802.2

[redacted] Corporation

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[redacted]

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VIA EMAIL AND FAX
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Ms. Nancy Ovuka
Premerger Notification Office
Federal Trade Commission

Dear Ms. Ovuka:

This letter is related to our phone conversation on November 4, 2003, concerning a proposed transaction, the structure of which is outlined below.

Transaction Description

Company A, a publicly held Canadian corporation that has publicly traded common shares on a U.S. national stock exchange, proposes to acquire Company B, a publicly held U. S. corporation, by way of a reverse-triangular merger, wherein a wholly owned subsidiary of A will be merged with and into B, with B being the surviving corporation. In the merger, all of B's security holders will receive common shares of A in consideration for their shares of B. Following the effective time of the merger, B will be a wholly owned subsidiary of A. A has a market capitalization in excess of $2.5 billion, and the shares of A that will be issued to B's security holders as consideration in the merger are valued at approximately $110 million.

A is one of the ten largest primary gold producers in the world. B has had essentially no operations, and only minimal revenue since its inception. B's assets are, almost exclusively, patented and unpatented mining claims in mineral reserves, primarily gold, located on one property site in the United States, and title to additional nearby real estate parcels (the "Interests"). B has not recognized any revenues from the Interests during the preceding three years. Other than the Interests, B's assets have only nominal value.

Exemptions from HSR Filing Requirements

As we discussed in our conversation, we believe that the described transaction is exempted from making a Notification and Report Form filing under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Filing"). Our belief is based upon the following analysis:

1- 16 CFR 802.4 provides that "(a) An acquisition of voting securities of an issuer whose assets together with those of all entities it controls consist or will consist of assets whose purchase would be exempt from the requirement of the act pursuant to . . . Sec. 802.2 . . . of these rules is exempt from the reporting requirements . . .."

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Since the transaction is structured as a merger, if an acquisition of B's assets would be exempt from the HSR Filing requirements pursuant to, among others, Section 802.2, then Section 802.4 provides that the acquisition of B's voting securities is also exempt from the HSR Filing requirements.

2- 16 CFR 802.2 provides that "An acquisition of unproductive real property shall be exempt from the requirements of the Act. . . .", and that ". . . unproductive real property is any real property, including raw land, . . . natural resources and assets incidental to the ownership of the real property, that has not generated total revenues in excess of $5 million during the thirty-six (36) months preceding the acquisition."

We believe that the Interests are "unproductive real property" according to Section 802.2 for the following three independent reasons:

(a) The Interests are "real property" because, under well established legal precedent, mining claims are considered real property.[1] As set forth earlier, the Interests are primarily patented and unpatented mining claims, with some outlying parcels of fee property. Unpatented mining claims are appropriations of public land made under the federal mining laws, in which the claimant holds possessory and equitable title, while the United States holds legal title.[2] The issuance of a patent by the United States (which is the equivalent of a deed from the United States) transfers the government's remaining legal interest in the property to the claimant,[3] and converts an unpatented mining claim into a patented mining claim. The owner of a patented mining claim thus acquires fee simple ownership of the property within the claim.[4] However, the existence or absence of a patent does not affect the mining claim's status as real property, and unpatented claims can be mined to extinction without ever seeking or obtaining a patent.[5] Furthermore, mining claims are real property

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[1] *Arnold v. Goldfield Third Chance Mining Co.*, 109 P. 718, 720 (Nev. 1910) ("It is well settled that a mining claim is real property . . . .").

[2] *Freese v. United States*, 639 F.2d 754, 757 (Ct. Cl. 1981) (citing *Oil Shale Corp. v. Morton*, 370 F. Supp. 108, 124 (D. Colo. 1973)). *See also* 30 U.S.C. § 26 (mining claim owners shall have the exclusive right of possession and enjoyment of the land within the claim boundaries).

[3] *United States v. Marshall Silver Mining Co.*, 129 U.S. 579, 587 (1889); *Freese v. United States*, 639 F.2d 754, 755 (Ct. Cl. 1981).

[4] *United States v. Wood*, 466 F.2d 1385, 1387 (9th Cir. 1972) ("The patent deed which was subsequently granted served to convert possessory title to fee . . . .").

