

AGREEMENT OF PURCHASE AND SALE

AGREEMENT made this 23rd day of May, 2018 by and between the following parties:

<u>NAME</u>	<u>ADDRESS</u>
<u>Herkimer County Industrial Agency</u> ("Seller")	<u>420 E. German Street, Suite 101A</u> <u>Herkimer, New York 13350</u>
<u>Higby Gold, Inc.</u> ("Purchaser")	<u>2128 State Route 5</u> <u>Utica, New York 13502</u>

WHEREAS, Seller is the owner (under contract) of certain unimproved land measuring approximately 7.68± acres situate in the Route 5S South Park in the Town of Frankfort, Herkimer County, State of New York being more particularly identified as Lot 19 and Lot 20, Tax Parcel Nos. 19 and 20 in said Town and shown on Exhibit A attached hereto and made a part hereof, together with all easements and rights-of-way benefitting or appurtenant thereto, and all right, title and interest of Seller in and to any land lying in the bed of any highway, street, road or avenue, opened or proposed, in front of or abutting or adjoining said real property (all of the foregoing referred to herein as the "Property"); and

WHEREAS, Seller desires to sell, and Purchaser desires to purchase, said Property described hereinabove upon the terms and conditions hereinafter set forth.

NOW, THEREFORE, the parties hereto mutually agree as follows:

1. SALE:

Seller hereby agrees to sell to Purchaser and Purchaser agrees to purchase from Seller, the Property subject to the terms set forth below.

2. PURCHASE PRICE:

A. The total purchase price for the Property shall be ONE HUNDRED THOUSAND and 00/100 Dollars (\$100,000.00) payable as follows:

- (i) Five Thousand and 00/100 Dollars (\$5,000.00) by check to be deposited with Seller's attorney and either applied against the purchase price upon Closing (as hereinafter defined) or returned to Purchaser as hereinafter provided; and
- (ii) Ninety Five Thousand and 00/100 Dollars (\$95,000.00) by Purchaser at Closing.

- B. If at the date of Closing there may be liens or encumbrances which Seller is obligated to pay and discharge, Seller may use any portion of the balance of the purchase price to satisfy the same, provided Seller shall simultaneously either (i) deliver to Purchaser at the Closing, instruments in recordable form and sufficient to satisfy such liens and encumbrances of record together with the cost of recording or filing said instruments, which costs may be paid by the Purchaser and deducted from the purchase price accordingly; or (ii) provided that Seller has made arrangements with the title insurance company employed by Purchaser in advance of Closing, Seller will deposit with said company sufficient monies, acceptable to and required by it to insure the obtaining and recording of such satisfactions and the issuance of title insurance to Purchaser either free of any such liens and encumbrances, or with insurance against enforcement of same out of the Property. If a request is made within a reasonable time prior to the date of Closing of title, Purchaser agrees to provide at the Closing separate certified checks as so requested, aggregating the amount of the balance of the purchase price then payable, to facilitate the satisfaction of any such liens or encumbrances.

3. PURCHASER'S CONTINGENCIES:

This Contract is contingent upon Purchaser's obtaining of all municipal approvals, inclusive, but not limited to, site plan approval and any other approvals necessary for Purchaser to acquire and construct a terminal facility upon the Property. The Contract is also contingent upon Purchaser obtaining purchase money financing at the then prevailing rates for a term of no less than twenty (20) years.

4. REPRESENTATIONS AND WARRANTIES OF SELLER AND PURCHASER:

Seller, to induce Purchaser to enter into this Agreement to purchase the Property, represents and warrants to Purchaser as follows:

- A. At the Closing, Seller will have, and will convey and transfer to Purchaser, good and marketable title to the Property free and clear of any liens, encumbrances, licenses, security interests, covenants, conditions, restrictions, judgments, rights-of-way, easements, encroachments and any other matters affecting title, and except for those expressly set forth herein and except for utility easements and other easements or rights-of-way of record which do not adversely affect Purchaser's use of the Property for the Project (as hereinafter defined).
- B. Seller has taken all necessary actions to duly enter into this Agreement and to be bound by the terms hereof and to consummate the transactions herein provided.
- C. No person, firm, corporation or entity other than Purchaser has, or as of the Closing will have, any right or option to acquire or to lease the Property or any portion thereof or any interest therein.

