IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No.

APPLICATION OF MICHAEL WILSON & PARTNERS, LIMITED FOR EXPEDITED JUDICIAL ASSISTANCE PURSUANT TO 28 U.S.C. § 1782

Applicant Michael Wilson Partners, Limited ("MWP" or "Applicant"), through its local counsel Solomon Pearl Blum Heymann & Stich, LLP, respectfully submits this Application for an Expedited Order of Judicial Assistance, pursuant to 28 U.S.C. § 1782. The Application is for the appointment of A. Katherine Toomey, Esq. and Sarah L. Knapp, Esq., attorneys with MWP's principal U.S. counsel, Baach Robinson & Lewis PLLC of Washington, D.C., as Commissioners of the Court to facilitate, within this District, the issuance of subpoenas and the gathering of testimony and documentary evidence for use in foreign proceedings.

Testimony and/or evidence is sought from Sokol Holdings, Inc. ("Sokol"), Frontier Mining, Ltd. ("Frontier"), and their principal officers, Thomas Sinclair and Brian C. Savage (collectively the "Sokol/Frontier Parties"). Applicant seeks the requested evidence for use in judicial proceedings before the High Court of Justice in England (the "English Court") and the Supreme Court of New South Wales, Australia (the "Australian Court"). As explained below, based on information available to the Applicant, it appears likely that the Sokol/Frontier Parties have information and documents highly relevant to those proceedings. Sokol and Frontier each has its principal place of business in this District, and Applicant is informed and believes that Sinclair and Savage can be

found in this District.

FACTUAL BACKGROUND

This application arises out of a dispute between MWP and its former director, John Forster Emmott ("Emmott"), and two former employees, Robert Colin Nicholls ("Nicholls") and David Ross Slater ("Slater"). From at least late 2005, Emmott, Nicholls and Slater have acted in concert fraudulently to deprive MWP of income and business opportunities. These actions were, and are, in violation of their fiduciary and contractual duties to MWP. The Applicant is informed and believes that the Sokol/Frontier parties are likely to have information concerning these wrongful actions because 1) the Sokol/Frontier parties were clients of MWP, whose business was diverted by Emmott, Nicholls and Slater; 2) the Sokol/Frontier parties are participants, investors, managers and co-venturers in numerous investment projects in which Emmott, Nicholls and Slater are involved, and which the Applicant believes were diverted by Emmott, Nicholls and Slater; and 3) the Sokol/Frontier parties or their shareholders or officers are likely to be shareholders or participants, either directly or indirectly, in entities owned and/or controlled by Emmott, Nicholls and Slater, including, without limitation, Temujin International Ltd, Temujin Services Ltd, the Temujin Trading Trust (collectively "Temujin"), Scoulton Holdings Ltd and Shaikenov & Partners, Ltd (collectively the "Shaikenov entities").

I. MICHAEL WILSON & PARTNERS, LIMITED

MWP is a company incorporated in the British Virgin Islands on September 9, 1998 under Registration Number 291158, which provides legal and business consulting services in

Russia, the Ukraine, Central Asia and Caucasia. MWP commenced business in Kazakhstan in late 1998. Its principal office is located in Almaty in the Republic of Kazakhstan. Declaration of Michael E. Wilson at ¶2 (attached hereto as Exhibit 1, and hereinafter referred to as "Wilson Decl.").

In 2002, MWP contracted with Emmott, an English solicitor who is also admitted in Australia, to join its practice. *Wilson Decl.* at ¶3. Under the terms of this agreement, MWP was to operate as a "quasi-partnership" between Emmott and MWP. Emmott was appointed a Director of MWP and was to devote his "full time and attention" to its practice. MWP and Emmott agreed to work together to develop business for MWP and, essentially, grow the practice. Any and all legal or consulting fees, or other remuneration, earned by Emmott, from any source, were to be paid to MWP. *Wilson Decl.* at ¶4. It is relatively routine in certain projects in Central Asia for lawyers' remuneration to be in the form of participation in the underlying transaction.

