

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

AMENDED MEMORANDUM OF FACT AND LAW
(of the defendant Nagib Tajdin /moving party)

I - NATURE OF THE MOTION

1. This is a motion for summary judgment dismissing the plaintiff's action.

II - FACTS

2. This defendant will rely on the Amended Memorandum of Fact and Law for the Reply to the Plaintiff's motion for summary judgement, served and filed by him in support of his Motion for Summary Judgment to be heard at the same time as the plaintiff's motion, and as such will only set out additional facts and law to be relied on by him in this factum.
3. The plaintiff is the spiritual father (hereinafter the "Aga Khan" or the "Imam") of this defendant, who is a follower of the Aga Khan. Farmans are given orally by the Aga Khan as Imam to Ismailis when He grants them an audience, and they immediately become binding upon all Ismailis across the world whether or not such a follower was present to hear the Farman in person.

Affidavit of Nagib Tajdin sworn May 7, 2010
Moving Party's Record, Tab 2, paragraph 3

*Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 5, paragraph 4*

4. In this action the plaintiff alleges that this defendant has infringed the plaintiff's copyright and moral rights relating to the publication under the name of *Golden Edition of Kalame Imam-e-zaman* (hereinafter the "Golden Edition") which contains the plaintiff's Guidance (hereinafter "Farman") given by the Imam to the Ismailis (who are followers of the plaintiff).

Statement of Claim dated April 6, 2010, Moving Party's Record, Tab 6

5. The Aga Khan is the present Imam of the Ismailis and is the bearer of the Noor, a word that means "The Light of God".

Cross-Examination of Sachedina pp.148-150: #619-#628

*Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 5, paragraph 22*

*Statement of Defence of Alnaz Jiwa
Moving Party's Record, Tab 8, paragraph*

6. One of the most important tradition of the Ismaili faith is that all Ismailis give their oath of allegiance (Bay'ah) to their Imam before they are accepted into the Ismaili faith, and in return, the Imam also reciprocates by giving His promise to protect and guide the Ismailis. This defendant has given his oath of allegiance to the Aga Khan, and states that he has an immense love and respect for the Aga Khan, and will never disobey or in any way of form displease Him.

*Affidavit of Nagib Tajdin sworn May 7, 2010
Moving Party's Record, Tab 2, paragraphs 3 and 4*

*Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 5, paragraphs 2-4*

" The authority of the Imam in the Ismaili Tariqah is testified by Bay'ah by the murid to the Imam which is the act of acceptance by the murid of the permanent spiritual bond between the Imam and the murid. This allegiance unites all Ismaili Muslims worldwide in their loyalty, devotion and obedience to the Imam within

the Islamic concept of universal brotherhood."
Ismaili Constitution, Preamble, Paragraph D

7. One of the essential obligations of Ismailis is to abide by the Farmans, which are generally delivered by the Aga Khan orally when He visits His Jamats (congregation). Occasionally, the Aga Khan might send a brief written message to the Jamats or individual Ismailis, which is known as Talika. In fact The Plaintiff's pleadings admits that He expects that all Ismailis have access to Farmans

*Affidavit of Nagib Tajdin sworn May 7, 2010
 Moving Party's Record, Tab 2, paragraph 5*

*Affidavit of Alnaz Jiwa sworn June 16, 2010
 Moving Party's Record, Tab 5, paragraph 3*

*Affidavit of Karim Alibhay sworn April 28, 2010
 Moving Party's Record, Tab 4, paragraph 14*

Reply to Statement of Defence of Tajdin, Paragraph 27

8. Pronouncements made by the Aga Khan before 1957 when He became Imam (bearer of the Noor) are not considered Farmans. Farmans and Talikas are considered by Ismailis as Divine Guidance for Ismailis (Spiritual Children of the Imam), and coming from the Light of God (Noor of Allah), and not necessarily linked to the physical manifestation of the present Aga Khan. All Farmans of all Imams belong to that Noor. Their reading in Jamatkhana is always accompanied by special prayers and ceremonies. The fact that neither Plaintiff nor Defendants have submitted the book as exhibit shows the special status of the Farmans and Talikas for Ismailis.

"For hundreds of years, my spiritual children have been guided by the rope of Imam. You have looked to the Imam of the Age for advice and help in all matters. And through your Imam's immense love and affection for his spiritual children, his Noor has indicated to you where and in which direction you must turn so as to obtain spiritual and worldly satisfaction". Karachi, Pakistan, 13th of December, 1964

Affidavit of Sachedina sworn June 25, 2010, Exhibit D, page 2

Cross-Examination of Sachedina p.16: #61-#62, pp.147-150: #617 - #628

Cross-Examination of Bhaloo pp. 25-26: #139, pp. 27-28: #150, pp. 28-29: #156, p. 32: #166

9. A Farman remains valid until and unless superceded by a new Farman, and becomes binding immediately on all Ismailis wherever they may be living, unless the Imam restricts a Farman for a particular Jamat or a particular segment of the Jamat, and when the Imam restricts a Farman, He indicates such a restriction when making that Farman.

