

**FEDERAL COURT**

BETWEEN:

**HIS HIGHNESS PRINCE KARIM AGA KHAN**

Plaintiff

AND:

**NAGIB TAJDIN, ALNAZ JIWA, JOHN DOE and DOE CO. and all other persons or entities unknown to the Plaintiff who are reproducing, publishing, promoting and/or authorizing the reproduction and promotion of the Infringing Materials**

Defendants

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**NOTICE OF MOTION**(Plaintiff's Motion for Answers to Outstanding and Deferred Questions)

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**TAKE NOTICE THAT** the Plaintiff will make a motion to the Court at a time to be scheduled by the Case Management Judge, Madam Prothonotary Tabib, at the Federal Court, 180 Queen Street West, Toronto, Ontario. The Plaintiff estimates that the duration of the motion will be 2 hours.

**THIS MOTION IS FOR:**

1. An Order requiring the Defendants to answer the outstanding and deferred questions identified at paragraphs 5 and 6 of this Notice of Motion within 10 days of the Order of this Court;
2. Costs of this motion; and

3. Such further or other relief as counsel may request and this Honourable Court may deem just.

**THE GROUNDS FOR THE MOTION ARE:**

1. This motion for answers to outstanding and deferred questions from the discovery of the Defendants arises in the context of a reference proceeding commenced by the Plaintiff for an accounting of profits for copyright infringement of a book entitled "*Farmans 1957-2009 – Golden Edition Kalam-E Imam-E-Zaman*" (the "**Golden Edition**").
2. The Defendants are responsible for the unauthorized publication and distribution of the Golden Edition and accompanying MP3 audio bookmark. The Golden Edition reproduced in substantial part a series of original religious addresses and messages (*viz.* Farmans and Talikas), of which His Highness is the sole and original author.
3. The Plaintiff's Statement of Issues sets out the issues for determination in the Reference Proceeding, as follows:
  - (a) What is the total number of books and MP3 audios that were printed and produced?
  - (b) What sales did the Defendants make of the Farmans and Talikas and the MP3 audio bookmark by the reproduction and distribution of the Golden Edition and the Farmans and Talikas contained therein (the "Impugned Sales")?
  - (c) What revenues were made by the Defendants from the Impugned Sales?
  - (d) What costs are properly deductible by the Defendants from the revenues made in respect of the Impugned Sales?
  - (e) What award of pre-judgment and judgment interest under sections 36 and 37 of the Federal Courts Act are applicable?

## The Outstanding and Deferred Questions are Relevant

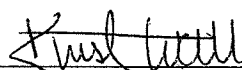
4. The Plaintiff is seeking answers to 5 outstanding questions and 2 deferred questions stemming from the examinations for discovery of the Defendants and the Referee's decision on the Plaintiff's refusals motion dated October 29, 2012 ("**Referee's Production Order**").
5. The Defendants appealed the Referee's Production Order. The Referee's Production Order was ultimately upheld by Judgment of the Federal Court of Appeal dated January 15, 2014 ("**FCA Judgment**"). The 5 outstanding questions at issue in this motion were remanded to this Court by the FCA Judgment for determination, as follows:
  - i. [Order para. 4] Tajdin Chart Item 6 undertaking: To produce the original unredacted invoices from the shipping company for the amounts referenced in the spreadsheet of revenue and expenses where the invoice contains a reference to the unit number of books (Exhibit 2, Tab 9);
  - ii. [Order para. 5] Tajdin Chart Item 8 undertaking: To produce the unredacted PayPal documents (Exhibit 1, Tab B-7 and Exhibit 2, Tab 11) showing customer names, without prejudice to Mr. Tajdin's right to seek a Rule 151 order at trial;
  - iii. [Order para. 6] Tajdin Chart Items 14-22 refusals: To produce the names of ten people who ordered books, as indicated on the "Golden Edition Shipping Spreadsheet" (Exhibit 2, Tab 8 Tajdin Transcript). The Plaintiff is entitled to select the ten names it wishes to have produced by Mr. Tajdin from this spreadsheet. If Mr. Tajdin does not have names in connection with the shipping orders identified by the Plaintiff, then Mr. Tajdin is to produce any customer names he has in connection with this spreadsheet;
  - iv. [Order para. 7] Tajdin Chart Items 24-25 refusals: To (i) identify the bank account where he placed monies received from the sale of the book; and (ii) identify the bank account where he deposited his book funds from paypal; and (iii) with respect to his personal bank account and personal line of credit, and to produce bank records from these two accounts only limited to the period of November 2009 to March 2011, without prejudice to the Plaintiff's right to later pursue information from other accounts;
  - v. [Order para. 10] Jiwa Chart Items 4-9 refusals: Mr. Jiwa is to answer questions 4-9 of the Revised Chart on the identity of book distributors and information on free books, including:

- a. To provide the names and addresses of the book distributors known to Mr. Jiwa;
  - b. To identify the person from whom Mr. Jiwa received 24 boxes of books that he distributed;
  - c. To prepare a list of names and addresses of all those who received a free copy of the book from Mr. Jiwa;
  - d. To provide a list of every person to whom Mr. Jiwa can recall distributing a book;
6. In addition, the Plaintiff is seeking to compel answers to questions that the Plaintiff had previously agreed to defer in the Referee Production Order, as follows:
- (i) [Order para. 22] Tajdin Chart Item 40 Refusal: To identify the location of Mr. Tajdin's laptop;
  - (ii) [Order para. 22] Tajdin Chart Item 41 Refusal: To deliver an electronic reproduction of Mr. Tajdin's Golden KIZ mailbox.
7. None of the documents provided to the Plaintiff since the Referee's Production Order provide answer to the outstanding and deferred questions addressed in this motion. The information sought from the answers to these questions is relevant to the accounting issues in this Reference Proceeding.
8. The Defendants have delivered minimal and redacted productions in this action. The Plaintiff's efforts to verify the little information that has been produced against third party sources, including bank account and e-mail records is relevant and reasonable in the circumstances of this case.
9. The Plaintiff relies on Rules 157, 183, 184, 240, and 241 of the *Federal Courts Rules*, SOR/98-106, as amended.
10. Such further and other relief as this Honourable Court may deem just.

**THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE RELIED UPON IN SUPPORT OF THIS MOTION:**

1. The pleadings and proceedings herein;
2. The affidavit of Christian Landeta sworn June 16, 2014; and
3. Such further and other material as counsel may advise and this Honourable Court may permit.