MWP hired Nicholls, an Australian Barrister and Solicitor, in April 2004 and Slater, an Australian solicitor, in July 2005, to work as Associates of the firm. *Wilson Decl.* at ¶7 and ¶8. As is customary for legal professionals in Commonwealth Countries, the terms of their employment were governed by a contract for an indefinite term, which included a non-competition clause under which they agreed not to "approach, solicit or make offers to any of [MWP's] contacts, clients or staff" or "seek to work on any projects or developments in which

MWP is or has been involved" both during and after their employment.[1] *Wilson Decl.* at ¶9. Slater left MWP in or around January 2006 and Nicholls followed at the end of February 2006. *Wilson Decl.* at ¶7 and ¶8.[2]

In the months preceding their departures from MWP, Slater and Nicholls, with the help of Emmott, laid the groundwork to start a rival firm to provide similar services to MWP in the same market. *Wilson Decl.* at ¶12. Thus, Slater began offering legal and business consulting services, in competition with MWP, almost immediately after he left MWP in January 2006. The Applicant is informed and believes Slater and Nicholls have been providing rival services with the assistance of a Kazakh lawyer named Arman Shaikenov, whom Slater, Nicholls and Emmott met during and through their work for MWP and its clients. *Wilson Decl.* at ¶¶13-14. The Applicant is further informed and believes these services are provided through the Shaikenov entities, which Shaikenov, Emmott, Nicholls and Slater control. *Wilson Decl.* at ¶15. In addition, Emmot, Slater and Nicholls established two corporations, Temujin International Ltd, Temujin Services Ltd, and a trust – the Temujin Trading Trust – to facilitate their participation in projects with clients by serving as an arranger and/or agent in transactions.

In or around June 2006, Emmott left MWP to join his cohorts, Nicholls and Slater. As his final act, he left a letter on Wilson's desk in the middle of the night indicating that he was terminating his agreement with MWP. In the letter, Emmott alleged that MWP had failed to

[1] Such non-competition clauses are acceptable under the rules governing Solicitors in the United Kingdom and Australia. Wilson Decl. at ¶ 10.

[2] Although Nicholls did not execute his contract, he agreed to be bound by its terms and at all times during his tenure at MWP, he acted as if the contract governed his employment. *Wilson Decl.* at ¶ 11.

satisfy certain conditions of his agreement. Although MWP subsequently accepted Emmott's unilateral repudiation of the agreement and considers the relationship to be terminated, his allegations are totally without merit. *Wilson Decl.* at ¶5. To the contrary, it has become apparent since his departure that, while still nominally working for MWP, Emmott breached numerous provisions of his agreement as well as his contractual and common law fiduciary duties to MWP. *Wilson Decl.* at ¶6. In particular, Applicant is informed and believes that Emmott provided substantial assistance to Slater and Nicholls in setting up their (and his also) competing firm, and that Emmott was instrumental in diverting projects involving the Sokol/Frontier parties and others to Slater and Nicholls. *Wilson Decl.* at ¶¶ 12-17. Indeed, it appears that Temujin and/or the Shaikenov entities were paid for time Emmott spent working for the Sokol/Frontier parties before he withdrew from MWP and that Emmott is the holder of an ownership share in the Temujin trust. Wilson Decl. at ¶ 17, Emmott currently practices with the Shaikenov entities.

II. PROCEEDINGS IN THE UNITED KINGDOM AND AUSTRALIA

To date, MWP has brought two legal actions to enforce its rights against Emmott, Slater and Nicholls.[3] These are described below:

The Australian Action: MWP filed an action against Nicholls and Slater in the Supreme Court of New South Wales, Australia on October 6, 2006, seeking damages from Nicholls and Slater under the following claims:

i) accessory liability for dishonest assistance given to Mr Emmott in breaches of his fiduciary duty to MWP;

[3] Additional proceedings are contemplated.

ii) tort claims, including conspiring with Mr Emmott and others to injure MWP by defrauding it; and

iii) breaches by Slater and Nicholls of their own fiduciary duties and contractual duties including their duty of fidelity and the restrictive covenants and duties of confidentiality owed to MWP.

