

MEMORANDUM OF ARGUMENT

PART I

STATEMENT OF FACTS

Nature of the Application

1. This is an application by an Ad Hoc Group of Debenture Holders (the “**Ad Hoc Group**”) for an interim stay of proceedings, and certain ancillary orders, in respect of the Orders of a Supreme Court Judge in Chambers, pronounced September 19, 2012 (the “**Initial Order**”) and September 27, 2012 in proceedings brought by Great Basin Gold Ltd. (the “**Company**” or the “**Petitioner**”) under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”). The orders of the chambers judge provide, in part, for the approval of a loan (the “**Initial DIP Loan**”) offered by Credit Suisse AG, and certain other lenders of the Company (the “**Initial DIP Lenders**”) pursuant to the terms of a term sheet dated September 19, 2012 (the “**Initial DIP Term Sheet**”). The Ad Hoc Group has filed a notice of application for leave to appeal from the chambers judge’s orders.

Facts

2. The Petitioner in the CCAA proceedings is an international mining company engaged in exploration, development and operation of gold properties.

3. The main assets of the Petitioner are its interests in the Hollister Mine in Nevada (the “**Hollister Mine**”), and the Burnstone Mine in South Africa (the “**Burnstone Mine**”). The Hollister Mine is currently active, while the Burnstone Mine was put into temporary shutdown on September 11, 2012.

4. The Petitioner is the parent company of several operating subsidiaries, including Great Basin Gold Inc., Antler Peak Gold Inc. and Rodeo Creek Gold Inc. (the "**Subsidiaries**"). The Subsidiaries are part of a consolidated business of the Petitioner which operates in various jurisdictions, including but not limited to British Columbia, Nevada and South Africa. The Subsidiaries have also granted several guarantees in respect of the Petitioner's obligations. Accordingly, the business of the Petitioner and the Subsidiaries (collectively, the "**GBG Group**") appear to be very closely connected.

5. Between May, 2010 and December, 2011, Credit Suisse AG and certain other lenders (the "**Burnstone Lenders**") provided financing in respect of the Burnstone Mine (the "**Burnstone Loan**"). The amount currently outstanding under the Burnstone Loan is approximately \$150 million. The Burnstone Lenders obtained various security over the Burnstone Mine in respect of the Burnstone Loan; however, they did not obtain any security over the Hollister Mine in connection with the same.

Monitor's Pre-filing Report, pg. 9

6. The Petitioner began experiencing financial difficulties in or around August, 2012. On or around September 11, 2012, the Petitioner issued a press release (the "**Press Release**") indicating it had suspended certain operations due to a lack of working capital. The Press Release indicated the Petitioner was in the process of seeking financing to cover immediate shut down costs.

7. The Subsidiaries are cash-flow insolvent and require immediate financing to fund their working capital requirements related to Hollister, without which they will be required to shut down the Hollister Mine.

8. The Burnstone Mine requires a cash infusion to fund payroll and benefits liabilities that will come due in the next few weeks, after which there are minimal cash flow needs resulting from the Burnstone Mine. Other than the Hollister and Burnstone related expenses, the GBG Group's significant cash needs are related to the DIP Loan and these proceedings.

9. Since the date of the Press Release, or earlier, the Petitioner has had several discussions with the Alternative DIP Lenders regarding the provision of further credit. Although the Alternative DIP Lenders have offered to discuss providing further credit on numerous occasions, the Petitioner has repeatedly declined to pursue these offers.

10. In at least one case, the Petitioner specifically declined to pursue a discussion in respect of further credit on the basis that such credit would have been "debtor in possession" financing and would have required super-priority security.

11. On September 19, 2012, just over a week after the Press Release, and without any notice to its existing creditors, the Petitioner applied for and obtained the Initial Order.

Initial Order made September 19, 2012

12. The Subsidiaries are not party to these proceedings or subject to the stay in the Initial Order.

Initial Order made September 19, 2012

13. In addition, despite the Petitioner's earlier rejection of possible financing on the basis that such might amount to a debtor in possession loan facility, the Initial Order includes orders for the approval of the Initial DIP Loan (those portions of the Initial Order herein referred to as the "**Initial DIP Order**"), provided by the Initial DIP Lenders pursuant to the terms of the Initial DIP Term Sheet.