Dated in Toronto this 16<sup>th</sup> day of June, 2014.



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000006

**TO: The Administrator**  
Federal Court

**AND TO: Me JEAN-PHILIPPE GERVAIS**  
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**Solicitor for the Defendants**

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**FEDERAL COURT**

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BETWEEN:

**HIS HIGHNESS PRINCE KARIM AGA KHAN**

Plaintiff

AND:

**NAGIB TAJDIN, ALNAZ JIWA, JOHN DOE  
and DOE CO. and all other persons or entities  
unknown to the Plaintiff who are reproducing,  
publishing, promoting and/or authorizing the  
reproduction and promotion of the Infringing  
Materials**

Defendants

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**NOTICE OF MOTION**

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**FEDERAL COURT**

BETWEEN:

**HIS HIGHNESS PRINCE KARIM AGA KHAN**

Plaintiff

- and -

**NAGIB TAJDIN, ALNAZ JIWA, JOHN DOE and DOE CO. and all other persons or entities unknown to the Plaintiff who are reproducing, publishing, promoting and/or authorizing the reproduction and promotion of the Infringing Materials**

Defendants

**AFFIDAVIT OF CHRISTIAN LANDETA**(sworn June 16<sup>th</sup> 2014)

I, Christian Landeta, of the City of Mississauga, in the Province of Ontario, MAKE OATH AND SAY:

1. I am a law clerk in the Intellectual Property Group of Norton Rose Fulbright Canada LLP, solicitors for the Plaintiff. I am assisting the lawyers with primary responsibility for this file and have personal knowledge of the facts set out in this affidavit.

**Relevant Court Orders**

2. Attached hereto as **Exhibit "A"** to my affidavit is a copy of the Judgment and Reasons for Judgment of the Federal Court of Appeal dated January 15, 2014.
3. Attached hereto as **Exhibit "B"** to my affidavit is a copy of the Order of Madam Justice Tremblay-Lamer dated April 24, 2013.
4. Attached hereto as **Exhibit "C"** to my affidavit is a copy of the Order of Prothonotary Milczynski dated October 29, 2012, including the schedules referred to in the Order.
5. Attached hereto as **Exhibit "D"** to my affidavit is a copy of the Order and Reasons of



Mr. Justice Russell dated October 26, 2011.

6. Attached hereto as **Exhibit "E"** to my affidavit is a copy of the Direction of Prothonotary Milczynski on discovery and document production dated September 6, 2011.

### Pleadings

7. Attached hereto as **Exhibit "F"** to my affidavit is a copy of the Plaintiff's Statement of Claim dated April 6, 2010.
8. Attached hereto as **Exhibit "G"** to my affidavit is a copy of the Plaintiff's Statement of Issues dated March 29, 2011.
9. Attached hereto as **Exhibit "H"** to my affidavit is a copy of the Reply to Plaintiff's Statement of Issues (of the defendant Alnaz Jiwa) dated July 18, 2011.
10. Attached hereto as **Exhibit "I"** to my affidavit is a copy of the Reply to Plaintiff's Statement of Issues (of the defendant Nagib Tajdin) dated July 18, 2011 including schedules thereto.

### Cross-examinations

11. Attached hereto as **Exhibit "J"** to my affidavit is a copy of the transcript to the cross-examination of Nagib Tajdin held October 17, 2011.
12. Attached hereto as **Exhibit "K"** to my affidavit is a copy of Exhibit 5 to the cross-examination of Nagib Tajdin held October 17, 2011.
13. Attached hereto as **Exhibit "L"** to my affidavit is a copy of Exhibit 10 to the cross-examination of Nagib Tajdin held October 17, 2011.
14. Attached hereto as **Exhibit "M"** to my affidavit is a copy of the transcript to the cross-examination of Alnaz Jiwa held October 19, 2011.

**Examination for Discovery**

15. Attached hereto as **Exhibit "N"** to my affidavit is a copy of the transcript to the Examination for Discovery of Nagib Tajdin held November 8, 2011.
16. Attached hereto as **Exhibit "O"** to my affidavit is a copy of the Exhibit 1 to the Examination for Discovery of Nagib Tajdin held November 8, 2011.
17. Attached hereto as **Exhibit "P"** to my affidavit is a copy of the Exhibit 2 to the Examination for Discovery of Nagib Tajdin held November 8, 2011.

**Additional Productions**

18. Attached hereto as **Exhibit "Q"** to my affidavit is a copy of a letter dated May 13, 2012 (Ref: Golden Edition), with attachments, from Mr. Tajdin. I am advised by Ms. Kristin Wall, of counsel for the Plaintiff, and believe that this letter was presented to counsel for the Plaintiff for the first time at the hearing of the refusals motion in this proceeding before the Referee on May 14, 2012.
19. Attached hereto as **Exhibit "R"** to my affidavit is a copy of a letter dated May 13, 2012 (Ref: Sound Bookmarks Golden Edition), with attachments, from Mr. Tajdin. I am advised by Ms. Kristin Wall, of counsel for the Plaintiff, and believe that this letter was presented to counsel for the Plaintiff for the first time at the hearing of the refusals motion in this proceeding before the Referee on May 14, 2012.
20. Attached hereto as **Exhibit "S"** to my affidavit is a copy of a letter dated February 18, 2013 from counsel for the Defendants to Counsel for the Plaintiff, with attachments including 13 previously unproduced printer invoices.
21. Attached hereto is as **Exhibit "T"** to my affidavit is a copy of the Affidavit of Mr. Tajdin sworn March 20, 2013, and Exhibit "T" to that affidavit on Clinique Medicale Diamant.

22. The documents at Exhibit "S" (printer invoices) and Exhibit "T" (document on Clinique Medicale Diamant) were the only documents in the file that were produced after the hearing which resulted in the Order of Prothonotary Milczynski dated October 29, 2012 (referred to in paragraph 4 above).

**The Golden Edition**

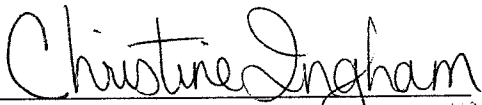
23. We maintain a copy of the subject book, the Golden Edition, in our files. No printer is identified in the Golden Edition. There is no price listed on the book.

