



Ontario  
Securities  
Commission

Commission des  
valeurs mobilières  
de l'Ontario

P.O. Box 55, 19<sup>th</sup> Floor  
20 Queen Street West  
Toronto ON M5H 3S8

CP 55, 19<sup>e</sup> étage  
20, rue queen ouest  
Toronto ON M5H 3S8

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**IN THE MATTER OF THE *SECURITIES ACT*,  
R.S.O. 1990, c. S.5, AS AMENDED**

**- AND -**

**IN THE MATTER OF MULTILATERAL INSTRUMENT 61-101 –  
PROTECTION OF MINORITY SECURITY HOLDERS IN SPECIAL  
TRANSACTIONS**

**- AND –**

**IN THE MATTER OF A PROPOSED INSIDER BID FOR MAG SILVER CORP.  
BY FRESNILLO PLC**

(Sections 104 and 127 of the Securities Act, Rule 4.3 of the Commission's Rules of Procedure)

**ORAL RULING AND REASONS FOR DECISION ON A  
DOCUMENTARY DISCLOSURE MOTION**

Hearing: June 16-17, 2009

Reasons: August 31, 2009 (Written Decision in support of Oral Ruling delivered on June 18, 2009)

Panel: Lawrence E. Ritchie Vice-Chair

Appearances: J. Sasha Angus For Staff of the Commission  
Cullen Price  
Shannon O'Hearn

Andrea Burke For MAG Silver Corp.

L. David Roebuck For Fresnillo plc and Fresbal Investments  
Melissa J. MacKewn

The following text has been prepared for the purpose of publication in the Ontario Securities Commission Bulletin and is based on excerpts of the transcript of the hearing. The excerpts have been edited and supplemented and the text has been approved by the Chair of the Panel for the purpose of providing a public record of the decision.

## ORAL RULING AND REASONS FOR DECISION

### I. BACKGROUND

[1] MAG Silver Corp. (“**MAG**” or the “**Target**”), is the potential target of a intended insider take-over bid by Fresnillo plc, through its wholly owned subsidiary, Fresbal Investments Ltd. (collectively, “**Fresnillo**” or the “**Bidder**”). Fresnillo announced its intended bid by press conference on December 1, 2008. Although more than six (6) months had passed since the announcement of its intention, Fresnillo had not yet made a formal offer.<sup>1</sup>

[2] Multilateral Instrument 61-101 – Protection of Minority Security Holders in Special Transactions (2008), 31 O.S.C.B. 1321 (“**MI 61-101**”) requires an insider bidder, at its own expense, to obtain a formal valuation of the target by a qualified and independent valuator, and requires the target to determine who the valuator will be, supervise the preparation of the formal valuation, and use its best efforts to ensure that the formal valuation is completed and provided to the bidder in a timely manner. This requirement is intended to address the fact that an insider bidder may have an informational advantage over the shareholders of the target. Both the bidder and the target are required to cooperate in obtaining the formal valuation. Both the bidder and the target may comment on the formal valuation in their respective circulars.

[3] In accordance with MI 61-101, MAG established an Independent Committee, which selected and retained Toronto Dominion Securities Inc. (“**TDSI**”) as Independent Valuator (“**Independent Valuator**”), and Scott Wilson Roscoe Postle Assoc. (“**SWRPA**”) as Technical Advisor to the Independent Valuator, to prepare an Independent Valuation of MAG (the “**Valuation**”).

[4] On February 1, 2009, MAG’s Independent Committee suspended the Valuation on the basis that Fresnillo had failed to provide the Independent Valuator with certain material undisclosed documents and information in the exclusion possession, power or control of Fresnillo (the “**Merits Documents**”).