Wilson Decl. at ¶35.

The Australian Court issued a Freezing Order against all of the assets of Nicholls and Slater, which has been maintained after inter-partes hearings. *Wilson Decl.* at ¶38. The pleadings are currently being amended and in due course, the Applicant expects that this matter will proceed to trial before the Australian Court. *Wilson Decl.* at ¶39.

The English Action: MWP has filed an action in England against Emmott, seeking preservation of Emmott's assets and evidence in his custody or control. *Wilson Decl.* at ¶30. The action in England has sought orders from the High Court of Justice in respect of the following:

- allowing a search of Emmott's home and, *inter alia*, the seizure of all relevant documents, including the imaging of his home and laptop computers;
- an injunction freezing the shares of Eagle Point Investments Limited ("EPIL"), a Bahamian entity owned and controlled by Emmott;
- an injunction freezing 14.75m shares of Max Petroleum plc (MXP) currently held by EPIL;
- the preservation of copies of Emmott's emails by BTOpenworld/Yahoo!;
- the disclosure by Emmott, under penalty of perjury, concerning several personal retainers he had while working with MWP, in apparent breach of his agreement with MWP, and all payments and other remunerations he received,

or to which he has become entitled; and

- the imaging of the hard drive of his Temujin desk top and laptop computers and those at his apartment in Almaty, Kazakhstan.

Wilson Decl. at ¶32.

This application was premised, in part, on the fact that Emmott had attempted to erase the hard drive on his MWP lap-top when he left the firm and sought to cover up his wrongful activities by only using a personal (not MWP) email address and failing to disclose and keep proper files, notes and records of his real activities. *Wilson Decl.* at ¶31. The English Court granted the requested relief on August 21, 2006, as subsequently amended. *Wilson Decl.* at ¶33. It retains jurisdiction to order additional remedies and/or disclosure concerning Emmott's conduct and assets. *Wilson Decl.* at ¶34.

III. THE PROSPECTIVE WITNESSES – THE SOKOL/FRONTIER PARTIES

Sokol and Frontier are each Delaware corporations that have their principal place of business in Colorado. *Wilson Decl.* at ¶18 and ¶19. Both companies are engaged in the acquisition, development and financing of mining, mineral and oil and gas exploration and development projects in Kazakhstan and surrounding countries. *Wilson Decl.* at ¶20. Brian C. Savage and Thomas Sinclair are principals and officers of Sokol and Frontier. *Wilson Decl.* at ¶21 and ¶22.

MWP first started advising Mr Sinclair (and his colleague Mr Bennett) in a personal capacity in or around August 2003. Sokol and Frontier themselves, as entities, became clients of

MWP starting in or around December 1, 2004, in the case of Sokol, and November 20, 2003, in the case of Frontier. At the beginning of the relationship, MWP assisted Frontier in relation to a large prospective transaction involving Frontier and its assets with Levant Consultants/LionOre Mining. *Wilson Decl.* at ¶23 and ¶24. From such dates through July 2006, in the case of Sokol, and February 2006, in the case of Frontier, MWP provided legal and business consulting services to the Sokol/Frontier Parties in connection with several significant projects in Kazakhstan and the surrounding region. *Wilson Decl.* at ¶25. MWP is no longer providing such services on a regular basis to the Sokol/Frontier Parties and understands that Temujin and/or the Shaikenov entities have assumed MWP's former role. *Wilson Decl.* at ¶27.