24. We maintain a copy of the MP3 audio book mark for the Golden Edition in our files. No manufacturer is identified on the bookmark.


25. Attached hereto as **Exhibit "U"** to my affidavit is a copy of the affidavit of Christine Miroslovich sworn June 21, 2013 with respect to a copy of the Golden Edition on [www.dropbox.com](http://www.dropbox.com), exhibit excluded.

26. I make this affidavit in support of the Plaintiff's Motion for Answers to Outstanding and Deferred Questions and for no other purpose.

**SWORN** before me at the City of Toronto, this 16<sup>th</sup> day of June 2014.



A Commissioner for taking affidavits



**CHRISTIAN LANDETA**

Christine Jennifer Ingham, a Commissioner, etc.,  
Province of Ontario, for Norton Rose Fulbright Canada LLP /  
S.E.N.C.R.L., s.r.l., Barristers and Solicitors.  
Expires April 29, 2016.

**FEDERAL COURT**

BETWEEN:

**HIS HIGHNESS PRINCE KARIM AGA KHAN**

Plaintiff

- and -

**NAGIB TAJDIN, ALNAZ JIWA, JOHN DOE and  
DOE CO. and all other persons or entities unknown to  
the Plaintiff who are reproducing, publishing,  
promoting and/or authorizing the reproduction and  
promotion of the Infringing Materials**

Defendants

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**AFFIDAVIT OF CHRISTIAN LANDETA**  
(sworn June 16<sup>th</sup>, 2014)

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**FEDERAL COURT**

BETWEEN:

**HIS HIGHNESS PRINCE KARIM AGA KHAN**

Plaintiff

- and -

**NAGIB TAJDIN, ALNAZ JIWA, JOHN DOE and DOE CO. and all other persons or entities unknown to the Plaintiff who are reproducing, publishing, promoting and/or authorizing the reproduction and promotion of the Infringing Materials**

Defendants

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**WRITTEN SUBMISSIONS**

(Plaintiff's Motion for Answers to Outstanding and Deferred Questions)

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**Solicitors for the Plaintiffs**

## PART I – FACTS

### **A. Introduction**

1. This motion arises in the context of a reference proceeding commenced by the Plaintiff for an accounting of profits for copyright infringement (“**Reference Proceeding**”), pursuant to the Defendants’ unauthorized publication of a book that wrongfully reproduced copyright protected material belonging to the Plaintiff.
2. In essence, this motion requests the Defendants to answer only 5 outstanding questions and 2 deferred questions stemming from examinations for discovery. The 5 outstanding questions were remanded to this Court by judgment of the Federal Court of Appeal dated January 15, 2014 following the Defendants’ unsuccessful appeal of the Referee’s decision dated October 29, 2012 ordering the questions to be answered (“**Referee’s Production Order**”).
3. In addition, the Defendants have refused to produce new affidavits testifying that all relevant documents have been produced (the subject of a separate Plaintiff motion dated June 16, 2014). The Defendants’ position can be summed up in the response of their solicitor Mr. Gervais in his letter of February 18, 2013: no further inquiries from his client need to be made because the Plaintiff has not adduced “actual documentary evidence establishing that either the number of printed copies is false, or that the actual sale price publically charged by Tajdin is false. No such evidence has been brought forth to our knowledge, and therefore no further inquiries may be made”.
4. This turns the whole exercise on its head. How can the Plaintiff adduce evidence to show that the self-selected information of the Defendants is false if we cannot get answers to questions? It is precisely the relevant questions that Mr. Tajdin does not want to answer and the relevant documents that he does not want to produce that will help to test the truthfulness of his statements. Mr. Tajdin can find a few documents selectively when he wants to, but when asked about documents that would enable a train of enquiry to be made against him concerning his financial transactions he has destroyed or refuses to produce them.

5. The truth is that there are no documents verifying the number of books sold. At best we have some information from one printer showing the number of books printed, but no way of verifying the accuracy or completeness of this document. We have some evidence that some books were sold at \$50, but there is no price on the book and no advertisements offering the book for sale at that price.
6. The Plaintiff has compromised on a majority of the questions asked in discovery in an attempt to receive the minimum information necessary to verify the truthfulness of Defendants' assertions, but even this narrow set of questions has been refused. If the Defendants wanted to put this action to bed, cannot they find invoices or advertisements showing the price at which the book was sold? Will they not instruct the printer to advise where the books were sent and to whom?
7. The Plaintiff has experienced extraordinary difficulties in extricating any verifiable or reliable information from the Defendants. The Defendants consistently protest that no further relevant documents exist, yet additional documents are produced in a piecemeal fashion that has both frustrated and lengthened the discovery process. As a result, the Referee agreed that the names of third parties were necessary to verify the revenues and expenses that have been declared by the Defendants in this proceeding.
8. The Plaintiff respectfully requests that this motion be granted, and all questions ordered answered.

**B. Procedural Background**

**(a) Underlying Action for Copyright Infringement**

9. The Defendants are responsible for the publication and distribution of a book and MP3 audio bookmark entitled *Farmans 1957-2009 – Golden Edition Kalam-E Imam-E Zaman* (“**Golden Edition**”). The Golden Edition reproduced in substantial part a series of original religious addresses and messages (*viz.* Farmans and Talikas), of which His Highness the Aga Khan, is the sole and original author.

Statement of Claim, Landeta Affidavit, para. 7, Exhibit “F”; Plaintiff’s Motion Record, Tab 2F, p. 82.

10. By judgment dated March 4, 2011, Mr. Justice Harrington found Messrs. Tajdin and Jiwa liable for copyright infringement and granted summary judgment in favour of the Plaintiff (“**Harrington Judgment**”). The Harrington Judgment was upheld by this Court. Leave to appeal to the Supreme Court of Canada was denied.

*His Highness Prince Karim Aga Khan v. Nagib Tajdin et al.*, 2011 FC 14 [“**Harrington Judgment**”], aff’d 2012 FCA 12, leave to appeal to the Supreme Court of Canada denied, [2012] S.C.C.A. No. 119.

**(b) The Reference Proceeding**

11. The Harrington Judgment provided for a reference for the determination of damages or profits. Mr. Justice Harrington was designated as Referee in place of Madam Prothonotary Milczynski. Madam Prothonotary Tabib was assigned as Case Management Judge.

Order of Chief Justice Crampton dated April 9, 2014.