*Affidavit of Nagib Tajdin sworn May 7, 2010
Moving Party's Record, Tab 2, paragraph 5*

*Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 5, paragraph 4*

Cross-Examination of Sachedina p.34: #141 - #142

" By virtue of his office and in accordance with the faith and belief of the Ismaili Muslims, the Imam enjoys full authority of governance over and in respect of all religious and Jamati matters of the Ismaili Muslims."

Ismaili Constitution, Preamble, Paragraph H

" This Constitution shall be read with any Farman made after the date hereof, and in the event of conflict, the said Farman shall prevail over this Constitution, and a later Farman shall prevail over an earlier."

Ismaili Constitution, Article 2.6

10. Farmans address not only spiritual matters, but Farmans also address worldly matters which are time-sensitive, so each Ismaili needs timely access to these Farmans made for them. Throughout Ismaili history, Followers have written, cherished, discussed, shared and lived by the Imam's Farmans.

*Affidavit of nagib tajdin sworn July 13th 2010
Tajdin's Responding Record, Tab 6, Paragraph 18-22*

"Historically and in accordance with Ismaili tradition, the Imam of the time is concerned with spiritual advancement as well as improvement of the quality of life of his murids. The Imam's Ta'lim lights the murids' path to spiritual

enlightenment and vision. In temporal matters, the Imam guides the murids, and motivates them to develop their potential."

Ismaili Constitution, Preamble, Paragraph F

11. One difficulty this defendant encountered over the years was the lack of accessibility to Farmans as often Farmans made in one area, such as Pakistan, were never made available to the Jamats residing in other areas, such as Canada, or Africa. Over a period of many years, this defendant sought and collected Farmans from various sources, individual Ismailis or the institutional leaders from local areas and across the world.

*Affidavit of Nagib Tajdin sworn May 7, 2010
Moving Party's Record, Tab 2, paragraphs 7-10*

12. In fact, even from the Farmans that are accessible, and despite there being a few thousand Jamatkhana's, the circumstances of the worldwide Ismaili Jamat are such that over 80% of Ismailis do not have access to Jamatkhana's or to Farmans. The Plaintiff's claim that All Ismailis have access to Farmans is false.

Cross-Examination of Sachedina pp.144-146: #606-#614

Plaintiff's Statement of Reply to Tajdin's Defense, Paragraph 27

13. Many of this defendant's friends, neighbours, other Ismailis, including the institutional leaders who had given him copies of written Farmans, or audio tapes (which were then transcribed by this defendant) routinely sought copies of the Farmans from this defendant's collection for their use. This defendant freely gave away such copies to anyone (only Ismailis) who asked for copies of the Farmans.

*Affidavit of Nagib Tajdin sworn May 7, 2010
Moving Party's Record, Tab 2, paragraphs 11, 12*

14. Subsequently, this defendant compiled Farmans from his collection and published the first Farman book, with a red cover and titled, KALAM-E IMAM-E -ZAMAN - FARMANS TO THE WESTERN WORLD, Volume 1 (the "First Farman Book") which contained Farmans made by

the Imam to the Western world, and was published on August 14, 1992.

*Affidavit of Nagib Tajdin sworn May 7, 2010
Moving Party's Record, Tab 2, paragraphs 13, 14 and Exhibit A*

15. This defendant's desire was to seek Guidance from the Aga Khan before commencing distribution of the First Farman Book, and would have destroyed the published books if the Aga Khan either was unhappy with the print, or did not want this defendant to distribute His Farmans in a book format.

*Affidavit of Nagib Tajdin sworn May 7, 2010
Moving Party's Record, Tab 2, paragraph 14*

16. The Aga Khan was scheduled to visit the Montreal Jamats on August 15, 1992, and the institutional leaders had decided that only about 20% of the Jamats would be allowed to attend personally before the Imam during His visit, chosen alphabetically. As this defendant's last name started with "T", he was not chosen to attend before the Imam to present a *Mehmani*, which is a religious ceremony when an Ismaili (usually with his spouse, or a family member) gets to present himself with an offering usually a plate of dry fruits, and seeks the Imam's Blessings and Guidance. The Imam accepts the follower in His presence, and bestows Blessings and Guidance upon him. This is a very auspicious occasion for any Ismaili to present himself or herself in the presence of his or her Imam.