- D. To the best of Seller's knowledge, information and belief, no default or breach exists, or as of the Closing will exist, under any of the covenants, conditions, restrictions, rights-of-way, or easements affecting the Property or any portion thereof which are to be performed or complied with by the Seller.
- E. There shall be no lawsuits or litigation pending against the Property caused by acts of Seller or arising out of Seller's ownership, use or occupation of the Property, and there shall be no claims or offsets of any kind or nature which affect title to the Property which have not been paid, satisfied or released prior to delivery of the deed at Closing.
- F. To the best of Seller's knowledge there is no hazardous waste on the Property, there has been no hazardous waste disposed of on the Property and the Property is not listed by any governmental agency as a past or present hazardous waste disposal site.
- G. From the date of execution hereof until Closing, Seller shall not enter into or modify any lease, easement or other agreement encumbering the Property or any portion thereof without the prior written consent of Purchaser.

Purchaser, to induce Seller to enter into this Agreement to sell the Property, represents and warrants to Purchaser as follows:

- A. Purchaser is a New York corporation, duly organized, validly existing and in good standing under the laws of the State of New York and is duly qualified and has the requisite power and authority to enter into and consummate the transactions contemplated by this Agreement.
- B. The execution of this Agreement and consummation of the transactions contemplated hereby will not constitute a violation of any agreement to which Purchaser is a party or by which Purchaser is bound, or any law, order or regulation applicable to Purchaser.

5. PROVISIONS WITH RESPECT TO THE CLOSING:

- A. Seller shall deliver to Purchaser at the Closing (unless some other date is herein specified) the following:
 - (i) A bargain and sale deed with covenants against grantors acts for the Property, duly executed and acknowledged by Seller and in proper form for recording and satisfactory to Purchaser's attorney, conveying to Purchaser good, marketable and insurable title free of all liens and encumbrances except as otherwise set forth in this Agreement; and
 - (ii) Both parties will execute the TP-584 form and Equalization and Assessment form upon closing of this transaction; and

(iii) Transfer Gains Tax Affidavit claiming exemption therefrom.

- B. Transfer of title to the Property (the "Closing") shall be held at the law offices of attorneys representing Purchaser's lender, or such other place as the parties may agree, on a date not later than thirty (30) days after the conditions of Purchaser's obligation as set forth in Section 3 and 9 hereof are either satisfied or waived by Purchaser, provided, that Purchaser may continue its due diligence with respect to the Property and its acquisition of all necessary Approvals for the Project (as such terms are hereinafter defined) for a period not less than twelve (12) months following the date of this Agreement. Possession of the Property shall likewise be transferred to Purchaser at Closing.
- C. Subject to the provisions of Section 9, Purchaser agrees to accept the Property "as is". Except as may be expressly set forth in this Agreement: (i) neither Seller, nor the employees, agents or representatives of Seller have made any verbal or written representations or warranties whatsoever with respect to the physical, surface or subsurface condition of the Property, its suitability for any use, the zoning and other laws, regulations and rules applicable thereto or the compliance by the Property therewith, or the taxes or other charges applicable thereto; (ii) Purchaser has not relied and will not rely on any such representations made or to be made; and (iii) Purchaser acknowledges that no such representations or warranties have been made.
- D. The place or date of the Closing may be changed by mutual agreement between the parties. This Agreement shall be terminated and of no further force and effect in the event that the Closing does not occur, or is not extended by mutual agreement, on or before the date which is twelve (12) months following the date of this Agreement. In such event, neither party shall have any further obligations to the other.

