Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GHANA GOLD CORPORATION, GHANA GOLD INC., COASTAL EXPLORATIONS LIMITED and ABURI GOLDFIELDS GHANA LTD.

Applicants

FACTUM OF THE APPLICANTS
(Motion returnable May 9, 2013)

May 8, 2013

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FACTUM OF THE APPLICANTS

PART I - NATURE OF THE MOTION

1. Ghana Gold Corporation ("**GGC**"), Ghana Gold Inc. ("**GG BVI**"), Coastal Explorations Limited ("**Coastal**") and Aburi Goldfields (Ghana) Ltd. ("**Aburi Goldfields**", and collectively, the "**Ghana Gold Group**" or the "**Applicants**") seek relief under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**").

2. The Applicants carry on business producing gold from their alluvial gold mining operations in the Republic of Ghana, West Africa. The Applicants' operations were funded, in part, by financing from FCMI Parent Co. ("**FCMI**"), which is due today (i.e. on May 8, 2013) in the amount of $4,013,469.00 (the "**FCMI Indebtedness**"). The Applicants are unable to repay the FCMI Indebtedness and are therefore insolvent.

3. Granting Ghana Gold Group protection under the CCAA will provide it with the breathing room it requires to undertake its restructuring plan including completing the

Sale and Investment Solicitation Process (the "**SISP**") it is seeking to have approved by the Court will allow it to repay the FCMI Indebtedness.

PART II - THE FACTS

4. The facts in support of this application are more fully set out in the Affidavit of A. Thomas Griffis sworn on May 8, 2013 (the "**Griffis Affidavit**"). To the extent capitalized terms are used but not defined herein, they have the meaning ascribed to them in the Griffis Affidavit. All references to currency in this Affidavit are to U.S. Dollars, unless otherwise indicated.

Griffis Affidavit, Application Record at Tab 2.

Overview of the Business and its Operations

5. GGC is a privately-held corporation incorporated pursuant to the laws of Ontario, and its registered head office is located in Toronto. The other Applicants are all subsidiaries of GGC.

Griffis Affidavit, at paras. 4 and 5.

6. GGC owns approximately 73.46% of the common stock of GG BVI, which is incorporated under the laws of the British Virgin Islands, with the balance held by other investors. In turn, GG BVI owns 100% of the shares of the Ghana Gold Group's operating arm, Coastal, a company incorporated under the laws of the Republic of Ghana ("**Ghana**"). In turn, Coastal owns 100% of Aburi Goldfields, a company incorporated under the laws of Ghana.

Griffis Affidavit, at paras. 7, 8 and 9.

7. The majority of the management personnel of the Applicants is based at GGC's registered head office in Toronto (the "**Head Office**"), with a few mine operations managers based in Ghana. It is expected that all existing management based in Toronto and all mine operations management based in Ghana will remain in place during the restructuring.

Griffis Affidavit, at paras. 7 and 11-15.

8. The Applicants are of the view that the restructuring of the Ghana Gold Group as a whole to be undertaken under the CCAA may involve a refinancing, recapitalization or sale of the Applicants' business or assets. All options will be explored to maximize value for stakeholders and to continue production at the Ghana Gold Group's facilities.

Griffis Affidavit, at para. 16.

Centre of Main Interest

9. The Ghana Gold Group's business is fully integrated, including between the Canadian, British Virgin Islands and Ghanaian operations. The restructuring of the Ghana Gold Group can be administered most efficiently through a single, centralized restructuring process. Such a process will minimize the cost of the restructuring, including the time necessary to effect the refinancing, recapitalization or sale effort and thereby maximize the overall value for the benefit of all of the Applicants' stakeholders.

Griffis Affidavit, at para. 17.

10. The Applicants' centre of main interest ("**COMI**") is Ontario. The Applicants' "nerve centre" is the Head Office in Ontario, from which the CEO, CFO, Secretary and

Controller of GGC operate. The primary corporate, management, banking, accounting and strategic functions for all Applicants are undertaken from the Head Office in Ontario. The Applicants' lender is located in Ontario and its financing documents are governed by Ontario law.