*Affidavit of Nagib Tajdin sworn May 7, 2010
Moving Party's Record, Tab 2, paragraph 15*

*Affidavit of Karim Alibhay sworn April 28, 2010
Moving Party's Record, Tab 4, paragraphs 5, 6*

17. The Imam guides Murids during the Mehmani ceremony. Murids may talk to the Imam. He listens to them, he gives guidance and blessings that become binding Farmans to them. Blessed items from the Mehmani are then shared with friends and family.

Cross-Examination of Sachedina by Jiwa pp.45-47: #195 - #199

Cross-examination of Bhaloo, pp. 16-17: #96-#98

*Affidavit of Nagib Tajdin sworn July 13 2010
Tajdin's Responding Record, Tab 6, Paragraph 13 & 17*

*Affidavit of Mohamed Tajdin sworn July 7, 2010
Tajdin's Responding Record, Tab 8, Paragraph 26*

18. The Imam sometimes gives guidance and projects and mandates to individuals for special service to be rendered outside of Ismaili institutions.

*Affidavit of Mohamed Tajdin sworn July 7, 2010
Tajdin's Responding Record, Tab 8, Paragraph 23*

19. On August 15, 1992, this defendant asked a very dear friend of his, Karim Alibhay (hereinafter “Karim”), who was chosen to attend before the Imam, and gave him a copy of the First Farman Book to present to the Imam during his *Mehmani*, and requested that he seek guidance from the Imam. Karim had also helped in transcribing and proofreading the Farmans that Tajdin Published.

*Affidavit of Nagib Tajdin sworn May 7, 2010
Moving Party's Record, Tab 2, paragraph 16*

*Affidavit of Karim Alibhay sworn April 28, 2010
Moving Party's Record, Tab 4, paragraphs 7, 8*

*Affidavit of Nagib Tajdin sworn July 13, 2010
Tajdin's Responding Record, Tab 6, Paragraph 11*

20. On August 15, 1992, during the *Mehmani* when Karim presented himself before the Imam, the Imam blessed him and his family, and thereafter the Imam looked at the First Farman Book, then He then placed His hand on the book, at which point Karim asked the Imam in French: “Mowlana Hazar Imam, que pouvons nous faire pour l'Imamat?” [Mowlana Hazar Imam - our Lord, the present Imam - what else can we do to serve the Imamat?]. The Imam came closer to Karim, placed His right hand on his shoulder and His left hand again on the First Farman Book (which was in red cover) and responded in French: “Continuez ce que vous faites” (continue what you are doing), “réussissez ce que

vous faites” (succeed in what you are doing), and then ended by saying “et ensuite nous allons voir ce qu'on peut faire ensemble” (and then we will see what we can do together)

*Affidavit of Nagib Tajdin sworn May 7, 2010
Moving Party's Record, Tab 2, paragraph 17*

*Affidavit of Karim Alibhay sworn April 28, 2010
Moving Party's Record, Tab 4, paragraphs 9-15*

21. This defendant was present in the hall on the day in question during the Mehmani ceremony, and was very excited when he saw Karim attending before the Imam and asking guidance and when he observed the Imam placed His hand three times on the First Farman Book, and saw the Imam speaking to Karim. This event was video taped and the local institutional leaders have a copy of the said *Mehmani* presentation, which would show the presentation of the *Mehmani* by Karim .

*Affidavit of Nagib Tajdin sworn May 7, 2010
Moving Party's Record, Tab 2, paragraph 17*

*Affidavit of Karim Alibhay sworn April 28, 2010,
Moving Party's Record, Tab 4, paragraphs*

*Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 5, paragraphs*

22. Thereafter, this defendant commenced distributing the First Farman Book, and later distributed the following Farman books commencing on or around the following dates:
- a. Kalam-e Imam-e -Zaman, Volume 2, printed with a green cover on December 13, 1993, which contained Farmans to Asia and Middle East;
 - b. Precious Guidance, Volume 1, Volume 3, in March 21, 1994;
 - c. Kalam-e Imam-e -Zaman, Volume 3, printed with a blue cover on December 13, 1994, which contained Farmans to Africa; and
 - d. Precious Guidances: Vol. 2, 3, and 4, on March 21, 1998.

*Affidavit of Nagib Tajdin sworn May 7, 2010
Moving Party's Record, Tab 2, paragraph 19*

23. In addition, this defendant also published *Khangi* Farmans, and *Bahere Rahemat* transcribed from

Khojki script to *Gujrati* Script, and both of these contained Farmans made by our former Imam, Sir Sultan Mahomed Shah Aga Khan.

Affidavit of Nagib Tajdin sworn May 7, 2010
Moving Party's Record, Tab 2, paragraph 20 and Exhibit B

24. From 1992 to the date of the publication of the Golden Edition, this defendant was distributing the Farman books openly to Ismailis, and was never asked by the Aga Khan at any time to recall or to stop the distribution of the Farman books.