6. CLOSING ADJUSTMENTS:

Real property taxes levied and assessed against the Property shall be prorated and adjusted between the parties hereto as of the date of Closing. Seller shall be responsible for the payment of revenue stamps to be affixed to the deed at the time of recording.

7. ACCESS TO PROPERTY:

Seller grants Purchaser and its duly authorized agents and employees, the right, at reasonable times after the date of execution hereof by Seller, upon reasonable prior notice to Seller, to enter upon the Property to make such surveys, tests and measurements thereof as Purchaser shall deem reasonably necessary, including without limitation, a Phase I environmental assessment and, if determined by Purchaser to be necessary or advisable, a Phase II environmental assessment. Seller shall have the right (but not the obligation) to have its representative(s) present at such times as said surveys, tests, measurements and other similar activities are taking place. Purchaser agrees to indemnify and hold Seller harmless against any and all losses, expenses, claims or damages (including reasonable attorney's fees) caused by or resulting from Purchaser's entry upon the

Property, including, without limitation, claims for personal liability and damage to the Property. Purchaser further agrees that any damage caused by Purchaser, its agents or employees in the course of such entry shall be promptly repaired by Purchaser at no cost whatever to Seller. Notwithstanding anything contained in this paragraph to the contrary, no construction or other physical alteration of the Property (other than geotechnical borings to obtain information on the physical property of soil and rock on the Property and soil borings, and groundwater and soil studies to obtain information on the environmental condition of the Property) shall be performed by the Purchaser or its agents, contractors or subcontractors, prior to Purchaser's closing of title to the Property in accordance with the terms of this Agreement.

8. UNMARKETABLE TITLE:

- A. Within twenty (20) days after the execution hereof, Seller shall furnish Purchaser with a copy of Seller's title insurance policy, if any, a current abstract of title starting with a warranty deed at least forty-five (45) years ago made by an incorporated title or abstract company, a ten (10) year tax search from the County of Herkimer, tax receipts for the current year and a boundary survey dated within the past five (5) years together with any other existing topographic maps or drawings of the Property in Seller's possession. Seller will bear the initial expense incurred in said abstract preparation and for said tax search and thereafter the Purchaser shall be responsible for the cost, if any, of a further continuation to the Closing Date. The foregoing items shall be promptly returned if the Closing does not occur.
- B. Purchaser shall promptly, upon receipt of the material specified in paragraph A above, examine title to the Property and if title to the Property is found to be defective, Purchaser shall notify Seller in writing specifying the defects.

Notwithstanding any other provisions of this Agreement, expressed or implied, if for any reason whatsoever, Seller shall convey the Property in accordance with the terms of this Agreement convey good and marketable title to the Property. If there is any non-monetary defect in title, then Seller shall have the option to cure said defect within a reasonable time or shall cause the deposit to be promptly repaid to Purchaser and the obligations of both parties under this Agreement shall then terminate, unless Purchaser shall elect, at its sole discretion, to accept such title as Seller is able to convey and close without any reduction of the purchase price or other credit on account thereof.

9. CONDITIONS OF PURCHASE:

- A. The obligation of Purchaser to consummate the within transaction and to pay the total purchase price is expressly contingent upon the following conditions being duly satisfied prior to Closing (it being agreed that Purchaser, at its sole election, may waive performance of any such condition by written notice to Seller at any time):
 - (i) The receipt by Purchaser, at Purchaser's sole cost and expense, of evidence of the issuance of any and all zoning, environmental, building, site and other governmental and/or municipal permits and approvals, including, but without limitation, variances, (together called the "Approvals") necessary

to enable Purchaser to develop upon the Property a truck terminal facility (the "Project"); and