12. On March 29, 2011, the Plaintiff submitted a Requisition and Statement of Issues for a Reference Proceeding to quantify the profits realized by Messrs. Tajdin and Jiwa as a result of their infringement.

Landeta Affidavit, para. 8, Exhibit “G”; Plaintiff’s Motion Record, Tab 2G, p. 105.

13. The Statement of Issues set out the following detailed issues for determination on the Reference Proceeding:
- i. What is the total number of books and MP3 audios that were printed and produced?
  - ii. What sales did the Defendants make of the Farmans and Talikas and the MP3 audio bookmark by the reproduction and distribution of the Golden Edition and the Farmans and Talikas contained therein (the “**Impugned Sales**”)?



- iii. What revenues were made by the Defendants from the Impugned Sales?
- iv. What costs are properly deductible by the Defendants from the revenues made in respect of the Impugned Sales?
- v. What award of pre-judgement and judgment interest under sections 36 and 37 of the *Federal Courts Act* are applicable?

Landeta Affidavit, para. 8, Exhibit "G"; Plaintiff's Motion Record, Tab 2G, p. 100.

14. The Golden Edition does not identify a price or the name of the printer. The MP3 audio bookmark does not identify a price or the name of the manufacturer.

Landeta Affidavit, paras. 23-24; Plaintiff's Motion Record, Tab 2, p. 11.

15. The Defendants sought to stay the Harrington Judgment, and in particular the Reference Proceeding, pending their appeal on the merits. The Federal Court of Appeal, by Order of Mr. Justice Mainville dated May 19, 2011, refused to stay the Reference Proceeding.

*Tajdin v. Aga Khan*, 2011 FCA 172.

16. On July 18, 2011, Messrs. Tajdin and Jiwa each served and filed a "Reply to the Plaintiff's Statement of Issues". Mr. Tajdin attached two self-prepared spreadsheets to his Reply purporting to represent his travel expenses and all revenue and expenses incurred with respect to the Golden Edition.

Landeta Affidavit, paras. 9-10, Exhibits "H"- "I"; Plaintiff's Motion Record, Tab 2H-2I, p. 105-128.

17. Mr. Tajdin took the position at that time that he had no further documents to produce in the Reference Proceeding.

Nagib Tajdin Reply to the Plaintiff's Statement of Issues, para. 24, Landeta Affidavit, para. 10, Exhibit "I"; Plaintiff's Motion Record, Tab 2I, p. 116.

(c) **The Referee's Direction for Discovery**

18. On August 26, 2011, the parties attended a case management conference, in person, at the Federal Court with the Referee. The Referee directed the Defendants to attend for examination for discovery and deliver:

“complete and unredacted copies of all relevant documents, and including an explanation for any documents missing or lost; and including enquiries that have been made of others to locate relevant documents”.

Referee Direction dated September 6, 2011, para. 2  
 (“**Referee Direction**”), Landeta Affidavit, paras. 6, Exhibit  
 “E”; Plaintiff’s Motion Record, Tab 2E, p. 79.

19. Mr. Tajdin appealed the Referee Direction. Further, he unilaterally determined that he would not comply with the Referee Direction to produce unredacted copies of relevant documents pending his appeal.

Landeta Affidavit, paras. 5-6, Exhibits “D”-“E”; Plaintiff’s  
 Motion Record, Tab 2D-2E, p. 63-79.

20. Mr. Justice Russell dismissed Mr. Tajdin’s appeal of the Referee Direction, with costs on a full indemnity basis, payable forthwith and irrespective of the cause (“**Russell Order**”).

*His Highness Prince Karim Aga Khan v. Nagib Tajdin et al.* (unreported in T-514-10) dated October 26, 2011  
 [“**Russell Order**”], aff’d 2012 FCA 238, Landeta  
 Affidavit, para. 5, Exhibit “D”; Plaintiff’s Motion Record,  
 Tab 2D, p. 63.

21. Russell J. held that Mr. Tajdin’s production in the Reference Proceeding was deficient, noting that:

- a) “The problem in this case is that Mr. Tajdin claims not to have kept records that will allow the assessment of profit. He expects the Plaintiff and the Court to simply accept his version of what occurred. Mr. Tajdin is the one who created the problem.”
- b) “His approach to record keeping means that the Plaintiff must, of necessity, seek relevant information from people Mr. Tajdin dealt with at the material times.”

- c) “Raising vague and unsubstantiated allegations of possible harassment and privacy infringement, he now wants to prevent the Plaintiff from finding out who the relevant third parties are.”
- d) “Transcripts of the cross-examination on the affidavits for this motion reveal that Mr. Tajdin intends to be uncooperative when it comes to answering questions and also that some of his answers are not necessarily supported by other evidence and require a much fuller explanation and confirmation from other sources.”
- e) Mr. Tajdin cannot simply control the relevant information to his own advantage. The Plaintiff is entitled to full discovery in the usual way as ordered by the Referee.

Russell Order, *supra*, paras. 41-43, Landeta Affidavit, paras. 5, Exhibit “D”; Plaintiff’s Motion Record, Tab 2D, p. 75-75.

22. Despite the Referee Direction, and the Russell Order, Mr. Tajdin continued to refuse to produce relevant unredacted documents pending his appeal to this Court, which was subsequently dismissed on September 17, 2012. To this day, Mr. Tajdin has never delivered a further Supplementary Affidavit of Documents or fully complied with the Referee’s Direction.

*Aga Khan v. Tajdin*, 2012 FCA 238.

**(d) Examination for Discovery of Messrs. Tajdin and Jiwa**

23. Messrs. Tajdin and Jiwa presented themselves for examination for discovery on November 8, 2011 pursuant to the Referee Direction. This examination was made difficult by Mr. Tajdin’s continued non-compliance with the portion of the Referee Direction and Russell Order requiring him to produce relevant unredacted documents.

Tajdin Discovery Transcript, Landeta Affidavit, para. 15, Exhibit “N”; Plaintiff’s Motion Record, Tab 2N, p. 197-269.

24. On discovery, Mr. Tajdin refused to produce original documents, including: any information or documents identifying the printer of the book; or any information or

documents that would enable the Plaintiff to verify the quantity of books printed, the sale price of the book, or the expenses Mr. Tajdin claimed to have incurred.