[5] On May 8, 2009, MAG brought an application under sections 104 and 127 of the Ontario Securities Act, R.S.O. 1990, c. S.5, as amended (the “**Act**”). In its application, MAG sought an order that Fresnillo provide the Merits Documents to the Independent Valuator and enjoining Fresnillo from taking any steps to proceed with the intended bid or any other bid for MAG until the completion of the Valuation (the “**Application**”). MAG submits that Fresnillo is delaying the Valuation, and that the delay is causing serious financial and other detriments to MAG’s shareholders. Fresnillo submits that MAG is delaying the Valuation, and that at least some of the Merits Documents do not exist and are, in any event, beyond the scope of what it is required to provide under MI 61-101.

[6] Fresnillo has a 56 percent interest in a Mexican joint venture company (the “**Juanicipio Joint Venture**”) and operates it pursuant to a **Joint Venture Agreement**. MAG owns the remaining 44 percent of the Juanicipio Joint Venture. MAG submits that Fresnillo has complete control over all information concerning the development of the Joint Venture Property.

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<sup>1</sup> On June 22, 2009, Fresnillo announced that it would not proceed with its intended bid.

[7] The Juanicipio Joint Venture owns a mining concession in respect of a property in Mexico that includes three silver veins: the Jarillas Vein, the Saucito Vein, and the Valdecañas Vein. MAG submits that the Valdecañas Vein “is widely considered to be one of the world’s most significant undeveloped silver deposits as a result of its scale, grade and, importantly, its close proximity to substantial existing infrastructure.” Fresnillo wholly owns and operates a nearby mine (the “**Fresnillo Mine**”), and wholly owns lands adjacent to the Joint Venture Property.

[8] In the Application, MAG submits that the Independent Valuator cannot ascertain the true value of MAG’s shares unless it has information known only to Fresnillo about the development and development potential of the adjacent lands owned by Fresnillo. In particular, MAG alleges that Fresnillo is in the course of developing a new mine (“**Fresnillo II**”) adjacent to the Fresnillo Mine. MAG submits that material undisclosed information in Fresnillo’s possession relating to the development of Fresnillo II is critical to permit the Independent Valuator to produce a Valuation of MAG that complies with MI 61-101. In the Application, MAG submits that its shares cannot be valued solely by valuing its 44 percent interest in the Juanicipio Joint Venture.

[9] Fresnillo denies that the Merits Documents exist, and submits that, in any event, MI 61-101 only requires it to disclose information that it possesses about the Juanicipio Joint Venture by virtue of being an insider of MAG. Fresnillo submits that it has fulfilled its obligations under MI 61-101 and is not required to disclose proprietary information about its business and/or about the lands adjacent to the Joint Venture Property that it does not possess in its capacity as an insider of MAG.

[10] The Application is scheduled to be heard by the Commission on June 23, July 7, 8 and 10, 2009 (the “**Application Hearing**”).

[11] Within the context of the Application, MAG brought a prehearing disclosure motion (the “**Motion**”) pursuant to Rule 4.3 of the Commission’s *Rules of Procedure* (2009), 32 O.S.C.B. 10 (the “**Rules**”), and section 5.4 of the *Statutory Powers Procedure Act*, R.S.O. c. S.22, as amended (the “**SPPA**”).

[12] MAG’s request for pre-hearing disclosure was first set out in paragraph 3 of the Application, but has subsequently been revised. The Motion before me concerns the Further Revised and Clarified Scope of Documentary Disclosure Requested by MAG, which is Schedule “A” to Exhibit “A” of the affidavit of Debra Bilous dated June 15, 2009 (the “**June 15, 2009 Disclosure Request**”). The June 15, 2009 Disclosure Request is included in these reasons as **Appendix A**.

[13] MAG submits that it requires the documents included in the June 15, 2009 Disclosure Request (the “**Requested Documents**”) to prepare its case on the Application, and that these documents more than satisfy the “semblance of relevance” or “arguable relevance” test known in civil procedure. Specifically, MAG submits that it requires the Requested Documents in order to contest Fresnillo’s claim that certain of the Merits Documents do not exist, and that the Commission will not be in a position to order disclosure of the Merits Documents at the Application Hearing unless it is satisfied that the documents exist. MAG further submits that the order requested falls within the Commission’s authority to order pre-hearing disclosure under the Rules and the SPPA, and that *Sears Canada Inc. et al.* (2006), 29 O.S.C.B. 6147 (“**Sears**”) and

*Re Hudbay Minerals Inc.* (2009), 32 O.S.C.B. 4406 (“**Hudbay**”) provide precedents for ordering pre-hearing disclosure of arguably relevant documents in the take-over bid context.

