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U.S. BANKRUPTCY COURT
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Apollo Gold, Inc.;

10
11 **IN THE UNITED STATES BANKRUPTCY COURT**
12 **FOR THE DISTRICT OF NEVADA**

13 In re:) Case Nos. BK-N-98-30088-GWZ through
14) BK-N-98-30105-GWZ
14 PEGASUS GOLD CORPORATION, a) (Jointly Administered)
15 Nevada corporation; and related entities,)
16 Debtors.) Date of Hearing: May 17, 1999
Time of Hearing: 9:00 a.m.

17
18 **APPLICATION FOR AN ORDER AUTHORIZING THE RETENTION AND**
19 **EMPLOYMENT OF WITHERSPOON, KELLEY, DAVENPORT & TOOLE ON A**
20 **NUNC PRO TUNC BASIS AS OF JANUARY 7, 1999; FIRST AND FINAL**
21 **COMPENSATION APPLICATION FOR WITHERSPOON,**
22 **KELLEY, DAVENPORT & TOOLE**

21 This application ("Application") for the retention and employment of Witherspoon,
22 Kelley, Davenport & Toole (the "Witherspoon Firm") is brought by Apollo Gold, Inc.
23 ("Applicant") requesting this Court enter an order authorizing, on a nunc pro tunc basis, the
24 employment of the Witherspoon Firm as special counsel, and for an award of compensation for
25 professional fees and for reimbursable expenses from the period of January 1, 1999 to February
26 5, 1999, based upon the First And Final Compensation Application For Witherspoon, Kelley,
27 Davenport & Toole ("Fee Application").
28

1 This Application is based on the memorandum of points and authorities attached hereto,
2 the Declaration of Ned M. Barnes ("Barnes Declaration") filed contemporaneously with this
3 Application, the papers and pleadings on file in these above-referenced bankruptcy cases, and
4 any argument of counsel presented at the time of hearing on this Application.

5 DATED this 5th day of April, 1999.

6 Respectfully submitted,

7
8 By Donald W. Vagstad ^{Wm. R. P. H. #01463}
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15 Attorney for Apollo Gold, Inc.

16 **POINTS AND AUTHORITIES**

17 **I.**

18 **STATEMENT OF FACTS**

19 1. On January 16, 1998 (the "Petition Date"), the Debtors commenced their
20 reorganization case by filing a voluntary petition for relief pursuant to Chapter 11 of the
21 Bankruptcy Code.

22 2. The Applicant seeks to have the Witherspoon Firm's retention as special counsel, on a
23 nunc pro tunc basis, for advice and the issuance of legal opinions to Debtors with regard to
24 acquiring initial start-up financing for Apollo Gold, Inc.

25 3. The compensation for members and associates of the Witherspoon Firm were on an
26 hourly basis as delineated in the Barnes Declaration, subject to the approval of this Court.
27
28

1 4. As provided by the Barnes Declaration, such legal services were provided by the
2 Witherspoon Firm at the request of the Debtors on an emergency basis, as the closing of the
3 financing and credit facility transactions were imminent.

4 5. The Witherspoon Firm has particular expertise in rendering legal opinions with regard
5 to such financing transactions as required by the Debtors.

6 6. To the best of Applicant's knowledge and based upon the Barnes Declaration, the
7 Witherspoon Firm does not represent an interest adverse to the estates, and its employment
8 would be in the best interests of the Debtors.

9 7. The Witherspoon Firm incurred post-petition fees of \$13,862.00.

10 8. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.

11
12 **II.**
13 **LEGAL ARGUMENT**

14 **A. REQUEST FOR AUTHORITY TO RETAIN AND EMPLOY THE**
15 **WITHERSPOON FIRM ON A NUNC PRO TUNC BASIS PURSUANT TO**
16 **SECTION 327 AND 328(A) OF THE BANKRUPTCY CODE AND BANKRUPTCY**
17 **RULE 2014(A)**

18 Section 327 of the Bankruptcy Code provides, in pertinent part:

19 (a) Except as otherwise provided in this section, the trustee,¹
20 with the Court's approval, may employ one or more attorneys,
21 accountants, appraisers, auctioneers, or other professional persons,
that do not hold or represent an interest adverse to the estate, and
that are disinterested persons, to represent or assist the trustee in
carrying out the trustee's duties under this title. . . .