14. The Initial DIP Loan contemplates a maximum advance of \$35 million (the "**Principal**"). The initial term of the loan is six months; however, this term may be extended up to three times by one-month extension periods, at the discretion of the Initial DIP Lenders, subject to payment of a 1% extension fee.

15. In addition, the Initial DIP Loan incorporates a number of fees, expenses and charges, including:

- (a) interest at a rate of LIBOR + 10% per annum;
- (b) an upfront fee equal to 2% of the Principal;
- (c) a commitment fee equal to 4% of the Principal;
- (d) a requirement that Southgold Exploration Proprietary Limited ("**Southgold**"), a subsidiary of the Petitioner and guarantor under the Initial DIP Loan, enter into an "Advisory Agreement" with the Initial DIP Lenders, pursuant to which the Initial DIP Lenders will earn a 15% fee (the "**Advisory Fee**") on the sale

of certain assets (the "**Burnstone Assets**"), net of the repayment of the existing Burnstone Loan facility and certain other expenses; and

- (e) a requirement that Great Basin Gold, Inc. ("**GBGI**"), a subsidiary of the Petitioner and guarantor under the Initial DIP Loan, provide a guarantee (the "**GBGI Guarantee**") with respect to the Petitioner's obligations under the Burnstone Loan, together with super priority security over all of GBGI's assets (the "**GBGI Security**") as security for the GBGI Guarantee.

Affidavit of Susan Taylor #1, Exhibit "A"

16. The basis for the Petitioner seeking the Initial DIP Order, without any notice, was ostensibly an urgent need for liquidity and a lack of any other available lenders.

17. The result of the GBGI Guarantee and the GBGI Security is to give the Burnstone Lenders additional security in respect of the Burnstone Loan. In particular, the GBGI Guarantee and the GBGI Security give security over the Hollister Mine that was specifically excluded at the time the Burnstone Loan was granted.

Monitor's Pre-filing Report, 9.6 – 9.11

18. Collectively, these fees amount to a substantial effective annual interest rate. Although the effective rate under the Initial DIP Term Sheet will vary depending on the ultimate value of the Burnstone Mine, even a wide range of gross sale prices (from \$250 million to \$643 million) results in an effective annual interest rate of between 100% and 900%.

19. The Initial Order was subject to the right of any party to apply to vary or amend the terms of the Initial Order, provided that any application to vary or amend those portions of the Order which related to the Initial DIP Loan must be made on or before October 3, 2012.

20. Despite the earlier discussions with the Petitioner and the rejection by the Petitioner of the overtures of financing by the Alternative DIP Lenders, the Ad Hoc Group remains committed to having the Alternative DIP Lenders provide interim financing to the Petitioner. Moreover, the Alternative DIP Lenders are prepared to offer the Alternative DIP Loan, which is on materially better terms than the Initial DIP Lenders, including:

- (a) an option to increase the principal amount of the facility to \$40 million, if required;

- (b) a term of six months, subject to two three-month extensions at the Petitioner's discretion with no extension fees payable;
- (c) an interest rate of LIBOR + 8.5% per annum;
- (d) an upfront fee equal to 1% of the principal;
- (e) a commitment fee equal to 1.25% of the principal; and
- (f) no requirement to pay an Advisory Fee or provide the GBGI Guarantee.

PART II

POINTS IN ISSUE

21. Whether an interim stay of proceedings should be issued to allow the Ad Hoc Group to pursue an effective appeal.

PART III**REASONS WHY A STAY SHOULD BE GRANTED**

22. In overview, the circumstances satisfy the tri-partite test for granting a stay pending resolution of the Ad Hoc Group's application for leave to appeal. First, whether a CCAA Court should approve the Initial DIP Loan given that it amounts to an agreement to receive interest at a criminal rate, contrary to section 347 of the *Criminal Code*, raises a serious question. Second, if the Initial DIP Loan closes pending resolution of the leave appeal, the Ad Hoc Group will lose any right to meaningful appeal which would result in irreparable harm. Third, because of the Alternative DIP Loan, the Petitioner will not suffer prejudice if Court-approval of the Initial DIP Loan is rescinded.

23. A justice in chambers has jurisdiction to stay the proceedings below both under s. 13 of the CCAA and s. 18 of the *Court of Appeal Act*.

24. The test for a stay is:

- (a) Is there a serious question to be argued on appeal?
- (b) Will the Ad Hoc Group suffer irreparable harm if this Court does not grant a stay?
- (c) Does the balance of convenience favour the stay?

RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 SCR
311

25. In this case all three elements of the test are met.

26. With respect to the serious question to be argued on appeal, whether a CCAA Court should approve the Initial DIP Loan given that it amounts to an agreement to receive interest at a criminal rate, contrary to section 347 of the *Criminal Code*, is a serious question, in particular when the Petitioner is able to find alternative financing.

27. With respect to irreparable harm, if the closing of the Initial DIP Loan is not stayed, the Ad Hoc Group's appeal will become moot. As a result, the Ad Hoc Group will lose any meaningful right to appeal and all existing stakeholders in the Petitioner's CCAA proceedings will be harmed. If the appeal of the Initial DIP Order becomes moot, the Initial DIP

Loan will proceed and the Ad Hoc Group will be prejudiced by the granting of the GBGI Guarantee and the GBGI Security, which will cause the indebtedness related to the Debentures to be subordinate to the Existing Burnstone Loan. Additionally, the terms of the Initial DIP Loan, as set out in the Initial DIP Term Sheet, amount to an agreement to receive interest at a criminal rate, which is an offence under section 347 of the *Criminal Code*, and the payment of which will prejudice all creditors of the Petitioner and the Subsidiaries.

Romspen Investment Corp. v. Chemainus Quay & Marina Complex Ltd., 2012 BCCA 292 (finding that absence of a meaningful right to appeal due to mootness constitutes irreparable harm)

28. The Ad Hoc Group's position before the chambers judge was that the Initial DIP Loan was primarily an attempt by the Initial DIP Lenders to bolster the Burnstone Lenders' security for the existing Burnstone Loan via the GBGI Guarantee and the GBGI Security, at the expense of the convertible debenture holders and other stakeholders of the Company.

29. As noted in the Monitor's Pre-Filing Report, the GBGI Guarantee and the GBGI Security with respect to the Existing Burnstone Credit Facility "effectively provides additional security of the Hollister property to the Existing Burnstone Lenders".

30. It follows that the Ad Hoc Group will suffer irreparable harm if there is no stay of the order granted pending the appeal. If the appeal is successful and the provisions of the Initial Order approving the Credit Suisse DIP are set aside, the net result will be that Credit Suisse will not enjoy super-priority for any advances made or to be made under the DIP facility because the DIP charge will be set aside. However, simply setting aside the approval of the Credit Suisse DIP will not "undo" the GBGI Guarantee and the security pledged over Hollister Mine in support of that guarantee as the guarantee and security were granted contractually. Accordingly, if the Ad Hoc Group is successful but the GBGI Guarantee and security over Hollister Mine is already pledged, the Ad Hoc Group's only recourse is to start brand new litigation to challenge the GBGI and supporting security over Hollister Mine as a fraudulent preference.

31. With respect to the balance of convenience, the Petitioner will not suffer prejudice if implementation of the Initial DIP Loan is stayed. First, the Ad Hoc Group will seek to have its appeal move forward on an expedited basis. Second, the Alternative DIP Loan is available to the Petitioner.

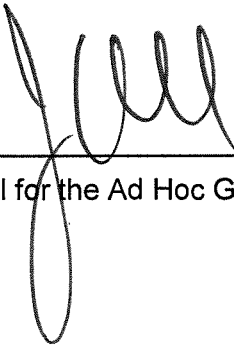
PART IV

NATURE OF THE ORDER REQUESTED

32. The Ad Hoc Group seeks an order stay the proceedings below pending determination of the Ad Hoc Group's application for leave to appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: September 27, 2012



Counsel for the Ad Hoc Group

PART V

TABLE OF AUTHORITIES

<u>Case</u>	<u>PAGE</u>
1. <i>Crystallex International Corporation</i> , 2012 ONSC 2125 and Endorsed Order granted pursuant thereto	
2. <i>RJR-MacDonald Inc. v. Canada (Attorney General)</i> , [1994] 1 SCR 311	7
3. <i>Romspen Investment Corp. v. Chemainus Quay & Marina Complex Ltd.</i> , 2012 BCCA 929	8
 <u>Legislation</u>	
4. <i>Companies' Creditors Arrangement Act</i> , RSC 1985, c C-36 s.13	1, 7
5. <i>Court of Appeal Act</i> , RSBC 1996, c.77 s. 10 and s. 18	7
6. <i>Criminal Code</i> , RSC 1985, c C-46 s 347.	7, 8