[14] Fresnillo submits that the requested order is over-broad and is akin to a civil search warrant. Fresnillo argues that MAG is on a “fishing expedition”, is motivated to defeat or delay the bid and is unfairly trying to obtain the Merits Documents in advance of the Application Hearing. Fresnillo submits that *Sears* and *Hudbay* are not helpful because, among other reasons, the orders in *Sears* were made on consent and the order in *Hudbay*, which was made at a pre-hearing conference, included no detail about the scope of disclosure sought or ordered. Further, Fresnillo submits that the cost and inconvenience of complying with the order sought in this case would be overwhelming and would far exceed any benefit to MAG, to the process and to the public.

[15] Staff of the Commission (“**Staff**”) agrees with MAG that the Commission has authority to order disclosure of the Requested Documents. Staff further submits that the Commission will not be able to fully consider the issues before it in the Application Hearing if the Motion is denied. Staff also urges me to address the issues raised by MAG as a pre-hearing matter, prior to the hearing of the merits of the Application. Staff argues that further delay will ensue, leading to further shareholder uncertainty if the issues raised by MAG in this motion are not resolved at this time.

## **II. REASONS AND DECISION**

### **A. The Motion and the Application**

[16] This Motion is not about the merits of the Application. The dispute about the nature and scope of Fresnillo’s duty to disclose documents and information to the Independent Valuator pursuant to MI 61-101 (having been raised by the Application) will be heard and decided by a quorum of the Commission in accordance with subsections 3(11) and 3.5(3) of the Act. Subsection 3(11) states that two members of the Commission constitute a quorum. Despite subsection 3(11), subsection 3.5(3) allows the Commission “to authorize one member of the Commission to exercise any of the powers and perform any of the duties of the Commission, except the power to conduct contested hearings on the merits, and a decision of the member shall have the same force and effect as if made by the Commission.” My decision and these Reasons address only MAG’s June 15, 2009 Disclosure Request and not the “contested hearing on the merits”.

### **B. The Commission’s Authority to Order Pre-Hearing Disclosure of the Requested Documents**

[17] I am satisfied that the Commission has authority to order pre-hearing disclosure of the Requested Documents pursuant to the Commission’s Rules and the SPPA.

[18] I note, first of all, that section 12 of the SPPA authorizes the Commission to “require any person, including a party, by summons”,

- (a) to give evidence on oath or affirmation at an oral or electronic hearing;
- and

- (b) to produce in evidence at an oral or electronic hearing documents and things specified by the tribunal,  
  
relevant to the subject-matter of the proceeding and admissible at a hearing.

[19] The Commission's summonses are issued under the authority of the SPPA and in accordance with Rule 4.7, which states:

- (1) At the request of a party, a summons to a witness may be issued pursuant to section 12 of the SPPA.
- (2) The issuance of or a refusal to issue a summons may be reviewed by a Panel by motion filed in accordance with Rule 3 [Motions].
- (3) Once a summons is served, it is effective for the duration of the hearing as long as the witness is advised of the adjourned dates.

[20] Accordingly, MAG could formally request a summons requiring Fresnillo to produce the Requested Documents at the Application Hearing, and in response, Fresnillo could bring a Motion to challenge the summons. Given the imminent commencement of the Application Hearing, this would likely result in an adjournment of the hearing of an Application in which each party submits that the other is delaying the Valuation required by MI 61-101.

[21] Section 5.4 of the SPPA gives the Commission power to order pre-hearing disclosure except for privileged information. The relevant provision in this Motion is subsection 5.4(1), which states:

- 5.4(1) If the tribunal's rules made under section 25.1 deal with disclosure, the tribunal may, at any stage of the proceeding before all hearings are complete, make orders for,
  - (a) the exchange of documents;
  - (b) the oral or written examination of a party;
  - (c) the exchange of witness statements and reports of expert witnesses;
  - (d) the provision of particulars;
  - (e) any other form of disclosure.