The Sokol/Frontier parties have also been involved with Emmott, Nicholls, and Slater in a number of mineral, oil and gas, and precious metal mining investment projects. *Wilson Decl.* at ¶27. With respect to each of these projects, MWP was an initial advisor and/or participant. Subsequent to the wrongful exodus of Emmott, Nicholls, and Slater, each of these business projects has been diverted from MWP. *Wilson Decl.* at ¶28. Each project involves a complex network of corporate entities and individuals, including the Sokol/Frontier Parties. With respect to each project, MWP was entitled (or would have become entitled) to all and any payments or other compensation (in the form of fees, shares, commission or participation rights) arising from MWP's performance of services. In each case, this entitlement has been siphoned from MWP to Temujin, the Shaikenov entities and/or Emmott, Nicholls and/or Slater. *Wilson Decl.* at ¶29.

The basic parameters of each project are as follows:

- Max Petroleum Plc: a structured investment in various oil and gas exploration territories comprising the A and E Blocks, East Alibek and Astrakhansky/South Imashevsky Blocks. MWP was heavily involved in the transaction leading up to, and including, the initial public offering of Max in October 2005. 14,750,000 shares in Max currently valued at approximately GBP 16,225,000 are currently registered in the name of EPIL, a Bahamas company owned and/or controlled by Emmott;[4]

- Urals Gold/Maminskoye Project: a structured investment in a gold exploration project in the Urals. MWP conducted due diligence and provided other services in connection with this goldmine acquisition project. Since about January 2006, Temujin and/or the Shaikenov entities have been providing similar services;

- Chilisai Phosphor Project: the planned acquisition of the subsoil rights and plant and equipment of an abandoned Soviet-era phosphate mine. MWP was involved in the Project Acquisition during 2005. Since about January 2006, Temujin and/or the Shaikenov entities have been providing services to Sokol in relation to the Chilisai Phosphor Project;

- North Karamandybas Oil Field: the planned acquisition of this oil and gas field and exploration block, initially by UMC Energy Plc, Resource Capital Partners and, more lately by Pinegrove Equities Ltd and Enola Resources Plc in which it is thought, directly or indirectly, Sinclair, Emmott, Nicholls and Slater are beneficiaries. MWP was involved in this project during 2005/2006, but now Temujin and/or the Shaikenov entities are involved instead;

- Project Abai: the planned acquisition of the Taldy Bulak Project, involving Summer Gold, Sokol and Frontier. MWP was involved in this project during 2005/2006 but now Temujin and/or the Shaikenov entities are involved instead;

- Vasilkovskoye Gold Mine: the planned acquisition of this gold mine and related exploration areas by Levant Consultants Ltd, Brookstone Business Inc., TLC Ventures, Barrick Gold, Joringel N. V., Asia Gold BV, Floodgate Holdings B.V. and others and which involves Slater, Nicholls, Emmott and possibly Sinclair. MWP was involved in this project during 2005/2006 but now Temujin and/or the Shaikenov entities are involved instead;

[4] EPIL's shares in Max and the shares in EPIL itself are frozen under the UK Court's injunction. Sinclair has filed an action in the Supreme Court of the Bahamas alleging that he is the beneficial owner of the Max shares registered to EPIL. MWP, which is named as a defendant in that action, plans to defend on jurisdictional grounds.

- Bolazhal Project: the planned acquisition of this gold mine and related exploration areas, involving Sokol and Frontier. MWP was involved in this project during 2005/2006 but now Temujin and/or the Shaikenov entities are involved instead;

- SemGeo: the planned acquisition of this entity involving Sokol and Frontier. MWP was involved in this project during 2005/2006 but now Temujin and/or Shaikenov entities are involved instead;

- South Inkai/Betpakdala Uranium Projects: the planned acquisition of these uranium mines and exploration areas, involving Sokol, Frontier and others.

Wilson Decl. at ¶26.

MWP respectfully submits that it is highly likely that the Sokol/Frontier Parties are in possession of documents and information relating to these projects, including the diversion of these projects from MWP, the roles played by Emmott, Nicholls, Slater, the Temujin and Shaikenov entities, and any remuneration they received, or are to receive, and whether directly or indirectly and whether in the past, now or in the future. *Wilson Decl.* at ¶40. Such information is highly relevant, if not critical, to the proceedings MWP has commenced in Australia and England. *Wilson Decl.* at ¶42. In addition, Sinclair and Savage are likely to have personal knowledge of these matters. *Wilson Decl.* at ¶40.