Tajdin Discovery Transcript, Landeta Affidavit, para. 15, Exhibit "N"; Plaintiff's Motion Record, Tab 2N, p. 197-269.

25. Rather, Mr. Tajdin continued to insist that his self-authored spreadsheets of financial data, unsupported by any original documents, and admittedly prepared after the commencement of the Reference Proceeding, were sufficient to satisfy his discovery obligations.

Tajdin Discovery Transcript, Exhibits 1 and 2, Landeta Affidavit, paras. 16-17, Exhibits "O", "P"; Plaintiff's Motion Record, Tab 2O-2P, p. 271-339.

Tajdin Discovery Transcript, p. 46, Q. 167-168, p. 48, Q. 172, Landeta Affidavit, para. 15, Exhibit "N"; Plaintiff's Motion Record, Tab 2N, p. 210-211.

26. Mr. Tajdin refused to disclose what he did with the revenues he received from sales of the Golden Edition. He refused to even accept that the Plaintiff needed information about revenue at all, once the number of books was ascertained.

Tajdin Discovery Transcript, p. 43, Q. 156; pp. 46-47, Q. 167-168; p. 48, Q. 172; pp. 90-92, Q. 362-368, Landeta Affidavit, para. 15, Exhibit "N"; Plaintiff's Motion Record, Tab 2N, p. 210-211, 221-222.

27. He also refused to give the Plaintiff verifiable information on his claimed expenses.

Tajdin Discovery Transcript, p. 43, Q. 156; pp. 46-47, Q. 167-168; p. 48, Q. 172; pp. 90-92, Q. 362-368, Landeta Affidavit, para. 15, Exhibit "N"; Plaintiff's Motion Record, Tab 2N, p. 210-211, 221-222.

28. Mr. Tajdin admitted that he is the author of the Golden Kiz e-mail address (goldenkiz@live.com). Despite repeatedly asserting on cross-examination that there has

only been one book printing, an advertisement posted by the Golden Kiz clearly states that there was a second printing of the book.

Tajdin Cross-Examination Transcript, p. 46, Q. 202-203, lines 10-20, p. 49; Q. 217-218, lines 11-17, pp. 50-51; Q.221-224, lines 7-25, Landeta Affidavit, para. 11, Exhibit "J"; Plaintiff's Motion Record, Tab 2J, p. 144-145.

Tajdin Cross-Examination Transcript, Exhibit 10 Print-out of Golden Edition advertisement, Landeta Affidavit, para. 13, Exhibit "L"; Plaintiff's Motion Record, Tab 2L, p. 172.

29. Although he is an experienced businessman who operates several businesses and is familiar with ledgers and books of account, and Mr. Tajdin himself estimated book revenues at between \$127,850 and \$182,850, Mr. Tajdin claimed that he nevertheless did not maintain any ledgers or books of account in respect of the sale of the infringing Golden Edition. Yet, according to the costing spreadsheets he has prepared and produced, he did maintain detailed cost reports. Mr. Tajdin will not say where he put the money he received or identify the bank or bank account.

Tajdin Cross-Examination Transcript, p. 19, Q. 78-81, lines 4-19; pp. 27-28, Q. 123-124, lines 21-3; pp. 30-31, Q. 139 and 142, lines 23-1, 10-14, Landeta Affidavit, para. 11, Exhibit "J"; Plaintiff's Motion Record, Tab 2J, p. 137, 139.

Tajdin Cross-Examination Transcript, Exhibit 5, Landeta Affidavit, para. 12, Exhibit "K"; Plaintiff's Motion Record, Tab 2K, p. 170.

30. With respect to Mr. Jiwa, although he admitted that many people asked him about the book and contacted him to buy the book, prior to the Referee Production Order, Mr. Jiwa had located very few e-mails relating to the purchase of the infringing Golden Edition. Apparently, he deleted any such e-mails as he received them.

Jiwa Cross-Examination Transcript, p. 13, Q. 60-63, lines 1-19, Landeta Affidavit, para. 14, Exhibit "M"; Plaintiff's Motion Record, Tab 2M, p. 180.

31. Mr. Jiwa knows the identity of some of the book distributors, including the distributor from whom he purchased his 24 boxes of books, but he will not disclose these names, or any others.

Jiwa Cross-Examination Transcript, pp. 24-25, Q. 122-125, lines 17-4; pp. 28-29, Q. 150-153, lines 15-5, Landeta Affidavit, para. 14, Exhibit "M"; Plaintiff's Motion Record, Tab 2M, p. 183-184.

32. Mr. Jiwa states that he bought the books and paid half the amount owing (\$2400 CAD) in cash. He sold all the books for cash. He did not pay or collect any GST or PST. He did not keep any records and he has no e-mails relating to book sales.

Jiwa Cross-Examination Transcript, pp. 26-27, Q. 138-145, lines 19-25, Landeta Affidavit, para. 14, Exhibit "M"; Plaintiff's Motion Record, Tab 2M, p. 183.

33. Mr. Jiwa searched his hotmail account, but cannot remember whether he found e-mails that related to the price at which he was selling the book. Later, Mr. Jiwa stated that when he searched his e-mail account, he could not find a single e-mail that referenced the price of the Golden Edition, or the amount of books that he was selling, or anything relating to the number, distribution or sale price of the Golden Edition.

Jiwa Cross-Examination Transcript, p. 34, Q. 184, lines 22-25; pp. 36-37, Q. 192-193, lines 24-8, Landeta Affidavit, para. 14, Exhibit "M"; Plaintiff's Motion Record, Tab 2M, p. 185-186.

**(e) The Referee Production Order**

34. Messrs. Tajdin and Jiwa refused numerous questions on discovery. The Plaintiff brought a motion to compel answers from the Defendants.
35. On May 14, 2012, the parties argued the Refusals Motion over the course of a half day hearing. The Referee heard submissions on each group of questions before deciding, in her discretion, which questions should be answered, had already been answered or should be dismissed or deferred.

Plaintiff's Revised Charts of Undertakings and Refusals,  
Landeta Affidavit, para. 4, Exhibit "C"; Plaintiff's Motion  
Record, Tab 2C, p. 30-61.

36. The Referee ruled on the questions from the bench and later issued an order dated October 29, 2012, ("**Referee Production Order**"). Messrs. Tajdin and Jiwa were ordered to answer 10 questions.