Affidavit of Nagib Tajdin sworn May 7, 2010
Moving Party's Record, Tab 2, paragraphs 22, 34

25. In November of 1998, this defendant gave a copy of the Farmans not previously published and a draft of Volume 4 of Kalam-e Imam-e Zaman to the Head of the Secretariat, Dr. Shafik Sachedina (hereinafter "Sachedina"), to enable him to publish and distribute a Farman book so that the distribution of the Farmans could be expanded to all Ismailis across the world. Thereafter, in January of 1999, Sachedina informed this defendant that the Aga Khan had approved the publication of the Farmans.

Affidavit of Nagib Tajdin sworn May 7, 2010
Moving Party's Record, Tab 2, paragraph 23

26. Additional details given by Mr Mohamed Tajdin have shown to be true and uncontested. Sachedina and Bhaloo did not go to Montreal in 1998 to Meet with Nagib, they were there in the context of a national tour for a fundraising campaign, and they were also the guests of the Tajdin family. Sachedina conveyed to the Tajdin family the Imam's blessings for their services. Sachedina offered to work together with Nagib Tajdin on various projects including the 4th KIZ Farman publication. Tajdin subsequently travelled to London in 1999 to meet staff at the Institute for Ismaili Studies (IIS) and proposed some project plans to Sachedina. The fact that Bhaloo still has Tajdin's draft of the 4th KIZ book in his house and that it never made it to the Imam shows that Sachedina and Bhaloo never came to stop the distribution of the 3 KIZ books, and never recalled them, and that they indeed only offered to collaborate on the 4th KIZ book that they kept

and did not follow-up on.

*Affidavit of Mohamed Tajdin sworn July 7, 2010
Tajdin's Responding Record, Tab 8, Paragraphs 13 - 22*

*Affidavit of Nagib Tajdin sworn July 13, 2010
Tajdin's Responding Record, Tab 6. Paragraph 45-50*

Cross-Examination of N. Tajdin p.96: #561-562

Cross-Examination of Sachedina p.76: #313- #314

Cross-Examination of Bhaloo pp. 24-26: #136-#139

27. Mr Tajdin continued, long after 1998, to circulate the Farman books that he had published, and to openly circulate Copies of more recent Farmans, often without collecting any cost. The fact that Mr Tajdin **never stopped** circulating unedited integral copies of Farmans is a well-known fact amongst Ismaili institutional circles.

Statement of Defence of Alnaz Jiwa - Paragraph 40

Affidavit of Sachedina sworn June 25, 2010, Tab C: 2008 Letter by the ITREB Coordinator to the Head of the National ITREB

Cross-examination of Sachedina pp.76-78: #315 - #322

28. Mr Tajdin has remained on respectful and cooperative good terms with the Ismaili leadership at all times, and respectful to the Imam, and following the Ismaili code of conduct at all times, as witnessed repeatedly by Sachedina and Bhaloo. Also, the named Plaintiff knows the family of this defendant as being abiding followers to whom he has written letters for other matters, and He could have done same in the last 20 years in matters of Farmans, but He has not.

Cross-Examination of Sachedina pp.78-79: #328, pp.113-114: #483-#484, pp.139-139: #580 #585, p.152:#635-#637

Cross-Examination of Bhaloo by Tajdin pp. 19-21: #114 - #121

Cross-Examination of Tajdin p.13: #66

29. This defendant published a white color hardcover book, KALAM-E IMAM-E-ZAMAN - GOLDEN EDITION [1957-2009] (hereinafter the “Golden Edition”), which contained all of the Farmans published in the Farman books referred to in paragraph 10, and 16 (a) and (c) with newer Farmans made after the last book was published with an updated index, and he commenced distributing the Golden Edition on December 13, 2009, (birthday of the Aga Khan). Mr Sachedina admits that the Golden Edition covers the contents of the previous KIZ publications.

*Affidavit of Nagib Tajdin sworn May 7, 2010
Moving Party's Record, Tab 2, paragraph 21 and Exhibit C*

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010
Moving Party's Record, Tab 3, paragraph 2*

Cross-examination of Sachedina pp. 12-13: #44- #46, pp.107-109: #453 & #459

30. On January 1, 2010, Sachedina emailed this defendant asking him to call him (Sachedina). When this defendant spoke with Sachedina, he was angry at this defendant for publishing the Golden Edition, and said that as he (Sachedina) had agreed to print the Farmans, he demanded to know why this defendant published it, and demanded this defendant to recall and stop the distribution of the Golden Edition. Sachedina made this demand on his own initiative before H. H. the Aga Khan was made aware of the publication of the Golden Edition.