Accordingly, MWP respectfully seeks leave, pursuant to 28 U.S.C. §1782, to pursue discovery of that information for use in its pending proceedings.

LEGAL ARGUMENT

The Supreme Court recently confirmed that applications for judicial assistance under 28 U.S.C. § 1782 are to be freely granted in the interest of justice and comity. *See Intel Corp. v.*

Advanced Micro Devices, Inc., 542 U.S. 241 (2004). As the Second Circuit has recognized, an expansive interpretation of § 1782 furthers the statute's "…twin aims of providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts." *In re Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992). This Application presents a paradigmatic case for judicial assistance.

I. THE APPLICATION MEETS ALL THREE FACTUAL REQUIREMENTS OF 28 U.S.C. § 1782

The requirements of § 1782 are straightforward:

"The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . . The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. . . ." 28 U.S.C. § 1782. Thus, the statute requires:

> "(1) that the person from whom discovery is sought reside (or be found) in the district of the district court to which the application is made, (2) that the discovery be for use in a proceeding before a foreign tribunal, and (3) that the application be made by a foreign or international tribunal or 'any interested person.'

In re Application of Euromepa, 154 F.3d 24, 27 (2d Cir. 1998); *see generally Phillips v. Beierwaltes*, 466 F.3d 1217, 219 n. 1 (10th Cir. 2006). This Application meets all of these

requirements, as discussed below.

A. The Sokol/Frontier Parties "reside" and are "found in" this District because they live or do business in Colorado.

Sokol and Frontier do business in the District of Colorado; each entity has its principal place of business at 3939 E. Arapahoe Road, Suite 225, Centennial, Colorado. *Wilson Decl.* at ¶18 and ¶19. Brian Savage and Thomas Sinclair are the principal officers of Sokol and Frontier, and Applicant is informed and believes that Savage works out of the companies' Colorado offices (as so does Sinclair from time to time, although he spends much time also in London and Kazakhstan). In addition, Applicant understands that Brian Savage lives in Centennial, Colorado. *Wilson Decl.* at ¶21 and ¶22.

B. The Applicant's requested discovery is "for use in" foreign proceedings before the Supreme Court of New South Wales and the High Court of Justice.

The Applicant's requested testimony is for use "in a proceeding" before a "foreign . . . tribunal." 28 U.S.C. § 1782. In analyzing this aspect of § 1782, Courts have focused "on two questions: (1) whether a foreign proceeding is adjudicative in nature; and (2) whether there is actually a foreign proceeding." *Euromepa*, 154 F.3d at 27.

The actions before the English and Australian Courts are presently pending and adjudicative in nature. The Supreme Court of New South Wales is a trial court of general jurisdiction in Australia and will render any judgment in the Australian Action in the first instance. The English Court has continued jurisdiction over the English Action, which has been

contested by Emmott. The requested discovery is thus "for use in a proceeding before a foreign tribunal," within the meaning of § 1782. *See Intel*, 542 U.S. at 258.

C. The Applicant is an "*interested person*" in respect of the foreign proceedings because it is a party to those proceedings.

As a party to the foreign proceedings, the Applicant is plainly an "*interested person*" for purposes of § 1782. *See* 28 U.S.C. § 1782 (captioned "Assistance to foreign and international tribunals and *litigants* before such tribunals") (emphasis added); *Intel*, 542 U.S. at 256 ("No doubt litigants are included among . . . the 'interested persons' who may invoke § 1782."); S. Rep. No. 1580, 88th Cong., 2d Sess., at 8 (1964) (stating that an "interested person" includes one who is a "party to . . . foreign or international litigation"); *cf. Malev*, 964 F.2d at 101 (noting that the phrase "upon the application of any interested person" was inserted into § 1782 "as part of the effort to liberalize the assistance provided by American Courts to foreign and international tribunals").