Landeta Affidavit, para. 4, Exhibit "C"; Plaintiff's Motion  
Record, Tab 2C, p. 30-37.

**(f) Appeals of the Referee Production Order**

37. The Defendants appealed the Referee's Production Order. By Order dated April 24, 2013, Madam Justice Tremblay-Lamer allowed the Defendants' appeal and overturned the entirety of the Referee's Production Order, save for a partial answer to a much-modified single question ("**Tremblay-Lamer Order**").

Landeta Affidavit, para. 3, Exhibit "B"; Plaintiff's Motion  
Record, Tab 2B, p. 26-28.

38. The Plaintiff appealed the Tremblay-Lamer Order. By Judgment and Reasons for Judgment dated January 15, 2014, the Federal Court of Appeal allowed the Plaintiff's appeal and set aside the Tremblay-Lamer Order on the basis that the trial judge had "no grounds to interfere with the Prothonotary's Order" ("**FCA Order**").

Landeta Affidavit, para. 2, Exhibit "A"; Plaintiff's Motion  
Record, Tab, 2A p. 13-24.

39. The Federal Court of Appeal remanded 5 questions that remained at issue back to the Referee for a determination "in view of the nature of the appeal, [and] the fact that the respondents are now represented by counsel who has provided documents to counsel for the appellant since the Prothonotary's order", as follows:

The appeal is allowed, each party assuming their own costs throughout. The order of Justice Tremblay-Lamer dated April 24, 2013, is set aside. The matter is sent back to Prothonotary Milczynski for a new determination in respect of the questions still

at issue identified as questions 4, 5, 6, 7 and 10 of her October 29, 2012 order.

Landeta Affidavit, para. 2, Exhibit "A"; Plaintiff's Motion Record, Tab, 2A p. 23.

40. By this motion, the Plaintiff seeks an order compelling the Defendants to answer the 5 questions remanded to the Referee by the FCA Order, as follows:
- i. [Order para. 4] Tajdin Chart Item 6 undertaking: To produce the original unredacted invoices from the shipping company for the amounts referenced in the spreadsheet of revenue and expenses where the invoice contains a reference to the unit number of books (Exhibit 2, Tab 9);
  - ii. [Order para. 5] Tajdin Chart Item 8 undertaking: To produce the unredacted PayPal documents (Exhibit 1, Tab B-7 and Exhibit 2, Tab 11) showing customer names, without prejudice to Mr. Tajdin's right to seek a Rule 151 order at trial;
  - iii. [Order para. 6] Tajdin Chart Items 14-22 refusals: To produce the names of ten people who ordered books, as indicated on the "Golden Edition Shipping Spreadsheet" (Exhibit 2, Tab 8 Tajdin Transcript). The Plaintiff is entitled to select the ten names it wishes to have produced by Mr. Tajdin from this spreadsheet. If Mr. Tajdin does not have names in connection with the shipping orders identified by the Plaintiff, then Mr. Tajdin is to produce any customer names he has in connection with this spreadsheet;
  - iv. [Order para. 7] Tajdin Chart Items 24-25 refusals: To (i) identify the bank account where he placed monies received from the sale of the book; and (ii) identify the bank account where he deposited his book funds from paypal; and (iii) with respect to his personal bank account and personal line of credit, and to produce bank records from these two accounts only limited to the period of November 2009 to March 2011, without prejudice to the Plaintiff's right to later pursue information from other accounts;
  - v. [Order para. 10] Jiwa Chart Items 4-9 refusals: Mr. Jiwa is to answer questions 4-9 of the Revised Chart on the identity of book distributors and information on free books, including:
    - a. To provide the names and addresses of the book distributors known to Mr. Jiwa;
    - b. To identify the person from whom Mr. Jiwa received 24 boxes of books that he distributed;
    - c. To prepare a list of names and addresses of all those who received a free copy of the book from Mr. Jiwa; and



- d. To provide a list of every person to whom Mr. Jiwa can recall distributing a book.

Landeta Affidavit, paras. 2, 4, Exhibits "A", "C";  
Plaintiff's Motion Record, Tab 2A, 2C, p. 13, 30.

41. In addition, the Plaintiff is seeking to compel answers to questions that the Plaintiff had previously agreed to defer in the Referee Production Order, as follows:

- i. [Order para. 22] Tajdin Chart Item 40 Refusal: To identify the location of Mr. Tajdin's laptop;
- ii. [Order para. 22] Tajdin Chart Item 41 Refusal: To deliver an electronic reproduction of Mr. Tajdin's Golden KIZ mailbox.

Landeta Affidavit, para. 4, Exhibit "C"; Plaintiff's Motion Record, Tab 2C, p. 36.

**(g) Documents Produced since the Referee Production Order**

42. Following the Referee Production Order dated October 29, 2012, Mr. Tajdin produced the following additional documents:

- i. 13 individual printer invoices represented in the Etat de Compte (letter dated February 18, 2013); and

Landeta Affidavit, para. 20, Exhibit "S"; Plaintiff's Motion Record, Tab 2S, p. 361-373.

- ii. In an affidavit sworn March 20, 2013 in support of Mr. Tajdin's appeal of the Referee's Production Order dated October 29, 2012, Mr. Tajdin produced the Quebec provincial corporate registration information for Clinique Medicale Diamant Inc., a company identified on certain printer's invoices.

Landeta Affidavit, para. 21, Exhibit "T"; Plaintiff's Motion Record, Tab 2T, p. 386-390 .

**PART II – POINTS IN ISSUE**

43. Should the Defendants be ordered to answer the outstanding and deferred questions?

**PART III – SUBMISSIONS****A. Standard on Examination for Discovery**

44. A referee may order that a party be examined for discovery and order the production of documents that are relevant to a matter in issue.

*Federal Courts Rules*, SOR/98-106, [*Federal Courts Rules*], Rule 157.

45. In examination for discovery, a person shall answer to the best of the person's knowledge, information and belief, any question that concerns the name or address of any person, other than an expert witness, who might reasonably be expected to have knowledge relating to a matter in question in the action.

*Federal Courts Rules*, *supra*, Rule 240.

46. A person who is to be examined for discovery shall, before the examination, become informed by making inquiries of any person who might be expected to have knowledge relating to any matter in question in the action where it may be reasonably expected, because of a relationship existing between a party and some third party, that a request for information will be honoured.

*Federal Courts Rules*, *supra*, Rule 241.