*Affidavit of Nagib Tajdin sworn May 7, 2010
Moving Party's Record, Tab 2, paragraph 30*

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010
Moving Party's Record, Tab 3, paragraph 2*

Affidavit of Sachedina sworn June 25, 2010, Paragraphs 19-21

31. Sachedina continued calling this defendant between January 2nd and January 24th, demanding that this defendant withdraw the Golden Edition from distribution, and continued to express his anger at this defendant for refusing to withdraw the Golden Edition.

Affidavit of Nagib Tajdin sworn May 7, 2010

Moving Party's Record, Tab 2, paragraphs 31, 32

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010
Moving Party's Record, Tab 3, paragraph 2*

32. On January 16, 2010, Sachedina used his authority as the head of Secretariat and through the Ismaili Leaders International Forum (hereinafter "LIF") sent an announcement to be read in all the Jamatkhana (congregation) worldwide to inform the Jamats that the Golden Edition was not "authorized" and discouraged the Jamats to purchase it. Notably, the announcement did not say that the Aga Khan had not authorized the Golden Edition, The Announcement was prepared by a few individuals. Such an announcement is not binding on anyone and is not binding also on Tajdin, who is already bound by The Imam's 1992 Mehmani consent and instruction to "continue".

*Affidavit of Nagib Tajdin sworn May 7, 2010
Moving Party's Record, Tab 2, paragraph 33 and Exhibit D*

Cross-Examination of Sachedina p.82: #347, p.84: #354-#355

Cross-Examination of N.Tajdin pp.57-59: #333-#343

33. In response to the angry phonecalls of Sachedina, this defendant informed him that he (this defendant) had sent correspondence dated January 4, 2010, to the Aga Khan seeking His Guidance with respect to the Golden Edition and of future projects, and was waiting for the Imam's Guidance.

*Affidavit of Nagib Tajdin sworn May 7, 2010
Moving Party's Record, Tab 2, paragraph 37*

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010
Moving Party's Record, Tab 3, paragraph 3 and Exhibit A*

34. Subsequently, Sachedina called this defendant and requested to be given a copy of the defendant's correspondence sent to the Aga Khan, informing this defendant that he (Sachedina) could not locate it at the Secretariat of the Aga Khan, and wanted to know how and when the

letter was sent to the Aga Khan. This defendant refused to give a copy to Sachedina and informed him that he had delivered the correspondence to the Aga Khan Council in Kenya for delivery to the Aga Khan's Secretariat. Sachedina then emailed Tajdin on January 7th and again on January 10th to say that there was no record at Aiglemont of Tajdin's letter. However, a DHL receipt showed that his letter actually reached Aiglemont on January 8th, 2010.

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010
Moving Party's Record, Tab 3, paragraph 4*

Cross-Examination of Sachedina p.190-191: #820-#826

35. The January 16th announcement was read in worldwide Ismaili Jamatkhans before Mr Tajdin's letter had reached the Aga Khan. This harsh announcement, written by persons who did not witness the consent of 1992 that Nagib had, already spoke of copyright infringement.

Cross-Examination of Sachedina p.179: #771, pp.212-213: #913-#916

36. The January 16th announcement admitted that Ismailis need access to Farmans by announcing that an official Farman publication has been approved by the Imam. However, this part of the announcement was also not an initiative of the Imam. Mr Sachedina cannot pinpoint whether or when the approval for this official Farman book was given, and indicates that contrary to the announcement, no work is under way to produce an official Farman book. In fact, Imam has for decades, given a standing approval for Farman publication, and He has been expecting such projects to be presented to Him. The institutions under Sachedina have simply not worked on this crucial project.

Cross-Examination of Sachedina pp.90-94: #390 - #402

37. A week or so later, this defendant received by email from Ms. Parkes, enclosing a letter dated January 24, 2010, purportedly signed by the Aga Khan (hereinafter the "First Letter"), demanding that this defendant recall and withdraw all Golden Edition books and to deliver all remaining

stocks of the books to the Institute of Ismaili Studies (IIS). This letter also asked Tajdin to confirm **directly** with the Imam. When he tried to do so, he was told by Sachedina to confirm **indirectly** through Sachedina. As this letter contradicted the Imam's Guidance and blessings given in Montreal during the *Mehmani* in 1992, and as the language in the First Letter seemed unlike language normally used by the Aga Khan, and as it also contained factual errors, this defendant requested clarifications and an audience at his own expense, but Sachedina refused to pass his request to The Aga Khan or to arrange an audience. Tajdin retained two handwriting and document examination experts to determine if the signature on the First Letter was actually signed by the Aga Khan.

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010
Moving Party's Record, Tab 3, paragraphs 1 and 2*

*Affidavit of Karim Alibhay sworn April 28, 2010
Moving Party's Record, Tab 4, paragraphs 6, 7, and Exhibit B*

Cross-Examination of Sachedina p.136: #570 - #573

38. One of the expert, Graziella Petinatti, signed a report on February 4, 2010, and stated that, "Given these numerous dissimilarities, we conclude that there is a **strong probability** that the disputed signature is a **forgery**." [emphasis original].