Griffis Affidavit, at para. 18.

11. The Applicants contemplate that the CCAA proceeding in Canada will be the primary court-supervised process for the restructuring of the Ghana Gold Group. While the restructuring will be undertaken in Canada, the Applicants may determine that it is necessary to have this proceeding recognized as a foreign main proceeding in the British Virgin Islands and/or to have the Initial Order or any future order granted in this proceeding enforced as a foreign order in Ghana in order to facilitate its restructuring.

Griffis Affidavit, at para. 19.

12. In support of the Applicants' position that the Applicants' COMI is Ontario, the Applicants rely on the following facts:

(a) all corporate strategic decision making for the Ghana Gold Group occurs at the Head Office and the CEO, CFO, Secretary and Controller have their primary business office in Ontario;

(b) the Applicants' senior management team is involved in all material decisions regarding the operations of all the Applicants, including the approval of all terms and conditions of any material contracts, and all such decisions are directed from, made in or monitored from the Applicants' offices in Ontario;

(c) budgeting for each of the Applicants is approved at the Head Office in Ontario;

(d) accounting is performed and the books and records are maintained at the Head Office in Ontario;

(e) all treasury management functions, including a centralized cash management system for the Ghana Gold Group, are conducted from the Head Office;

(f) financial reporting of the Applicants is done on a consolidated basis (except where separate entity reporting is required by taxing authorities) and the audited financial statements are prepared in Ontario;

(g) the auditor of the Applicants, Collins Barrow, is located in Ontario;

(h) human resource policy and administration, including certain human resource functions such as employee recruitment strategy and the administration of employee benefits, are performed and located in Ontario;

(i) investor communication functions are undertaken at the Head Office in Ontario;

(j) the corporate minute books for each Applicant are located and maintained in Ontario;

(k) the only financing made available to the Applicants is with FCMI, which manages its financing in Toronto;

(l) the loan documents and security granted in respect of the financing by FCMI are governed by Ontario law; and

(m) the Board of Directors' meetings are customarily held in Ontario.

Griffis Affidavit, at para. 20.

13. The Applicants have two operating alluvial gold mining projects in central Ghana whereby they remove gold from superficial deposits, process and refine the gold, and sell the gold to buyers that take possession and make payment onsite.

Griffis Affidavit, at paras. 21-23 and 30.

14. The Applicants do not hold mining leases directly, but have alluvial gold mining agreements with certain parties that hold the relevant mining leases pursuant to which they produce gold in exchange for a royalty paid to the relevant lease holder.

Griffis Affidavit, at paras. 32-33.

15. The Applicants manage a centralized cash management system out of the Head Office in Toronto whereby cash is loaned by GGC on an inter-company basis to the other Applicants. Revenue after costs is repatriated to GGC.

Griffis Affidavit, at paras. 35-40.

16. It is anticipated that the Applicants will continue to use the existing cash management system and will continue to maintain the bank accounts and arrangements already in place. This approach will minimize any disruption to business operations as the Applicants restructure.

Griffis Affidavit, at para. 41.

Indebtedness to FCMI and Other Creditors and Immediate Liquidity Issue

17. Before the Applicants began production, GGC received pre-production financing from FCMI, pursuant to a Secured Convertible Grid Promissory Note in the amount of $5,000,000.00 on October 28, 2011 (the "**Note**"). The terms of the Note provide that it is

to be repaid monthly at a rate of $300 per ounce of gold sold by the Ghana Gold Group multiplied by the Applicants' relative interest in the gold produced. The Note is not interest bearing.

Griffis Affidavit, at paras. 49-52 and Exhibit "H".

18. The maturity date under the Note was April 29, 2013 (the "**Maturity Date**"). FCMI agreed to extend the Maturity Date to May 6, 2013 and then to May 8, 2013. Repayment of the Note is due today. The Applicants are unable to repay the FCMI Indebtedness and are therefore insolvent.

Griffis Affidavit, at paras. 53-54.