*Eli Lilly and Co. v. Apotex Inc.*, [2000] F.C.J. No. 154 at para. 5 (F.C.T.D.).

47. A question is relevant when there is a reasonable likelihood that it might elicit information which may directly or indirectly enable the party seeking the answer to advance its case or to damage the case of its adversary, or which fairly might lead to a train of inquiry that may either advance the questioning party's case or damage the case of its adversary.

*Novopharm Limited v. Eli Lilly Canada Inc. et al.*, 2008 FCA 287, (2008), 69 C.P.R. (4th) 381 [“*Novopharm v. Eli Lilly*”] at p. 400.

48. In a copyright infringement case, the production of information pertaining to the identity of clients and invoices may be relevant to establishing that the defendants infringed the copyright. The production of information by the defendants concerning gross fees may be relevant to an accounting of the profits earned by the copyright infringement.

*International Tele-Film Enterprises Ltd. v. De Boche Library Inc. et al.* (1994), 55 C.P.R. 198 [“*International Tele-Film*”] at p. 199.

**B. The outstanding and deferred questions in the Referee Production Order are relevant and have not been satisfactorily answered**

49. None of the outstanding or deferred questions have been answered by the Defendants. Specifically:
- i. Mr. Tajdin has never produced the original unredacted invoices from the shipping company where the invoice contains a reference to a unit number of books (Referee Production Order, paragraph 4);
  - ii. Mr. Tajdin has never produced the unredacted PayPal documents showing the customer names (Referee Production Order, paragraph 5);
  - iii. Mr. Tajdin has never produced the names of 10 people, selected by the Plaintiff, who ordered books as indicated on the “Golden Edition Shipping Spreadsheet” (Referee Production Order, paragraph 6). Some people on this list have ordered and had shipped to them 100, 300 and even 400 books each;
  - iv. Mr. Tajdin has never produced any information with respect to the bank accounts he used to deposit the money received for the books, nor has he ever produced bank records, for the period during which he manufactured and sold the infringing Golden Edition (Referee Production Order, paragraph 7);

- v. Mr. Jiwa has never identified the names and addresses of known book distributors, identified the names and addresses of those who received a free copy of the book, or provided a list of persons to whom he distributed the book (Referee Production Order, paragraph 10);
- vi. Mr. Tajdin has never identified the location of this laptop (Referee Production Order, paragraph 22); and
- vii. Mr. Tajdin has never delivered an electronic reproduction of his Golden Kiz mailbox (Referee Production Order, paragraph 23).

Landeta Affidavit, paras. 18-22; Plaintiff's Motion Record,  
Tab 2, p. 10-11.

50. The Defendants' answers to these questions, including information on customer names, units of books sold, price of books sold and revenues collected are all relevant to this Reference Proceeding as they will enable the Plaintiff to verify the assertions made by the Defendants and the documents proffered to date. This in turn will allow the Plaintiff to advance his case or damage the case of Messrs. Tajdin and Jiwa by testing their assertions, as is the Plaintiff's right on discovery.

*Novopharm v. Eli Lilly, supra* at p. 400.

*International Tele-Film, supra* at p. 199.

51. None of the information provided by Mr. Tajdin subsequent to the Referee Production Order, including the printer invoices and incorporation information on Clinique Medicale Diamant, provide answer to these questions.

Landeta Affidavit, paras. 18-22; Plaintiff's Motion Record,  
Tab 2, p. 10-11.

52. Although there is some information that some books were sold at \$50, there is no price or printer identified on the Golden Edition, nor has a manufacturer been identified on the audio bookmark.

Landeta Affidavit, paras. 23-24; Plaintiff's Motion Record,  
Tab 2, p. 11.

53. In seeking to compel answers from infringing defendants on questions relating to the profits earned by those defendant in a reference action:

“...the court must be conscious that it is the defendant’s wrongdoing which has made the present litigation necessary and that neither the court nor the plaintiff are obliged to accept, at face value, the defendant’s assertions as to its revenues and costs.” **[Emphasis added.]**

*Beloit Canada Ltee/Ltd. et al. v. Valmet Oy* (1992), 45  
C.P.R. (3d) 116 at 118 (F.C.A.).

54. On the facts of this case specifically, the identification of customers and other third parties has previously been determined to be an important issue, where as noted by Russell J.: virtually no original documents or records have been disclosed, Mr. Tajdin has been “uncooperative”, and his evidence requires “a much fuller explanation and confirmation from other sources”:

[41] The problem in this case is that Mr. Tajdin claims not to have kept records that will allow the assessment of profit. **He expects the Plaintiff and the Court to simply accept his version of what occurred. Mr. Tajdin is the one who created the problem. His approach to record keeping means that the Plaintiff must, of necessity, seek relevant information from people Mr. Tajdin dealt with at the material times.** Raising vague and unsubstantiated allegations of possible harassment and privacy infringement, he now wants to prevent the Plaintiff from finding out who the relevant third parties are. He has created the problem, but he suggests no way that the Plaintiff can ascertain the information he needs to assess profit objectively.

[42] Transcripts of the cross-examination on the affidavits for this motion reveal that **Mr. Tajdin intends to be uncooperative** when it comes to answering questions and also that some of his answers are not necessarily supported by other evidence and require a much fuller explanation and confirmation from other sources.

[43] **Mr. Tajdin cannot simply control the relevant information to his own advantage.** The Plaintiff is entitled to full discovery in the usual way as ordered by the Referee. Mr. Tajdin’s attempts to mount a full-blown relevance discussion as part of this motion and before discovery has taken place reveal that he intends to resist discovery and does not wish to submit

to normal procedures. In addition, his unsubstantiated allegations that Mr. Gray has misused information reveal that what he says needs to be objectively tested for accuracy. **[emphasis added]**.

Russel Order, Landeta Affidavit, para. 5, Exhibit "D";  
Plaintiff's Motion Record, Tab 2D, p. 74-75.

55. Information on customer names, units of books sold, price of books sold and revenues collected are directly relevant to the Statement of Issues identified by the Plaintiff in this Reference Proceeding, including:

- i. What sales did the Defendants make of the Farmans and Talikas and the MP3 audio bookmark by the reproduction and distribution of the Golden Edition and the Farmans and Talikas contained therein (the "Impugned Sales")?; and
- ii. What revenues were made by the Defendants from the Impugned Sales?