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010
Moving Party's Record, Tab 3, paragraph 7 and Exhibit C*

39. The second expert, Wendy Carlson, also signed a report on February 8, 2010, finding in non equivocal terms that, "a different person authored the signature on the questioned document. Someone did indeed forge the signature of the Aga Khan".

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010
Moving Party's Record, Tab 3, paragraph 8 and Exhibit D*

40. Subsequently, Sachedina telephoned this defendant shortly after this defendant sent an email to Ms. Parkes concerning the forged signature, and this defendant asked him as to

why he had sent a letter purported to be from the Aga Khan with a forged signature, to which Sachedina reacted in a very hostile manner threatening to ruin this defendant's reputation in the worldwide Jamat (congregation).

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010
Moving Party's Record, Tab 3, paragraphs 9, 10*

*Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 5, Exhibit A*

41. On February 18, 2010, this defendant received another letter purported to be from the Aga Khan, repeating that the first signature was not forged and reporting in almost the same sentences uttered by Sachedina in our telephone conversation. It even contained an addition of a handwritten paragraph ending in a comma. An Expert found that his paragraph as well as the signature have not been penned on that letter.

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010
Moving Party's Record, Tab 3, paragraph 11*

*Affidavit of Graham P. Ospreay sworn July 15, 2010
Tajdin's Responding Record, Tab 9, Exhibit D*

42. This statement of claim in this action for copyright infringement was issued on April 6, 2010, and is similar in content to the First Letter, and was immediately circulated widely to thousands of Ismailis worldwide by way of mass email campaign the same day it was filed in court, and also publicized through an Ismaili journalist, who operates a news reporting web site out of Vancouver.

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010
Moving Party's Record, Tab 3, paragraphs 12, 13*

43. The mass circulation of the statement of claim was made even before it was personally served on the defendants. In fact, the claim was served on this defendant almost a month after, and only after his statement of defence was filed, although his whereabouts were

well known to Sachedina, and the Aga Khan Secretariat. Announcements of this action were read in all Jamatkhana (congregation) of countries where this defendant is well known, fulfilling the threats made by Sachedina to ruin this defendant's reputation.

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010
Moving Party's Record, Tab 3, paragraphs 12-14*

44. The claim therein that Farmans must be edited aligned with Sachedina's declarations over the years that Imam's Farmans must be edited, that the Imam "Thinks in French and Speaks in English", and with his general disrespect for the status of the Farmans and of the Imam in Ismaili Faith. If witness Sachedina is to be believed, the dozens of Farmans that never got released over the years, although they are full of guidance and blessings that were made to large gatherings of Ismailis who cherish those words and aim to follow them, although they are Divine, they are no longer "Farmans". This is quite contradictory and disrespectful to the tenet of Ismaili Faith that the Hereditary Imam is the bearer of the Light of God

Statement of Claim Paragraph 23

*Cross-Examination of Sachedina p.59:#253, p.129: #544-#545, pp.147-150:
#617 - #628*

*Affidavit of Nagib Tajdin sworn May 7, 2010
Moving Party's Record, Tab 2, Paragraph 25-26*

*Affidavit of Nagib Tajdin sworn July 13
Tajdin's Responding Record, Tab 6, Paragraph 27-29*

*Affidavit of Mohamed Tajdin sworn July 7
Responding record Tab 8, , Paragraph 17*

45. Contrary to the statement of claim, there is no established criteria for editing or guidelines for publication or dissemination of Farmans. Mr Sachedina admits that the Farman dissemination policy document dated March 2010 presented as Exhibit B in Mr

Sachedina's affidavit is a last-minute document that comes from Mr Manji, the President of the Ismaili Council for Canada, and that it is not sent by the Imam. It is clear that document and others have been created after the publication of the Golden Edition to back the Statement of Claim.

Sachedina's Cross-examination p.74: #306-#309

Statement of Claim Paragraph 23

46. The Claim that the integrity of the Aga Khan's works is compromised is also wrong. There is no evidence of mutilation or distortion. Quite the contrary, Ismaili Faith dictates that the Imam's Farmans become effective and binding to Ismailis as soon as they are spoken and as they are spoken. Tajdin also believes that Farmans cannot be edited and has published them in their integral form.

Statement of Claim, Paragraph 20 & 34 &35

Statement of Defence of Tajdin, Paragraph 23.

