

NO. S245121  
VANCOUVER REGISTRY

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,  
R.S.C. 1985, c. C-36, AS AMENDED**

AND

**IN THE MATTER OF THE BUSINESS CORPORATIONS ACT,  
S.B.C. 2002, C. 57, AS AMENDED**

AND

**IN THE MATTER OF ELEVATION GOLD MINING  
CORPORATION, ECLIPSE GOLD MINING CORPORATION,  
ALCMENE MINING INC., GOLDEN VERTEX CORP., GOLDEN  
VERTEX (IDAHO) CORP. AND HERCULES GOLD USA, LLC**

PETITIONERS

**APPLICATION RESPONSE**

**Application response of:** Patriot Gold Corp. ("**Patriot Gold**")

THIS IS A RESPONSE TO the Notice of Application of Elevation Gold Mining, Eclipse Gold Mining Corporation, Golden Vertex Corp., Golden Vertex (Idaho) Corp. filed the 3<sup>rd</sup> day of December, 2024.

The application respondent estimate that the application will take 2 hours.

**PART 1: ORDERS CONSENTED TO**

The application respondent consent to the granting of the orders set out in the following paragraphs of Part 1 of the Notice of Application on the following terms:

1. None.

**PART 2: ORDERS OPPOSED**

The application respondent opposes the granting of the orders set out in paragraphs 1(a) and 1(c) of Part 1 of the Notice of Application.

**PART 3: ORDERS ON WHICH NO POSITION IS TAKEN**

The application respondent take no position on the granting of the orders set out in paragraph 1(b) of Part 1 of the Notice of Application.

**PART 4: FACTUAL BASIS**

1. Elevation Gold Mining Corporation's ("**Elevation Gold**") principal operation is the production of gold and silver from the Moss Gold Mine (the "**Moss Mine**") owned by Golden Vertex Corp. ("**Golden Vertex**"). Golden Vertex is a company incorporated pursuant to the laws of the state of Arizona in the United States of America, and its assets and primary interest holders and creditors are in the U.S.

Affidavit #1 of Tim Swendseid, sworn July 29, 2024 at paras 7 and 18

2. Patriot Gold's royalty interest in the Moss Mine is the subject of motions (the "**Determination Motions**") in the proceedings before the United States Bankruptcy Court for the District of Arizona (the "**Chapter 15 Court**") under chapter 15 of title 11 of the United States Code (the "**Chapter 15 Proceedings**"). Patriot Gold's position is that its royalty interest in the minerals at the Moss Mine (and the proceeds of such minerals) is a separate real property interest that is not owned by Golden Vertex.

Affidavit #6 of Tim Swendseid, sworn December 3, 2024  
(the "**Sixth Swendseid Affidavit**") at para 23

3. The Petitioners, along with KSV Restructuring Inc. (in its capacity as Monitor of the Petitioners, the "**Monitor**") and INFOR Financial Inc., as sales agent, conducted a sales process resulting in the execution of a final sale agreement amongst Elevation Gold and EG Acquisition (the "**Purchaser**") on December 2, 2024 (the "**Proposed Sale**"). The Proposed Sale is structured as a 'reverse vesting' transaction whereby the Purchaser will acquire all shares in Golden Vertex, and by extension, acquire the Moss Mine. The Petitioners are now seeking this Court's approval of the Proposed Sale (the "**Approval and Vesting Order**"). The Purchaser is not purchasing any Canadian assets.

Sixth Swendseid Affidavit at paras 7-17



4. As part of the Approval and Vesting Order, the Petitioners seek releases in favour of the Petitioners' present and former legal and *de facto* directors and offices (the "**Directors and Officers**").

Sixth Swendseid Affidavit at para 39

5. On November 18 and 19, 2024, Patriot Gold and Nomad Royalty Company Ltd. ("**Nomad**") each filed in the Chapter 15 Proceedings an adversary complaint (collectively, the "**Adversary Proceedings**") against the Petitioners for, among other things, a declaratory judgment regarding the respective royalty interests asserted by Patriot Gold and Nomad, an accounting, a constructive trust over all amounts owing to the respective royalty holders, conversion, and other relief. Among other things, under applicable U.S. law, directors and officers of Golden Vertex, as well as any other recipients of wrongfully withheld royalty payments, can be liable for conversion. The Adversary Proceedings remain pending before the Chapter 15 Court.

Affidavit #1 of Susan Danielisz, sworn December 13, 2024  
at Exhibits "A" and "B"

## **PART 5: LEGAL BASIS**

- i. Approval of the Proposed Sale Should Be Determined by the Chapter 15 Court
6. Approval of the Proposed Sale is more appropriately determined by the Chapter 15 Court in the Chapter 15 Proceedings. While this Court may be the foreign main proceeding, there are still matters that are best determined by the Chapter 15 Court. Approval of the Proposed Sale is one of those matters.
7. The Proposed Sale is structured as a share subscription with reverse vesting order. The Purchaser will acquire from Elevation Gold all of the issued and outstanding shares in the capital of Golden Vertex—a U.S. incorporated company—whose primary asset is the Moss Mine—a U.S. located asset—that is subject to litigation before a U.S. court and U.S.-law governed contracts. To approve this transaction in the U.S., the U.S. court is required to do a complete review under the U.S. Bankruptcy Code (discussed below). These circumstances call out for the approval to be deferred to the U.S. court.
8. Under U.S. law, even when the U.S. Bankruptcy Court is not the foreign main proceeding, the U.S. Bankruptcy Court cannot simply defer to foreign courts under



principles of comity for the sale or transfer of interests of debtors in property within the U.S. Instead, the U.S. Bankruptcy Court must conduct an independent review of the applicable transaction under section 363 of the U.S. Bankruptcy Code (11 U.S.C. § 363)—the applicable section governing the sale of assets by a debtor's estate. Moreover, U.S. Bankruptcy Courts have *in rem* jurisdiction over the foreign debtor's U.S. assets and, therefore, the U.S. Bankruptcy Court, rather than the foreign court, must decide whether a request to sell such assets should be approved under section 363(b).