[22] The Commission's Rules, made under section 25.1 of the SPPA, deal with disclosure in Rule 4. For example, the Commission's Rule 4.3(1) requires each party to a proceeding to "deliver to every other party copies of all documents that the party intends to produce or enter as evidence at the hearing . . ." MAG's June 15, 2009 Disclosure Request is not limited to documents on which Fresnillo intends to rely; it extends to documents which MAG submits are relevant to the Application and may tend to support it. Therefore, the request is not explicitly authorized by the Rules.

[23] This notwithstanding, I am satisfied that the Commission has power to order disclosure of the documents requested in the June 15, 2009 Disclosure Request.

[24] MAG relies on *Ontario Human Rights Commission v. Dofasco Inc.* (2001), 57 O.R. (3d) 693 (“*Dofasco*”), in which the Ontario Court of Appeal stated:

Section 5.4(1) of the *Statutory Powers Procedure Act*, which confers power on the board to “make orders for (a) the exchange of documents”, should be read as meaning the exchange of documents to carry out the basic purposes of pre-hearing disclosure and so should not be read as confined to documents on which a party intends to rely.

[25] In my view, this statement from *Dofasco* is persuasive support for MAG’s position in the Motion.

[26] Moreover, I find MAG’s interpretation to be consistent with the purposes and scheme of the Rules and the SPPA. For example, Rule 4.2 gives the Commission broad discretion to make appropriate disclosure orders. It states:

At any stage in a proceeding, the Panel may order that a party:

- (a) provide to another party and to the Panel any particulars that the Panel considers necessary for a full and satisfactory understanding of the subject of the proceeding; and
- (b) make any other disclosure required by this Rule, within the time limits and on any conditions that the Panel may specify.

[27] In interpreting the Rules, I adopt the principle set out in Rule 1.2(3), which states:

The Rules shall be construed to secure the most expeditious and least expensive determination of every proceeding before the Commission on its merits, consistent with the requirements of natural justice.

[28] Rule 1.2(3) is consistent with section 2 of the SPPA, which is as follows:

This Act, and any rule made by a tribunal under subsection 17.1(4) [costs] or section 25.1 [practice and procedure], shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits.

[29] Moreover, Rule 1.4 sets out the Commission’s power to make procedural orders in the course of a proceeding. The relevant provisions state:

- (2) A Panel may issue procedural directions or orders with respect to the application of the Rules in respect of any proceeding before it, and may impose any conditions in the direction or order as it considers appropriate.

- (3) A Panel may waive or vary any of the Rules in respect of any proceeding before it, if it is of the opinion that to do so would be in the public interest or that it would otherwise be advisable to secure the just and expeditious determination of the matters in issue.
- (4) In considering a request to waive or vary any of the Rules or to hold a hearing on an expedited basis, a Panel may consider factors including:
  - (a) the nature of the matters in issue;
  - (b) whether adherence to the time periods set out in Rules would be likely to cause undue delay or prejudice to any of the parties;
  - (c) costs; and
  - (d) any other factors a Panel considers relevant in the public interest.

[30] Rule 1.4 is consistent with and reflects section 25.0.1 of the SPPA, which states as follows:

A tribunal has the power to determine its own procedures and practices and may for that purpose,

- (a) make orders with respect to the procedures and practices that apply in any particular proceeding; and
- (b) establish rules under section 25.1.

[31] I conclude that the Commission's Rules and the SPPA authorize me to order pre-hearing disclosure of the Requested Documents.

### **C. Application of these Principles to this Motion**

[32] I am satisfied that the Requested Documents are relevant to the issues in the Application.