Affidavit of Nagib Tajdin sworn July 13, 2010

Tajdin's Responding Record, Tab 6, Paragraph 18-22, 83-85

47. The premise in the claim that the Farmans must be edited before they are published is not an Ismaili concept. There is no evidence that the Imam Edits Farmans because they are, in Ismaili belief, from a Divine source. A judgment admitting without admissible evidence that Imam edits the Farmans would reform the basis of the Ismaili religion in a legal framework and it is not the mandate of judges to make changes to various religions or to let anyone use the legal setup to do this.
48. On May 14, 2010, the counsel of the plaintiff sent a photocopy of an Affirmation (hereinafter "Affirmation") to the defendants by email, purported to have been signed in

Boston by the Aga Khan in front of a Notary Public, along with threats to circulate it widely, and also stated that the Aga Khan signed the Affirmation in the presence of his friend who is a senior lawyer (but it was not notarized by him). This defendant sent two emails to the plaintiff's counsel requesting to be given the name and address of the senior lawyer, of the notary public, of the personal secretary all of whom were said to be present at the time the Aga Khan is alleged to have signed the Affirmation, along with the place where it was signed, however, counsel has declined to disclose this information.

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010
Moving Party's Record, Tab 3, paragraph 15 and Exhibit E*

*Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 5, paragraphs 26-28*

49. These and other points aroused this defendants suspicion on the authenticity of the Affirmation, as it is unlikely that the Aga Khan would instruct His counsel to threaten the defendants. This defendant has followed the Aga Khan and His activities very closely, and knows that the Aga Khan does not act with such vengeance against anyone, let alone against His own spiritual children.

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010
Moving Party's Record, Tab 3, paragraphs 16 and 17*

50. The Aga Khan announced a visit to Toronto in the last week of May of 2010, and this defendant wrote to the counsel of the plaintiff on May 16, 2010, asking to arrange a five minutes meeting with the Aga Khan so that this defendant could seek his Imam's direct instructions, along with giving a commitment in writing to abide by any instructions directly given by the Aga Khan.

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010
Moving Party's Record, Tab 3, paragraph 18*

51. On May 25, 2010, this defendant flew to Toronto all the way from Nairobi, Kenya, to be

present and available if the plaintiff's counsel arranged the meeting with the Aga Khan as requested by this defendant. Counsel did not arrange the meeting during the time the Aga Khan was present in Toronto.

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010
Moving Party's Record, Tab 3, paragraphs 19, 20*

52. Since the Affirmation also contradicted the Imam's Guidance previously given to this defendant, and since the signature on the First Letter has been determined by two experts as being forged, the defendants retained a further document and handwriting expert to analyze the January Letter and the Affirmation. The plaintiff's counsel initially refused to provide the original Affirmation, and after persistently asking for it, he reluctantly agreed to release the original of the Affirmation upon Jiwa giving his undertaking that it would be returned within ten days, even though later the defendants were told that 3 copies existed. This is why defendants needed to find a new local expert in Toronto.

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010
Moving Party's Record, Tab 3, paragraph 21*

53. Both the First Letter and the Affirmation, along with about 20 known signatures were delivered to Graham P. Ospreay, a highly qualified and experienced document and handwriting examiner, for analysis, who subsequently gave his report on June 9, 2010, stating that the Aga Khan **had not signed** the two documents in question. All five expert reports by three different independent experts have confirmed that the signatures purporting to be that of the Aga Khan were forged signatures. To date, no real signature of the Aga Khan, the named Plaintiff, can be seen on any document related to this lawsuit.

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010
Moving Party's Record, Tab 3, paragraphs 22, 23, and Exhibits F and G*

54. This defendant has undertaken these activities due to immense love and affection for his Imam and His Jamats, and will do whatever his Imam asks this defendant to do, and as such this action would not be necessary if it is actually the Imam's wish not to publish and distribute His Farmans. This defendant's love, respect, obedience for the Imam has no bounds, and he considers the Imam as the Master of his material and spiritual life and upon one gesture of the Imam, this defendant is willing to give Him all his time, wealth – present and future, intellect, life, capabilities, work, dignity and soul.

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010
Moving Party's Record, Tab 3, paragraph 26*

55. The Imam has simple ways of transmitting true messages. He has written to the Tajdin Family over the years, but he has never mentioned in those letters for Tajdin to stop Farman Publication. He has travelled across most of the Ismaili world and made Farmans to all the Jamats, not once did he mention this concern so that all unofficial Farman publications may stop, not only Nagib's. He has performed a long review of the Ismaili constitution which is binding upon every Ismaili and modified it in 1986 and amended it in 1998, and instead of adding any restriction on Farman publication, He has removed any clauses about Farman publication from the Constitution.