[5] As stated by the Supreme Court in *Wilbur v. Krushnic*, 280 U.S. 306, 316-17 (1930): "The rule is established by innumerable decisions of this Court, and of state and lower federal courts, that, when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner is taxable by the state; and is 'real property,' subject to the lien of a judgment recovered against the owner in a state or territorial court. The owner is not required to purchase the claim or secure patent from the United States; but, so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent." (Citations omitted.)

that, under the Fifth Amendment, cannot be taken without just compensation to the owner.[6] Thus, B's mining claims, whether patented or unpatented, are real property, as are B's outlying parcels of non-mineralized fee property. The unmined gold is contained in B's mining claims and remains a part of the real property until it is mined and removed from the claims.

(b) B's assets are "natural resources," under Section 802.2. The SBP to Section 802.2 states the following: "Natural resources refers to any assets growing or appearing naturally on the land, such as timber and mineral deposits." (*Federal Register*, Vol. 61, No. 61, Thursday, March 28, 1996, p.13675). Essentially all of the consideration being paid in the transaction is on account of the natural mineral resources (gold, primarily) located within the Interests that A is acquiring from B.

(c) The Interests are "assets incidental to the ownership of the real property," since the gold is contained within real property, making the Interests, therefore, incidental to such real property.

None of subparagraphs (i), (ii) or (iii) of Section 802.2(c)(2) would cause the Interests not to qualify as "unproductive real property" under Section 802.2(c).

Informal Staff Opinions

In our review of informal interpretation letters on the FTC's website, we have located the following FTC Informal Staff Opinion letters that we believe are helpful to our analysis and conclusion that the described transaction is exempt from the HSR Filing requirements:

1- Letter addressed to Mr. Michael Verne, dated November 13, 2001 (Informal Staff Opinion 0111003). This letter states that production sharing contracts, which gave the right to develop and drill a certain natural gas field and receive a share of such production, are viewed as the equivalent of the underlying gas reserves in the drill field, despite the fact that no title or other interest in the real property containing the reserves was held. The letter also states that if such gas reserves have not yet produced revenues, then the reserves (and therefore the production contracts) are exempted from the HSR Filing requirements pursuant to the unproductive real property exemption. The FTC Staff concluded, then, that (a) natural gas reserves are, if they have not yet produced income, real property for purposes of Section 802.2, and (b) agreements related to real property, as determined according to Section 802.2, are also considered real property for the purposes of that rule.

2- Letter addressed to Ms. Nancy Ovuka, dated March 3, 1999 (Informal Staff Opinion 9903003). This letter states that (a) the Staff has interpreted Section 802.2 to apply to leases if the lease pertains to real property, the acquisition of which would be exempt if purchased outright, and (b) permits and agreements associated with a power plant to be constructed on real property are "assets incidental to the ownership of real property." In this letter, the Staff again states that agreements related to real property are considered real property for purposes of Section 802.2, and the Staff appears to take the position that the nature of the assets, and not their value, is the most important factor in determining "incidental assets" for the purposes of Section 802.2,

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[6] *Freese v. United States*, 639 F.2d 754, 757 (Ct. Cl. 1981); *Humboldt Placer Mining Co. v. Best*, 293 F.2d 553, 555 (9th Cir. 1961), *rev'd on other grounds*, 371 U.S. 334 (1963).

and not something otherwise (e.g., that "assets incidental to the ownership of real property" must have nominal value).

These letters demonstrate that the FTC Staff views the undeveloped real property exemption as designed to include a wide variety of real property interests and related agreements and transactions, even to the point of including agreements that relate only to resources in real property, and not to the real property itself. As set forth previously, the mining claims that make up the Interests are clearly real property for other areas of the law, and we believe they should be included within the "any real property" language of Section 802.2. Moreover, the inclusion of so many varied types of real property in the exemption, both in the rule (e.g., natural resources) and in Informal Staff Opinions (e.g., agreements relating to real property or resources in real property) provides additional support to our conclusion that the unproductive real property exemption applies to the described transaction and that no HSR Filing is required.

The Interests are valued at significantly greater than $50 million, and, after excluding the Interests, B's remaining assets have a value of significantly less than the required $50 million threshold for an HSR Filing. Our conclusion is, therefore, that the transaction as proposed will not require an HSR Filing.

Please contact me with any questions, concerns or requests for additional information that you may have. We appreciate your assistance in this matter.

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12/2/03
Called writer. Without getting into the merits of all of the agreements made, I agreed that the transaction is exempt under 802.2(c).
N. Ovuka
M. Verne & M. Bruno concur