Landeta Affidavit, para. 8; Plaintiff's Motion Record, Tab  
2G, p. 94.

56. The information sought on this motion is relevant as follows:

- i. First, it will assist in determining how many infringing items were sold and the revenue received from those sales. By identifying the distributors, the Plaintiff will be able to at least attempt to corroborate the unsubstantiated statement of the Defendants as to how many books were sold and to determine if the books came from the single printer as alleged. It appears that many of those books were shipped directly from the printer to distributors.
- ii. The second basic issue is expenses. Simply because Mr. Tajdin now states that he does not wish to claim expenses (other than the cost of the printing and certain free books), does not mean that no documentation on expenses is relevant. Some of the expenses information will provide secondary evidence as to how many books were sold and at what price. Documents such as shipping information, advertising expenses (if any) or other commercial documents could help to establish the number of books sold and the price.

iii. Thirdly, the sale price of the Golden Edition must be determined. The Defendants assert that they do not have invoices, books of account or banking records showing the price at which the Golden Edition books were sold and the revenues received. By going to third party customers and distributors to whom the books were sold, the Plaintiff can obtain some certainty as to the price that was received for the books. Notably:

- (1) The Defendants have collectively produced only one cheque showing payment received from a customer, and this shows a payment of \$70, which the Defendants state includes the cost of shipping. Some of the books may have been sold at \$50, but there has so far been no documentation to independently verify this price.
- (2) The Plaintiff's reference in the Statement of Claim that the Defendants "promoted" the sale of the Golden Edition book for \$50 on their website is not an admission that all or even most books were sold at \$50. This could have been an introductory or sale price. At no time has the Plaintiff admitted the price of the book, nor would the Plaintiff have had the necessary information to do this. In any event this allegation in the Statement of Claim was denied by one Defendant, and not admitted by another Defendant, in their respective Statements of Defence.

Statement of Claim, para. 25, Landeta Affidavit, para. 7;  
Plaintiff's Motion Record, Tab, 2F, p. 88.

*Federal Courts Rules, supra*, Rules 183(1)(a), 184(1).

57. The Defendants make much of the fact that the Plaintiff pleaded that some books were offered on the internet at \$50, a fact not admitted by the Defendants. In spite of this fact being directly in issue between the parties, the Defendants have produced little no documents on the price of the book, including no book advertising on price and there is no price indicated in the book itself.

58. Mr. Tajdin's insistence that he has not maintained any ledgers or books of account in respect of the sale of the Infringing Materials is simply not credible in respect of an enterprise which saw the printing and distribution of at least 5,500 books, and perhaps more. With receipts of revenue which could be as high as \$275,000 (if the books admittedly printed were all sold at \$50) or which could be much higher if more books were printed (as asserted), or were sold at a higher price. Mr. Tajdin himself estimated revenue at between \$127,850 and \$182,850.
59. Moreover, Mr. Tajdin's ability to provide a detailed account of expenses he incurred in preparing the book, including travel and shipping costs belies his failure to have kept similar records of book sales and revenues, especially when shipping invoices show that certain individuals were shipped hundreds of copies.
60. The questions ordered to be answered by the Referee in the Production Order remain relevant. Allowing the Plaintiff to select the purchaser names of those who purchased 100, 300 and even 400 books, as opposed to only a handful of books, will permit the Plaintiff to identify high-volume purchasers in order to verify the number of books acquired, sold, and the purchase price of the book. All of which are relevant inquiries in this Reference Proceeding.
61. Information from third parties for verification purposes is particularly important in the circumstances of this case where Messrs. Tajdin and Jiwa have failed to produce adequate original and unredacted documentation. It has been virtually impossible for the Plaintiff to follow any chain of money, accounting or sales to determine what happened to any profits, other than through the unverified assertions of the Defendants.
62. The identification of Mr. Tajdin's laptop, and the delivery of an electronic reproduction of his Golden Kiz mailbox, which was admittedly used to promote and sell the book, will also allow the Plaintiff to determine and verify the sale price of the book, and the revenues gained.
63. None of the documents provided to the Plaintiff since the Referee's Production Order provide answer to the outstanding and deferred questions addressed in this motion. The



Plaintiff should not be required to assess an accounting of profits without testing the information submitted by the Infringer.

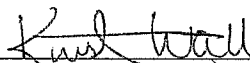
Landeta Affidavit, paras. 18-22; Plaintiff's Motion Record,  
Tab 2, p. 10-11.

64. All of the information sought by the Plaintiff on this motion is relevant to the accounting issues in this Reference Proceeding and imposes no onerous or unreasonable burden upon the Defendants. Any information provided by the Defendants will be protected from extraneous use by the implied undertaking rule.
65. The Defendants have consistently resisted the discovery process in this Reference. They have both admitted to having destroyed or failed to keep relevant documents. They delivered minimal and redacted productions. They insisted that no other relevant documents existed. Yet, when pressed, continued to locate and produce documents when it suited them, including outside of the discovery process. They have appealed every order or direction on discovery.
66. As a result, by their own actions, the Defendants have left the Plaintiff with little choice on how to proceed. The Plaintiff's efforts to verify the little information that has been produced against third party sources, bank account and e-mail records is relevant and reasonable in the circumstances of this case.

#### **PART IV – ORDER SOUGHT**

67. For the foregoing reasons, the Plaintiff respectfully requests:
  - a) An Order requiring the Defendants to answer the outstanding and deferred questions identified at paragraphs 5 and 6 of the Notice of Motion dated June 16, 2014 within 10 days of the Order of this Court;
  - b) Costs of this motion; and
  - c) Such further or other relief as counsel may request and this Honourable Court may deem just.

Dated in Toronto this 16th day of June, 2014.



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Solicitors for the Defendants

Court File No. T-514-10

**FEDERAL COURT**

BETWEEN:

**HIS HIGHNESS  
PRINCE KARIM AGA KHAN**

Plaintiff

- and -

**NAGIB TAJDIN, ALNAZ JIWA, JOHN DOE  
and DOE CO. and all other persons or entities  
unknown to the Plaintiff who are reproducing,  
publishing, promoting and/or authorizing the  
reproduction and promotion of the Infringing  
Materials**

Defendants

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**WRITTEN SUBMISSIONS**

(Plaintiff's Motion for Answers to Outstanding and  
Deferred Questions)

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