Hence, all of the requirements of § 1782 are met.[5]

II. THE APPLICATION SHOULD BE GRANTED IN THE EXERCISE OF THE COURT'S DISCRETION.

Even where all elements of the statute are satisfied, whether to grant the relief sought is committed to the discretion of the District Court. The Supreme Court has recently set forth factors to be considered in exercising discretion under § 1782. *Intel*, 542 U.S. at 264. These

[5] Section 1782 does not require that the materials sought be discoverable in the foreign proceeding or under limitations applicable to U.S. discovery. *See Intel*, 542 U.S. 260-62. Similarly, litigants need not "exhaust" discovery procedures in the foreign jurisdiction before requesting the assistance of the U.S. courts. *See Euromepa*, 51 F.3d at 1098.

factors include the identity and status of the potential witness(es), the nature of the foreign court and proceeding, and whether the §1782 application conceals an "*end-run*" around foreign discovery restrictions. As discussed below, in the instant case, each of these factors supports the granting of the present application.

First, a favourable exercise of discretion is generally warranted where, as here, the person from whom discovery is sought is not a party to the foreign proceeding. The Supreme Court has confirmed that §1782 is most helpful in obtaining evidence from non-party witnesses, who "may be outside the foreign tribunal's jurisdictional reach" and whose "evidence, available in the United States, may be unobtainable absent § 1782(a) aid." *Intel*, 542 U.S. at 264. This is a perfect description of the circumstances in the instant proceeding, because the Sokol/Frontier parties are not parties to the proceedings in England and Australia.

Second, the Court may consider "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance." *Id.* In this case, the foreign proceedings are both pending in sister common law jurisdictions, each of which has been found to have procedures generally similar to our own. *See In re Brierley,* 145 B.R. 151, 162 n. 5 (S.D.N.Y. 1992); *Vesta Fire Ins. Co. v. New Cap Reinsurance Co. Ltd.*, 244 B.R. 209, 215 (S.D.N.Y. 2000). Accordingly, the UK and Australian actions are appropriate subjects of judicial assistance. *Cf. Clarkson Co., Ltd. v. Shaheen*, 544 F.2d 624, 629-30 (2d Cir. 1976) (exceptions to comity "construed especially narrowly when the alien jurisdiction is, like Canada, a sister common law jurisdiction

with procedures akin to our own"). There is, moreover, no reason to suspect that either court would object to judicial assistance the Applicant has requested from this Court.

Third, the Supreme Court has stated that the District Court may consider whether the § 1782(a) request "conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of the foreign government or the United States" and whether the discovery requests are "unduly intrusive or burdensome." 542 U.S. at 265. The present application seeks neither to circumvent foreign disclosure restrictions, nor to impose onerous or unnecessary burdens on the Sokol/Frontier Parties.

Rather, as set forth above, the Applicant seeks to issue ordinary subpoenas for documents and testimony in order to obtain from non-party witnesses core information critical to the English and/or Australian proceedings. The discovery sought by the Applicant is necessary in aid of the England and Australian actions. The testimony is unlikely to impose any unusual or onerous burdens on the Sokol/Frontier parties.

The application should, therefore, be granted in pursuit of the important objectives of § 1782 and in the interests of justice.

CONCLUSION

For the foregoing reasons, the application for judicial assistance should be granted and an order issued, on an expedited basis, in form similar to the order attached hereto.

Dated: December 14, 2006

Respectfully submitted,

Solomon Pearl Blum Heymann & Stich LLP

s/ Erik D. Cansler
Erik D. Cansler, Colorado Bar #36227
ATTORNEYS FOR APPLICANT MICHAEL WILSON & PARTNERS, LIMITED
1801 Broadway, Suite 500
Denver, CO 80202
telephone (720) 264-4791
fax (303) 832-6653