19. GG BVI and Coastal guaranteed the obligations of GGC to FCMI under the Note pursuant to a Guarantee dated October 28, 2011 (the "**Guarantee**"). GGC, GG BVI and Coastal secured their obligations to FCMI under the Note and the Guarantee pursuant to a Securities Pledge Agreement dated October 28, 2011 (the "**Securities Pledge Agreement**").

Griffis Affidavit, at paras. 55-56 and Exhibits "J" and "K".

20. The Ghana Gold Group's unsecured creditors are principally trade creditors and mining lease holders that are owed approximately $2,236,600 as at May 6, 2013.

Griffis Affidavit, at paras. 58-60.

CCAA Restructuring Plan

21. Since the Applicants cannot repay the FCMI Indebtedness, a stay of proceedings is essential for the continued operation of the Applicants' business. Such a stay would

provide the Applicants with the necessary time to undertake the SISP and continue discussions with its stakeholders with respect to a potential plan of arrangement. Accordingly, the Applicants believe it is necessary to file for CCAA protection.

Griffis Affidavit, at para. 80.

22. FCMI has indicated to the Applicants that it supports their CCAA Application.

Griffis Affidavit, at para. 82.

23. The immediate objective of the Applicants' restructuring plan is to secure sufficient funds to repay FCMI in full through the implementation of the SISP. The purpose of the SISP is to identify one or more financers or purchasers of or investors in the Applicants' business with a projected completion date of a transaction or transactions by the first week of August, 2013.

Griffis Affidavit, at para. 84-85.

24. The SISP will include broad marketing to all potential financiers and investors, including those that have already engaged in talks with the Applicants. The SISP will accommodate offers for proposed financing, or investment in the Applicants' business, or the purchase of the Applicants' assets. It will be a fair and transparent process overseen by the Proposed Monitor. The Proposed Monitor has advised that it approves the SISP being proposed by the Applicants.

Griffis Affidavit, at para. 86-90.

25. FCMI has advised that it will support the Applicants' CCAA proceeding on the basis that it continues to be paid its principal at $300 per ounce. To allow for this repayment, the

FCMI Financial Corporation (the "**DIP Lender**") has agreed to provide debtor-in-possession financing ("**DIP Financing**") to the Applicants up to the aggregate amount of CDN$750,000.00, subject to the Applicants obtaining an Initial Order in this proceeding on the terms requested granting the DIP Lender a charge over all of the property, assets and undertaking of the Applicants in priority to all creditors to secure the DIP Financing (the "**DIP Charge**") save and except for the Administration Charge (defined belw). The terms of the DIP Financing to be provided by the DIP Lender are described in the DIP Term Sheet.

Griffis Affidavit, at para. 92.

26. The Applicants request that this Honourable Court grant a charge in favour of the Applicants' counsel and in favour of the Monitor and its counsel to secure the payment of fees and expenses incurred in connection with this proceeding in the amount of CDN$250,000 (the "**Administration Charge**"). The Applicants also request that the Applicants' directors be granted the protection of a directors' charge in the amount of CDN$50,000 (the "**Directors' Charge**") as provided for in the draft Initial Order.

Griffis Affidavit, at paras. 95-96.

27. The Applicants propose that Ernst & Young Inc. be appointed Monitor for this proceeding. Ernst & Young Inc. is not the auditor for the Applicants. Ernst & Young Inc. has consented to act as Monitor and its written consent is being filed with this Honourable Court.

Griffis Affidavit, at para. 98.

PART III - THE ISSUES

28. The issues on this Application are as follows:

    (a) Should this Court grant protection under the CCAA to the Applicants?

    (b) Should this Court authorize the DIP Financing and grant the DIP Charge?

    (c) Should this Court grant the Administration Charge and the Directors' Charge, each on a priority basis over the Applicants' Property (as defined in the Initial Order)?

PART IV - THE LAW

(a) THE GHANA GOLD GROUP SHOULD BE GRANTED PROTECTION UNDER THE CCAA

The Ghana Gold Group are "Debtor Companies" to which the CCAA Applies

29. The CCAA applies to a "debtor company" or affiliated debtor companies where the total claims against the debtor or its affiliates exceed $5 million. Pursuant to section 2 of the CCAA, a "debtor company" means, *inter alia*, a company that is insolvent.