[33] MI 61-101 imposes a unique and inevitably uncomfortable obligation on a target company to oversee a valuation of itself, with full knowledge that the valuation will be used to the detriment of the incumbent board, hitherto supported by the shareholders. The shareholders have a right, in the circumstances of a hostile insider bid, to ensure that that valuation is founded on a sufficient fact base. In the circumstances of this case, it is asserted by the special committee of the Target that the inside Bidder has, within its possession, salient facts and information which it needs to ground a proper valuation. Without determining whether this assertion is true, the Applicant seeks, and in my view, is entitled, to put forward its best case in its endeavour, since, if the assertion is true, the information sought will advance the matter to the benefit of the shareholders of the Target. Fairness to the shareholders requires that the appropriate information is made available to the Independent Valuator. However, the pursuit of this information should be reasonable and not impose an unfair burden on the Bidder. Accordingly, it is my task to balance the ability of the special committee to assess what information exists, against fairness to the bidder, and the reasonableness of the request.

[34] I agree with MAG and Staff that an order for pre-hearing disclosure in this case is consistent with the Commission's public interest role in resolving take-over bid disputes. These disputes are usually contentious, time sensitive and require quick decisions from the Commission to ensure the purposes of our regime are met – namely, ensuring fairness to shareholders of the target.

[35] At the same time, I recognize and am concerned about the impact that an onerous pre-hearing disclosure order on a pre-hearing motion of this kind may have on the Bidder in this case and bidders in general.

[36] In my consideration of the public interest, even if the Requested Documents are relevant to the matters at issue in the Application, I must also weigh the costs to MAG of not receiving requested disclosure of the Requested Documents against the costs Fresnillo will incur in complying with the disclosure order and the risk that these costs will be incurred unnecessarily, in the event the Commission ultimately accepts Fresnillo's position on the Application. MAG has not offered to pay Fresnillo's costs of disclosing the Requested Documents or undertaken to pay such costs in the event that the Commission determines that MAG is not entitled to the Merits Documents. Nonetheless, in my view, the public interest in fair and efficient resolution of the Application favours pre-hearing disclosure.

#### **D. The Requested Documents**

[37] I turn now to the specifics of the June 15, 2009 Disclosure Request.

[38] I am satisfied that paragraph 1(a), as qualified by MAG's clarification that the request pertains only to Jaime Lomelin, David Giles, Octavio Alvidrez Sr., Mario Arreguin, Manuel Luevanos, Sadot Gomez, Javier Garcia Fons, Andreas Raczynski, Ruben Pella (collectively, the "**Nine Custodians**"), Carlos Del Hoyo, and anyone else who was substantially involved in Fresnillo's responding to information requests from TDSI, SWRPA or Staff, is a reasonable request that is unlikely to prove unduly onerous to Fresnillo.

[39] I am also satisfied that paragraph 1(b), as qualified by MAG's agreement, at the hearing of the Motion, that the request concerns only the Saucito, Jarillas, and Valdecañas veins, is a reasonable request that is unlikely to prove unduly onerous for Fresnillo.

[40] I make the same finding with respect to subparagraphs (ii) through (vii) of paragraph 1(c), again, taking note of the clarifications noted by MAG in the June 15, 2009 Disclosure Request.

[41] Accordingly, the Motion is granted with respect to paragraphs 1(a), 1(b), and subparagraphs (ii) through (vii), inclusive, of paragraph 1(c) of the June 15, 2009 Disclosure Request, subject to the clarifications described above.

[42] However, with respect to subparagraph (i) of paragraph 1(c), I am concerned about the breadth of the request made in respect of emails of the Nine Custodians, the uncertain costs associated with it, and the fact that MAG has not offered to cover or contribute to those costs, even on a conditional basis, depending on the outcome of the proceeding on the merits. I am not satisfied that ordering disclosure of these documents is in the public interest. The Motion is



denied with respect to subparagraph (i) of paragraph 1(c) of the June 15, 2009 Disclosure Request.

[43] With respect to paragraph 2 of the June 15, 2009 Disclosure Request, I will make the requested direction consistent with Ms. Burke's submission, on that point, requesting Fresnillo to distribute a "preservation notice" to its employees, if the parties do not agree otherwise.