- (ii) The receipt by Purchaser of evidence of the availability of necessary utility services including sanitary and storm sewer, water (including adequate pressure), electricity and gas to service the Project; and
- (iii) Soil tests, percolation tests and other physical inspections and subsurface exploration of the Property, being performed by and at the expense of Purchaser, and being reasonably satisfactory to Purchaser; and
- (iv) Purchaser, at its own expense, obtaining a written report of an environmental inspection or audit of the Property made by a licensed engineer disclosing that no hazardous substance or hazardous waste is stored or has been stored on the Property, that there are no, and that there have been no, underground storage tanks, and that no adverse environmental condition exists with respect to the Property, such report to be otherwise reasonably acceptable in form and content to Purchaser and Purchaser's lender; and
- (v) There being no known notes or notices of violations issues by any municipality or government agency having jurisdiction which would significantly increase the cost of the project as contemplated herein by Purchaser. Seller agrees to notify Purchaser of any municipal or governmental notices that may be received prior to the transfer of title of the subject Property to Purchaser; and
- (vi) Determination that no portion of the property is subject to a wetlands delineation or flood zone so as to adversely affect the development of the property.

- B. Purchaser agrees to proceed to make such tests and inspections, apply for and attempt to obtain the Approvals and the construction loan and evidence of the availability of the utility services referred to in subparagraph A above as soon as reasonably practicable after the execution hereof. Seller agrees to aid and cooperate with Purchaser and provide to Purchaser any and all information which Seller may have and which Purchaser or the Town of Frankfort shall require in connection with Purchaser's endeavors to obtain the Approvals and evidence of the availability of the utilities as aforesaid, provided that such aid and cooperation shall not require the expenditure of money by Seller.

In all events, upon termination of this Agreement, the entire deposit (less Seller's expense in redating the abstract or obtaining a new abstract, obtaining tax searches and redating the survey) will be returned to the Purchaser and neither party shall have any further rights against the other, provided, however, if the Agreement has been terminated as a result of Purchaser's willful failure to satisfy its obligations, the entire deposit shall be paid to Seller.

10. NOTICES:

All notices, requests and other communications under this Agreement shall be in writing and shall be personally delivered or sent by registered or certified mail, return receipt requested, addressed to the parties at their respective addresses shown at the beginning of this Agreement, or at such other address which the parties shall have given notice of as herein provided. All such notices, requests and other communications shall be deemed to have been sufficiently given for all purposes hereof, on the date of personal delivery or the receipt or refusal thereof as the case may be.

Copies of any notice (as an accommodation and not as a condition to its effectiveness) shall likewise be sent by the same means to the attorney for the respective parties, if notice of the attorney is provided in the above manner.

11. CONDEMNATION:

Seller represents that it has no knowledge of any proceedings instituted by any municipal, state or federal agency to condemn or acquire the Property or any portion thereof, by eminent domain. In the event Seller is informed of the initiation of any condemnation proceeding, Seller agrees to promptly notify Purchaser in writing, forward to Purchaser copies of any and all maps and documents received in connection therewith and permit Purchaser to participate in such proceedings and/or negotiation. If a condemnation is initiated, then Purchaser, within ten (10) days of Seller's notification, shall notify Seller that Purchaser either:

- A. Elects to cancel this Agreement and thereupon rights and obligations of the parties hereto shall cease and terminate and all monies paid to Seller by Purchaser, shall be returned within five (5) days after receipt of said notice less Seller's expense in redating the abstract, obtaining the tax search and redating the survey; or
- B. Elects to accept delivery of the Deed to the Property, and the Purchaser shall then pay the full purchase price as set forth herein (less any condemnation award actually received by Seller) or take at Closing an assignment of all Seller's right in and to any condemnation award not yet received by Seller pertaining to the Property so taken.

Purchaser shall be deemed to have elected option "B" above, if it fails to notify Seller of its election within the time frame stated hereinabove.