    CCAA, sections 2(1) and 3(1).

30. While the CCAA does not define the term "insolvent", the definition of " insolvent person" under the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 (the "**BIA**") is commonly referenced in order to establish that an applicant is a "debtor company" within the meaning of the CCAA. The definition of "insolvent person" under section 2(1) of the BIA is as follows:

    > **"insolvent person"** means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.
>
> **BIA, s. 2.**

31. In the present case, the Applicants are affiliated debtor companies with total claims against them exceeding $5 million. The Ghana Gold Group is unable to satisfy its obligations under the FCMI Indebtedness. As such, the Applicants are insolvent.

    Griffis Affidavit, paras. 53-54.

Centre of Main Interests

32. Section 45(2) of the CCAA provides that, in the absence of proof to the contrary, a debtor company's registered office is deemed to be its COMI. The head offices of the Applicants is located in Toronto, Ontario.

    CCAA, section 45(2).

    Griffis Affidavit, para. 18.

33. Where the location of the debtor company's head office is not determinative, the Courts have analyzed the following factors as being relevant or providing guidance in determining the COMI of a debtor company:

    (a) the location where corporate decisions are made;

    (b) the location of employee administrations, including human resource functions;

    (c) the location of the debtor's marketing and communication functions;

(d) whether the enterprise is managed on a consolidated basis;

(e) the extent of integration of an enterprise's international operations;

(f) the centre of an enterprise's corporate, banking, strategic and management functions;

(g) the existence of shared management within entities and in an organization;

(h) the location where cash management and accounting functions are overseen;

(i) the location where pricing decisions and new business development initiatives are created; and

(j) the seat of an enterprise's treasury management functions, including management of accounts receivable and accounts payable.

***Re Angiotech Pharmaceuticals Ltd.*, 2011 CarswellBC 124, para 7 (S.C.), Brief of Authorities of the Applicant, Tab 1.**

***Re Massachusetts Elephant & Castle Group Inc.*, 2011 CarswellOnt 6610, paras. 26-27 (S.C.J.), Brief of Authorities of the Applicant, Tab 2 [*Elephant*].**

34. The Court has indicated that some of the factors listed above or other factors may be considered to be more important than others but no one factor is necessarily determinative and all may be considered depending on the case. The factors determined usually to be significant are as follows:

(a) the location of the debtor's headquarters or head office functions or nerve centre;

(b) the location of the debtor's management; and

(c) the location which significant creditors recognize as being the centre of the company's operations.

***Elephant*, paras. 28 and 30.**

35. In the Applicants' view, an analysis of the relevant factors in the Applicants' business demonstrates that the Applicants' COMI is Ontario for the reasons set out in paragraph 12 above.

Griffis Affidavit, at para. 20.

An Order Granting a Stay of Proceedings is Appropriate

36. Pursuant to section 11.02(3) of the CCAA, on an initial application the Court may make an order on any terms that it considers appropriate where the applicant satisfies the Court that circumstances exist that make such an order appropriate.

CCAA, section 11.02(3).

37. The fundamental purpose of the CCAA is to facilitate compromises and arrangements between companies and their creditors and enable the continuance of the companies seeking CCAA protection. The legislation is remedial in nature and, as such, is entitled to a liberal interpretation. Justice Farley in *Re Lehndorff General Partner Ltd.* stated as follows:

> The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA. ... The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and all of the creditors.

***Lehndorff General Partner Ltd (Re)*, 1993 CarswellOnt 183 (Gen. Div.) [Commercial List] at paras. 6, 7 and 10, Authorities, Tab 3.**

38. A stay of proceedings is essential for the continued operation of the Applicants' business since the FCMI Indebtedness is due and unable to be repaid at this time. The Applicants intend to undertake the SISP and continue discussions with its stakeholders with respect to a potential plan of arrangement. The purpose of the SISP and this Application is consistent with the fundamental purpose of the CCAA.