[44] Further, I have considered MAG's submission at the hearing of the Motion that it is prepared to agree to appropriate confidentiality protections for the documents disclosed in compliance with this Order, including that the documents will not be provided to the Independent Valuator. I note, as well, MAG's submission that the intended use of the documents is for cross-examination of Fresnillo's witnesses at the hearing.

[45] MAG had originally asked that disclosure be completed by June 22, 2009. At that time, it was anticipated that the Motion hearing would conclude by the end of the day on June 16, 2009. It is now June 18, and a deadline of June 22 would only give Fresnillo two business days to comply with the order. In all the circumstances, it is my view that it is reasonable to give Fresnillo at least a week to comply with the Order. For that reason, Fresnillo shall be required to comply with the Order by 5:00 p.m. on June 26, 2009, unless the parties agree otherwise.

[46] I am asking the parties to work out the specific terms of this Order, particularly with respect to confidentiality, and limitations and restrictions on the access to and use of the documents, and provide the Secretary's Office with a draft order for me to consider. If there are any unresolved matters, I can be spoken to about them, preferably on June 23, 2009.

**DATED IN TORONTO** as of 18th day of June, 2009, this August 31, 2009.

*"Lawrence E. Ritchie"*

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Lawrence E. Ritchie

## APPENDIX A: THE JANUARY 15, 2009 DISCLOSURE REQUEST

### SCHEDULE "A" - FURTHER REVISED AND CLARIFIED SCOPE OF DOCUMENTARY DISCLOSURE REQUESTED BY MAG

1.

(a) to produce all documents in its possession, power, custody or control, relating to Fresnillo's responses to requests for information made by TD Securities Inc. (the "Independent Valuator"), Scott Wilson Roscoe Postle Associates Inc. ("Scott Wilson RPA") or by Staff of the Commission ("Staff") **[By way of further clarification/refinement, the electronic documents/data search is to be restricted to the following custodians: Jaime Lomelin; David Giles; Octavio Alvidrez, Sr.; Mario Arreguin; Manuel Luevanos; Sadot Gomez; Javier Garcia Fons; Andreas Raczynski; Ruben Pella (collectively, the "Nine Custodians"); and Carlos Del Hoyo; and any other individuals (unknown to MAG, but presumably easily identifiable by Fresnillo), if any, who were substantially involved in Fresnillo's responses to such requests.]**;

(b) to produce a complete list of all consultants and contractors (the "Consultants and Contractors") that have been involved in providing services or advice in connection with, or that have otherwise been engaged in, the development of a further underground mine adjacent to the existing Fresnillo mine referred to as the "Fresnillo II development project" in Fresnillo's May 2008 prospectus, which development project includes any or all of the Saucito Vein, Jarillas Vein, Sta. Natalia Vein, Madroño Vein, Mezquite Vein, Valdecañas Vein and Juanicipio Vein, and which development project is delineated as "Fresnillo II" on the map (prepared by Fresnillo) which is attached hereto as Schedule A (referred to herein as "Fresnillo II"), including:

- (i) SRK Consulting;
- (ii) Wardrop;
- (iii) Industrias Petioles, S.A.B. de C.V.; and
- (iv) SNC Lavalin;

(c) to produce copies of the following documents in its possession, power, custody or control relating to, referring to or otherwise concerning the development of Fresnillo II **[We note that the foregoing qualifies all categories of documents in the list below]**:

- (i) the correspondence and other communications, including letters, memoranda and e-mails (with attachments), from the period

beginning March 1, 2008 to the date of the Order (the "Period") to and from the following individuals:

- (A) Jaime Lomelin;
- (B) David Giles;
- (C) Octavio Alvidrez, Sr.;
- (D) Mario Arreguin;
- (E) Manuel Luevanos;
- (F) Sadot Gomez;
- (G) Javier Garcia Fons;
- (H) Andreas Raczynski;
- (I) Ruben Pena;
- (J) ~~any secretaries and/or assistants to the individuals listed above;~~