22 (e) The trustee, with the court's approval, may employ, for
23 a specified special purpose, other than to represent the
24 trustee in conducting the case, an attorney that has
25 represented the debtor, if in the best interest of the
26 estate, and if such attorney does not represent or hold
any interest adverse to the debtor or to the estate with
respect to the matter on which such attorney is to be
employed.

27
28 ¹ Pursuant to Section 1107(a) of the Bankruptcy Code a debtor-in-possession has the same rights as a trustee except for certain enumerated exceptions which do not include the authority to employ professionals pursuant to Section 327.

1 Section 328(a) provides, in pertinent part:

2 the trustee . . . may employ a professional under section 327 . . . of
3 this title . . . on any reasonable terms and conditions of
4 employment, including a retainer, an on hourly basis . . .

5 Bankruptcy Rule 2014(a) provides, in pertinent part:

6 An order approving the employment of attorneys . . . pursuant to
7 §327 . . . of the Code shall be made on application . . . The
8 Application shall state the specific facts showing the necessity for
9 employment, the name of the person to be employed, the reasons
10 for the selection, the professional services to be rendered, and any
11 proposed arrangement for compensation . . . and all of the person's
12 connections with the debtor, creditor, and any other party in
13 interest . . .

14 In this case, the Debtors required the expertise of the Witherspoon Firm to furnish advice,
15 and issue the legal opinions necessary to obtain the initial start-up financing for Apollo Gold,
16 Inc., as set forth in the Barnes Declaration.

17 Debtors also required the Witherspoon Firm to provide such legal opinions on an
18 emergency basis, as further delineated by the Barnes Declaration. If such legal opinions were not
19 furnished on such basis, it is likely that Debtors would not have met the requirements of the
20 parties supplying the financing and credit facilities to Apollo Gold, Inc., and thus not enabling
21 Debtors to satisfy the conditions precedent required by Debtor's Second Amended Joint Plan Of
22 Reorganization Dated As Of September 9, 1998 ("Joint Plan") for such Plan to become effective.

23 The Witherspoon Firm is well suited by experience and expertise to provide such
24 services. The Applicant, based on the Barnes Declaration, believes the Witherspoon Firm does
25 not hold or represent any interest adverse to the Debtors.

26 **B. REQUEST FOR APPROVAL OF FIRST AND FINAL COMPENSATION**
27 **APPLICATION FOR WITHERSPOON KELLY, DAVENPORT & TOOLE**

28 On behalf of the Witherspoon Firm, the Applicant requests the award of final
compensation for professional fees incurred from the period of January 5, 1999, to February 5,

1 1999 (the "Application Period"), payable by PGC (as defined in the Joint Plan) in accordance
2 with Section 5.4(a) of the Joint Plan.

3 The Witherspoon Firm seeks the payment of final compensation in the amount of
4 \$13,862.00, as provided by the Barnes Declaration, representing 100% of the fees for services
5 rendered during the Application Period. Members of the Witherspoon Firm expended 80.5 hours
6 in the provision of services to the Debtors during the Application Period. A copy of the billing
7 statement is attached to the Barnes Declaration as Exhibit "1."

9 As set forth above, the Witherspoon Firm furnished advice, and issued the legal opinions
10 necessary to obtain the initial start-up financing for Apollo Gold, Inc. on an emergency basis. In
11 this way, the services provided greatly benefited the estate.

12 Neither the Witherspoon Firm nor any members of the Witherspoon Firm has any
13 agreement or understanding of any kind to divide, payover, or share with any other person,
14 except as among the members of the Witherspoon Firm, any portion of the fees or expenses to be
15 awarded pursuant to this fee application.
16

17 THEREFORE, Applicant, on behalf of the Witherspoon Firm, requests that the Debtors
18 pay the compensation for services rendered during the Application period as set out in the Fee
19 Application and as provided in the Barnes Declaration.

20
21 **III.**
CONCLUSION

22 Based upon the foregoing, the Applicant respectfully requests that this Court 1) enter an
23 order authorizing the Debtors to retain and employ the Witherspoon Firm as on a nunc pro tunc
24 basis as of January 5, 1999; 2) enter and order for authorizing Debtors to pay the Witherspoon
25 firm as provided by the Fee Application; and 3) grant such other and further relief as the court
26 may deem proper.
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