> **Griffis Affidavit, at para. 80.**

39. FCMI, supports this Application. The Proposed Monitor also supports the relief being sought by the Applicants and is of the view that the CCAA proceedings are appropriate.

> **Griffis Affidavit, at para. 82.**
>
> **Monitor's Pre-Filing Report of the Monitor dated May 8, 2013 [*Monitor's Pre-Filing Report*], at para. 35.**

40. For all of the above reasons, the test for an initial application under section 11.02(3) of the CCAA is met and the Applicants respectfully submit that granting them protection under the CCAA is appropriate in the circumstances.

(b) THE DIP FACILITY SHOULD BE APPROVED AND THE DIP CHARGE SHOULD BE GRANTED

41. The Applicants are seeking approval of the DIP Facility in the maximum principal amount of CDN$750,000.00.

> **Griffis Affidavit, at para. 92.**

42. Section 11.2 of the CCAA sets out the jurisdiction of this Court to grant the DIP Charge as follows:

> 11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge – in an amount that the court considers appropriate – in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> ...
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> > (a) the period during which the company is expected to be subject to proceedings under this Act;
> >
> > (b) how the company's business and financial affairs are to be managed during the proceedings;
> >
> > (c) whether the company's management has the confidence of its major creditors;
> >
> > (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
> >
> > (e) the nature and value of the company's property;
> >
> > (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
> >
> > (g) the monitor's report referred to in paragraph 23(1)(b), if any.
>
> **CCAA, section 11.2.**

43. In *Canwest*, this Court held that the following factors weigh in favour of granting DIP financing and a DIP charge pursuant to section 11.2 of the CCAA:

(a) the DIP Charge does not purport to prime any secured party who has not received notice of this application;

(b) the amount to be advanced under the DIP facility is appropriate and required, having regard to the debtor's cash-flow statement; and

(c) the charge does not secure an obligation that existed before the Order was made.

> ***Canwest Publishing Inc. (Re)* (2010), 63 C.B.R. (5th) 115 at paras. 42-45 (Ont. S.C.J. [Comm. List]) [*Canwest Publishing*], Commercial List Authorities Book, Tab 4.**
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> ***Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 at paras. 31¬35 (Ont. S.C.J. [Comm. List]) [*Canwest Global*], Applicants' Book of Authorities, Tab 5.**

44. In the present case, the DIP Charge does not purport to prime any secured party who has not received notice of this Application. The Monitor has confirmed that the amount to be advanced under the DIP Facility is appropriate and required, having regard to the Applicants' cash-flow statement. Further, the DIP Charge does not secure an obligation that existed before the Order would be made.

45. In deciding to approve the DIP Facility and the DIP Charge, the Court must also consider the factors listed in s. 11.2(4) of the CCAA. The following analysis demonstrates that the Applicants meet the requirements thereof:

(a) *the period during which the Applicants are expected to be subject to CCAA proceedings* – The Applicants are confident that the refinancing, recapitalization or sale of the Applicants' business that is the objective of this CCAA proceeding can be completed in short order;

(b) *how the Applicants' business and financial affairs are to be managed during the proceedings* – During the CCAA proceedings, the Applicants' business is to be managed by its existing management personnel with the oversight of the Monitor and the DIP Lender;

(c) *whether the Applicants' management has the confidence of its major creditors* – FCMI, the only secured creditor, supports this Application;

(d) *whether the DIP Facility would enhance the prospects of a viable compromise or arrangement being made in respect of the Applicants* – The DIP Facility will enhance the prospects of a viable compromise since it provides additional liquidity to the Applicants and the opportunity to work with the Monitor and the DIP Lender to achieve that objective;

(e) *the nature and value of the Applicants' property* – The cash flow forecast prepared by the Monitor indicates that the amount of the DIP Facility is appropriate in light of the nature and value of the Applicants' property;

(f) *whether any creditor would be materially prejudiced as a result of the security or DIP Charge* – No creditor would be materially prejudiced as a result of the DIP Charge; and

(g) *the Monitor's Report* – In its Pre-Filing Report dated May 8, 2013, the Monitor indicates its support for the approval of the DIP Facility and the granting of the DIP Charge.