*In re Fairfield Sentry Ltd.*, 768 F. 3d 239, 245-46 (2nd Cir. 2014)  
*In re Elpida Memory, Inc.*, 2012 WL 6090194,  
(Bankr. D. Del. Nov. 20, 2012)  
*Crystallex Int'l Corp.*, 2022 WL 17254660 (Bankr. D. Del. Nov. 28, 2022)

9. U.S. Bankruptcy Courts have held that section 1520(a) unequivocally states that section 363 applies to transfers of a foreign debtor's U.S. assets and ruled that the business judgment standard applied to section 363(b) sales must also apply in chapter 15 cases. Upon recognition of a foreign main proceeding, 11 U.S.C. § 1520(a) provides that certain provisions of the Bankruptcy Code automatically come into force, including restrictions on, and procedures governing, the use, sale, lease, transfer, or encumbrance of the debtor's assets. Under 11 U.S.C. § 1520(a)(2), "section 363, 549, and 552 apply to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the U.S. to the same extent that the sections would apply to property of an estate."
10. 11 U.S.C. § 1502(7) defines "within the territorial jurisdiction of the United States" as "tangible property located within the territory of the United States and intangible property deemed under applicable non-bankruptcy law to be located within that territory, including any property subject to attachment or garnishment that may properly be sized or garnished by an action in a Federal or State court in the United States."

*Crystallex Int'l Corp.*, 2022 WL 17254660 (Bankr. D. Del. Nov. 28, 2022)

11. As a U.S. incorporated company with a U.S. asset, both the Moss Mine and the shares of Golden Vertex qualify as property within the territorial jurisdiction of the U.S. The connection to Canada is tangential at best. As a result, the court approving this transaction must, under U.S. law, apply a section 363 analysis to the Proposed Sale. Only the Chapter 15 Court is capable of this review. Therefore, approval of the Proposed Sale should be referred to the Chapter 15 Court.



12. In the alternative, to the extent this Court is prepared to approve the Proposed Sale without referral to the Chapter 15 Court for consideration first, such order should expressly state that none of the royalty interests, rights, or related claims asserted or held by Patriot Gold against the Petitioners are affected by the Proposed Sale. Instead, all such interests, rights, and related claims will be determined by the Chapter 15 Court and, where appropriate, any other federal or state U.S. courts. A full analysis under Chapter 15 will be necessary and nothing in this Court's order should seek to predetermine what are properly matters before a U.S. court, including without limitation, the subject of the Adversary Proceedings.

ii. The Directors and Officers Releases Should Not Be Approved

13. The Approval and Vesting Order includes a release for the Directors and Officers of all present and future claims in connection with (i) the sale and solicitation process undertaken by the Petitioners before the commencement of these proceedings, (ii) the Petitioners' decision to commence these proceedings, (iii) these proceedings or the administration and management of the Petitioners during the course of these proceedings, (iv) the Proposed Sale, or (v) anything done pursuant to the terms of the Approval and Vesting Order.

14. The Adversary Proceedings commenced by Patriot Gold and Nomad include claims against the Petitioners for, among other things, conversion of Patriot Gold's and Nomad's property by wrongfully withholding royalty payments, including during these proceedings. In the Adversary Proceedings, Patriot Gold and Nomad have alleged that, under Arizona law, directors and officers may be liable for intentional torts, such as conversion, where they have direct involvement in tortious acts and that third party recipients of converted funds may also have liability to the royalty holders. There is no basis to grant the Petitioners a release, in particular one that may release them from asserted and potential claims of the royalty holders, simply by virtue of effecting the Proposed Sale, which is nothing more than an asset sale to the benefit of the first secured creditor. Instead, the Adversary Proceedings must first be determined by the Chapter 15 Court in accordance with the governing law of the claims, the underlying contracts, and the assets.

*Jabczenski v. S. Pac. Mem'l. Hosps., Inc.*, 119 Ariz. 15, 20, 579 P.2d 53, 58  
(Ariz. Ct. App.1978).

15. In the alternative, all asserted and potential claims of Patriot Gold should at minimum be carved out from the proposed release in the Approval and Vesting Order.

**PART 6: MATERIALS TO BE RELIED ON**

1. Affidavit #1 of Tim Swendseid, sworn July 29, 2024;
2. Affidavit #6 of Tim Swendseid, sworn December 3, 2024; and
3. Affidavit #1 of Susan Danielisz, sworn December 13, 2024.

The application respondent has not filed in this proceeding a document that contains an address for service. The application respondent's ADDRESS FOR SERVICE is:

Respondent's address for service:


McCarthy Tétrault LLP  
Barristers & Solicitors  
Suite 2400, 745 Thurlow Street  
Vancouver, BC V6E 0C5

**Attention: H. Lance Williams  
Ashley Bowron**

Email address for service (if any):

lwilliams@mccarthy.ca  
abowron@mccarthy.ca

DATE: December 13, 2024

  
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H. Lance Williams and Ashley Bowron  
Counsel for the Respondent,  
Patriot Gold Corp.