**[By way of clarification/refinement: The scope of custodians is reduced to remove secretaries and/or assistants to these nine individuals.]**

- (ii) all documents provided to the syndicate of underwriters (comprised of JP Morgan Cazenove Limited, Canaccord Adams Limited, Citigroup Global Markets U.K. Equity Limited, J.P. Morgan Securities Ltd. and UBS Limited) in connection with Fresnillo's initial public offering (the "IPO"); **[By way of clarification: MAG confirms that it is only seeking production of documents that were provided to the underwriters in connection with their due diligence related to Fresnillo II and the disclosure that was made about Fresnillo II in Fresnillo's May 2008 IPO Prospectus. These are the documents that were provided by Fresnillo to its underwriters to justify the statements it made in its May 2008 IPO Prospectus relating to the development of Fresnillo II. This should be a straightforward and simple exercise and such documents should be readily available both to Fresnillo and to Fresnillo's counsel who acted with respect to the IPO.]**

- (iii) all due diligence questionnaires and transcripts of responses to such questionnaires in connection with Fresnillo's IPO; **[By way of clarification: MAG confirms that this is a very straightforward and constrained request. Collecting such documents, which go to the due diligence the underwriters conducted regarding the statements made by Fresnillo about Fresnillo II in its May 2008 IPO Prospectus, should be a straightforward exercise and they should be readily available both to Fresnillo and to Fresnillo's counsel who acted with respect to the IPO.]**
- (iv) all requests for proposals issued in the Period;
- (v) all written communications, including all emails (with attachments), during the Period with the Consultants and Contractors; **[By way of clarification/refinement, MAG is willing to limit this request to those communications between the Consultants and Contractors and the Nine Custodians listed in (c)(i), above, plus any other individuals (unknown to MAG, but presumably easily identifiable by Fresnillo), if any, who were substantially involved in communicating with the Consultants and Contractors.]**
- (vi) all reports and draft reports prepared by the Consultants and Contractors during the Period; and
- (vii) all contracts and/or engagement letters and/or other documents relating to instructions to and/or scope of work to be provided by the Consultants and Contractors; and

(d) to the extent necessary, to provide access to, or produce complete copies of, all other documents in its possession, power, custody and control relating to, referring to or otherwise concerning the development of Fresnillo II from the Period ("All Other Documents"). **[By way of clarification and as per our advice in writing on May 29, 2009 and again on June 1, 2009, MAG is not seeking this relief at the return of its motion on June 16, 2009.]**

2. An Order that it take all necessary steps to ensure that All Other Documents are preserved pending the final determination of these proceedings and any and all appeals therefrom. **[By way of clarification/refinement: MAG confirms that the electronic data and documents of the 80 to 180 employee custodians identified by Mr. Del Hoya need not be imaged for preservation purposes. Rather, and in the event the relief in paragraph 2 is granted, we confirm that MAG merely expects that Fresnillo will issue a Preservation Notice to all possible custodians to ensure that relevant documents are not destroyed or deleted. Such preservation notices are standard practice when any litigation is commenced,**

**and as they simply require dissemination of a memorandum to relevant custodians, they are not onerous in any way.]**

3. An Order that the "documents" ordered to be produced and preserved shall include all documents in electronic form including archived and deleted files, regardless of where or how such documents are stored, including computer hard drives and servers, backup media, USB storage devices, CDs and DVDs, laptop computers and personal digital assistants (devices like Blackberries and Palm Pilots).

4. In the event that Fresnillo is permitted to summons and cross-examine witnesses from the Independent Valuator and/or Scott Wilson RPA to give viva voce evidence at the return of MAG's Disclosure Motion (to which MAG objects), an Order adjourning MAG's Disclosure Motion to permit MAG to also call witnesses including one or more witnesses from the list included in subpara. 1(c)(i) of this Notice of Motion to give viva voce evidence at MAG's Disclosure Motion.

[Emphasis in original and reflects MAG's clarifications of its disclosure request.]