Griffis Affidavit, paras. 84-85 and 92.

Monitor's Pre-Filing Report, paras. 25-26.

46. Accordingly, the Applicants respectfully request that the Court grant an Order approving the DIP Facility in the maximum principal amount of $750,000 on the terms described in the DIP Term Sheet and secured by the DIP Charge.

(c) THE ADMINISTRATION CHARGE AND D&O CHARGE SHOULD BE GRANTED

The Administration Charge

47. The Ghana Gold Group is seeking a priority charge on the assets, property and undertakings of the Ghana Gold Group (the "**Property**") in the maximum amount of $250,000 to secure the fees and disbursements of the Monitor and its counsel (the "**Administration Charge**"). The Administration Charge is proposed to rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise in favour of any person.

> **Griffis Affidavit, para. 95.**

48. Section 11.52 of the CCAA provides the Court the statutory jurisdiction to grant the Administration Charge and provides as follows:

> 11.52(1) Court may order security or charge to cover certain costs – On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge – in an amount that the court considers appropriate – in respect of the fees and expense of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

11.52(2) Priority – This court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

CCAA, sections 11.52(1) and (2).

49. In *Canwest Publishing Inc.*, Justice Pepall considered section 11.52 of the CCAA and identified the following non-exhaustive list of factors that may be considered by the Court when granting an administration charge:

(a) the size and complexity of the businesses being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.

***Canwest Publishing Inc. (Re)* (2010), 63 C.B.R. (5th) 115 (S.C.J.) [Commercial List] at para. 54, Authorities, Tab 4.**

50. The proposed Monitor supports the granting of and the amount of the Administration Charge.

Monitor's Pre-Filing Report, para. 24.

51. The Applicants respectfully submit that this is an appropriate case in which to grant an Administration Charge and that the amount of the Administration Charge is reasonable in the circumstances.

Directors' Charge

52. The Ghana Gold Group is seeking the granting of the Director's Charge in the amount of $50,000 as security for its indemnification of the directors and officers for liabilities imposed upon them after the date of the filing. The proposed Director's Charge would be secured by the Property and will rank behind the proposed DIP Charge and Administration Charge.

> **Griffis Affidavit, at para. 96.**

53. The Director's Charge is necessary for the successful restructuring of the Applicants, with the continued participation of the Ghana Gold Group's directors and officers.

54. Section 11.51 of the CCAA provides the Court the statutory jurisdiction to grant the Director's Charge and provides as follows:

> 11.51(1) *Security or charge relating to director's indemnification* - On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge – in an amount that the court considers appropriate – in favour of any director or officer of the company to indemnify the director or officer against the obligations and liabilities that they may incur as a director or officer of the company after commencement of proceedings under this Act.
>
> 11.51(2) *Priority* – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> 11.51(3) *Restriction* – indemnification insurance – The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> 11.51(4) *Negligence, misconduct or fault* – The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's

gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

CCAA, section 11.51.

55. In approving a similar charge in *Re Canwest Global Communications Corp.*, Justice Pepall applied s. 11.51 of the CCAA and noted that the Court must evaluate the propriety of the amount of the charge in light of obligations and liabilities that may be incurred by the directors and officers after the commencement of proceedings. Justice Pepall held as follows:

> The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protections against liabilities they could incur during the restructuring: *Re General Publishing Co.* [(2003), 39 C.B.R. (4^{th}) 216)]. Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.
>
> ***Canwest Global Communications Corp. (Re)*** **(2009), 59 C.B.R. (5th) 72 (S.C.J.) [Commercial List] at para. 48, Authorities, Tab 5.**

56. In this case, the Applicants are seeking a Director's Charge in the amount of $50,000. The Proposed Monitor supports the granting of and the amount of the Director's Charge.

Griffis Affidavit, at para. 96.

57. The Applicants respectfully submit that this is an appropriate case to grant a Director's Charge and that the amount of the Director's Charge is reasonable in the circumstances.

