2019

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SCHEDULE 1

BUCKET 1 CUSTOMERS PARTICIPATING IN
JOINT SUBMISSION IN OPPOSITION TO DEBTORS' AND
SENIOR LENDERS' MOTION FOR SUMMARY JUDGMENT

7645635 Canada Inc. o/a Ottawa Gold Buyer
Alex Morningstar Corp. d/b/a Morningstar's
Auris Noble, LLC
Bay Area Metals
Brilliant Jewelers / MJJ Inc. and Anjay Corp.
Cyber-Fox Trading Inc.
Deb Schott, Inc.
Design Gold Group, Inc.
FCP Diamonds, LLC
Geib Refining Corp.
General Refining and Smelting Corp.
INTL FCStone, Ltd.
Mid-States Recycling, Inc.
Midwest Refineries, LLC
Mitchell Levine, Erie Management Partners, LLC and Plat/Co.
Noble Metal Services, Inc.
PPS, Inc. d/b/a Braswell & Son
Pyropure, Inc. d/b/a Pyromet
So Accurate Group, Inc.
Texas EZPAWN, L.P.
The Gold Refinery, LLC