12. MISCELLANEOUS:

- A. **Entire Agreement/Modifications:** This Agreement embodies and constitutes the entire understanding between the parties with respect to the transactions contemplated herein, and all prior or contemporaneous agreements, understandings, representations and statements, oral or written, are merged into this Agreement. Neither this Agreement nor any provision hereof may be waived, modified, amended, discharged or terminated except by a written agreement of such waiver, modification, amendment, discharge or termination executed by the parties and then only to the extent set forth in such instrument.


- B. **Applicable Law:** This Agreement shall be construed and enforced in accordance with, and governed by, the laws of the State of New York.
- C. **Captions:** The captions in this Agreement are inserted for convenience of reference only and in no way define, describe or limit the scope or intent of this Agreement or any of the provisions hereof.
- D. **Binding Effect:** This Agreement when executed by both parties shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, legal representatives, successors and assigns. Purchaser shall have the right to assign its rights and interests hereunder to a partnership, corporation or limited liability company composed of substantially the same principals of Purchaser. Purchaser shall immediately give Seller notice of any such assignment, however, notwithstanding such assignment and in all events, the Purchaser named herein shall continue to be responsible for the performance of all terms and conditions of this Agreement.
- E. **Counterparts:** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.
- F. **Memorandum of Contract:** The parties agree that neither this Agreement, nor a memorandum of this Agreement, shall be recorded and any attempted recordation by Purchaser shall be void and constitute a default hereunder.
- G. **Broker:** Each party represents and warrants that it has not dealt with any real estate broker in connection with this transaction. Each party hereby agrees to indemnify and hold the other harmless from and against the claim of any other real estate broker for a commission relating to this transaction arising out of the acts of the indemnifying party.
- H. **Full Performance:** The acceptance of the deed by Purchaser shall be deemed to be the full performance and discharge of every agreement and obligation on the part of Seller to be performed pursuant to the provisions of this Agreement except those, if any, which are herein specifically stated to survive the closing.
- I. **Reversion:** In the event that the Purchaser does not commence construction on its manufacturing facility upon the subject property, within two (2) years from the date of closing and transfer and closing, the Seller reserves the right in its sole discretion to require the reconveyance of the property to the IDA upon its payment of the same consideration recited in Paragraph "2" hereinabove. This term and condition of sale shall survive the closing and passing of title and shall not otherwise merge with the tender of the original deed of conveyance.

- J. **Agency Packet:** The Purchaser has received the IDA Agency Packet, and has reviewed policies regarding tax exemption, recapture and construction hiring and understands that Purchaser shall be responsible for all Agency Fees, including attorneys' fees and expenses related thereto.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement of Purchase and Sale as of the date and year first written above.


PURCHASER:

HIGBY GOLD, INC.

By: 
Name: Anthony Giovinazzo
Title: President

SELLER:

HERKIMER COUNTY INDUSTRIAL
DEVELOPMENT AGENCY

By: 
Name: JOHN T. PISEK JR
Title: EXECUTIVE DIRECTOR

STATE OF NEW YORK)
COUNTY OF Herkimer) SS:

On the 23RD day of MAY, 2018, before me, the undersigned, a notary public in and for said State, personally appeared Anthony G. DiNatale, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity and that by his signature on the instrument, the individual or person ups behalf of which the individual acted, executed this instrument.

BARBARA J. BOULIA
Notary Public in the State of New York
Qualified in Herkimer County 01B04506590
STATE OF NEW YORK)
COUNTY OF HERKIMER) SS:

Barbara J. Boulia
Notary Public

BARBARA J. BOULIA
Notary Public in the State of New York
Qualified in Herkimer County 01B04506590
My Commission Expires April 30, 2019

On the 21st day of August, 2018, before me, the undersigned, a notary public in and for said State, personally appeared John T. Pisek, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity and that by his signature on the instrument, the individual or person ups behalf of which the individual acted, executed this instrument.

Stacey J. Holleran
Notary Public

STACEY J HOLLERAN, 5004200
Notary Public, State of New York
Qualified in Herkimer County
My Commission Expires 11-16-2018