(d) THE SALE AND INVESTOR SOLICITATION PROCESS SHOULD BE APPROVED

58. The Applicants are seeking an Order approving the SISP, which has been developed in conjunction with the Proposed Monitor and the DIP Lender.

Griffis Affidavit, paras. 84-85.

59. To the extent the SISP may result in a sale of the Applicants' business as a going concern, such a sale would be consistent with the objectives of the CCAA, and the Court therefore has the jurisdiction to authorize such a sale under the CCAA even in the absence of a plan of arrangement or compromise.

***Consumers Packaging Inc., Re* (2001), 27 C.B.R. (4th) 197 (Ont. C.A.), at paras. 5 and 9, Applicants' Book of Authorities, Tab 6.**

60. In the context of a motion for approval of a sale process in a receivership, Justice Brown summarized the jurisprudence on the approval of sales and investment solicitation processes as follows:

> [6] Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties. Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:
>
> (i) the fairness, transparency and integrity of the proposed process;
>
> (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,

> (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.
>
> ***CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, (2012) 2012 ONSC 1750 (Ont. S.C.J. [Comm. List]) [*blutip Power*], at para. 6, Applicants' Book of Authorities, Tab 7.**

61. The following, when considered in relation to the criteria set out in *blutip Power*, support the granting of approval of the SISP:

    (a) *The fairness, transparency and integrity of the proposed process.* The SISP will be overseen by the Proposed Monitor.

    (b) *The commercial efficacy of the proposed process in light of the specific circumstances facing the company.* Given the limit to the DIP Facility, and given the extensive marketing already done, the SISP is both the best option, and a very effective option for preserving the business as a going concern.

    (c) *Whether the investor solicitation process will optimize the chances, in the particular circumstances, of securing the best possible price for the equity rights being offered or credit being obtained.* The SISP will widely market the investment opportunity in the Applicants, and build on the extensive marketing already done by the Ghana Gold Group. By providing a bidding process, the SISP will reveal the best of any investment offers available.

    (d) *Whether the Monitor has approved the process.* The Proposed Monitor supports the approval of the SISP.

    Griffis Affidavit, paras. 86-90.

    Monitor's Report, para. 32.

62. Accordingly, the Applicants respectfully request that the Court grant an Order approving the SISP.

PART V - RELIEF REQUESTED

63. The Applicants respectfully request that this Honourable Court grant an Order substantially in the form of the draft Initial Order attached at Tab 4 to the Applicants' Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of May, 2013.

Thornton Grout Finnigan LLP
By: Kyla E.M. Mahar (LSUC# 44182G)

Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

No.	Case
1.	*Re Angiotech Pharmaceuticals Ltd.*, 2011 CarswellBC 124 (S.C.)
2.	*Re Massachusetts Elephant & Castle Group Inc.*, 2011 CarswellOnt 6610 (S.C.J.)
3.	*Lehndorff General Partner Ltd (Re)*, 1993 CarswellOnt 183 (Gen. Div.) [Comm. List]
4.	*Canwest Publishing Inc. (Re)* (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Comm. List])
5.	*Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Comm. List])
6.	*Consumers Packaging Inc., Re* (2001), 27 C.B.R. (4th) 197 (Ont. C.A.)
7.	*CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, (2012) 2012 ONSC 1750 (Ont. S.C.J. [Comm. List])

SCHEDULE "B"
RELEVANT STATUTES

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36 as amended

2. Definitions

(1) In this Act, [...]

"debtor company"

"debtor company" means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) (c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or

(d) (d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent.

[...]

Application

3.(1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

11.02 (3) Burden of proof on application

The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

Security or charge relating to director's indemnification

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Centre of debtor company's main interests

45. (2) For the purposes of this Part, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

2. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3

Definitions

2. In this Act, [...]

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

[...]

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **GHANA GOLD CORPORATION, GHANA GOLD INC., COASTAL EXPLORATIONS LIMITED and ABURI GOLDFIELDS GHANA LTD.**

Applicants

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