Cross-Examination of Sachedina pp.100-102:#429-#439

*Affidavit of Alnaz Jiwa, sworn June 16, 2010
Moving Party's Record, Tab 5, Paragraphs 14-18*

56. Because of lack of credible evidence, or of any true direct communication to the contrary by the Aga Khan, Mr Tajdin has maintained since before the Aga Khan was even made aware of the Golden Edition, that if The Aga Khan says in person that He has written and signed the questioned letters or if He says in person that he revokes consent, Tajdin will

stop the activities complained of. Tajdin's intentions have been clear and harmless from the beginning. Even in February, when he knew about the forgery, he only wanted Sachedina to inform the Imam, he did not publicize this information until the statement of Claim was filed and he had no choice.

Cross-Examination of Sachedina p.151-152: #630 - #632

Cross-Examination of Tajdin pp.25-26:#134-#140, pp.33-35: #189-#202, p.41: #236 - 239, p.43-44: #248-#253, p.46: #267, pp.68-70: #398-#404, p.79:#450-#451, pp.82-83#470 - #476

57. This Defendant remains loyal to the Imam, he has dedicated his life, soul, time and resources to the Aga Khan and His institutions, he has created the oldest and largest website dedicated to the Aga Khan, he has written a "Bibliography of Ismailism" described as an "essential reference" by the Aga Khan's Uncle, circulated the Imam's Farmans to his followers all around the world for decades at his own expenses. To him, the Imam is the bearer of the Light of God, and he would unconditionally follow whatever his Imam would say and is willing to give his life for any wish of the Imam.

*Affidavit of Nagib Tajdin sworn July 13th 2010
Tajdin's Responding Record, Tab 6, Exhibit A & Paragraphs 42-45*

Statement of Defence of Nagib Tajdin, Paragraphs 31-34

58. In view of this defendant's unwaivering allegiance to the Imam, the fact that after Discovery he has maintained that the Statement of Claim does not represent the Imam's intentions is sure evidence of the Imam's position in this matter.
59. In the many months since the action was filed, the Plaintiff party is not submitting its best evidence. The Aga Khan has yet to provide any direct evidence in this matter. There is no affidavit, no affidavit of documents, even no recent signature samples to disprove the

conclusions of forgery. The exhibits purportedly written by the Aga Khan are not submitted as admissible evidence and their contents and their authenticity is also being questioned. Defendants are relying on the only true uncontested knowledge they have of the Imam's intentions, which is what he has said in person, in His Farmans, in the Ismaili Constitution, and especially at the 1992 Mehmani.

60. The lack of admissible evidence from the Aga Khan to support this action is not surprising and supports the Defendants. The Aga Khan does not need to give any public evidence or start a lawsuit in order to be obeyed by the Defendants who have pledged unconditional obedience. He has many other simple means of dealing with this in a definite manner. He could say "Nagib, stop", he could amend the Ismaili constitution or make a Farman that would bind all Ismailis and prevent them all from circulating Farmans, he could use the Ismaili Internal Arbitration process that is binding and that He has championed, all remedies that are within His reach but not used. On the other hand, if, as evidence shows, He has been misrepresented in this case, then there is no use in His giving contradictory evidence either: it would go against the conciliatory approach that He favours, and it would only further embarrass His leaders and undermine the Ismaili institutional structure.

Statement of Defence of Nagib Tajdin, Paragraphs 58-61

61. *Cross-examination of Tajdin p.80: #454* The question of disobeying the Imam or to act against any of His wishes, therefore, has never arisen in this defendant's mind. **Whatever wealth this defendant has or will have in future is surrendered unconditionally to the Imam whose love and protection he trusts.**

*Affidavit of Nagib Tajdin sworn May 7, 2010
Moving Party's Record, Tab 2, paragraph 4*

62. This defendant therefore seeks that this action be dismissed as he has published and distributed the Golden Edition with the Aga Khan's consent, authorization and Blessings given by the Aga Khan on August 15, 1992.

III - POINTS IN ISSUE

63. Whether there is a genuine issue for trial with respect to the claim filed by the plaintiff?

Whether the Aga Khan gave His consent and authorization on August 15, 1992, in Montreal to the publication of His Farmans by this defendant? IV- SUBMISSIONS

64. Since the Imam ordered to Continue the Farman publication Project in 1992, this is legally an explicit consent, and according to Tajdin's faith, it is a binding Farman. Both Legally and according to His faith, this consent can only be revoked by the Aga Khan in Person. Sachedina's own initiative to give instructions to Tajdin about stopping publication are not binding on Tajdin. Consent cannot be revoked by a questioned letter, it cannot be revoked by a phonecall from someone else, or by an announcement.

*Affidavit of Nagib Tajdin sworn July 13, 2010
Tajdin's Responding Record, Tab 6, Paragraph 56*

65. Rule 213 (2) provides that a defendant may, after serving and filing a defence and at any time before the time and place for trial are fixed, bring a motion for summary judgment dismissing all or part of the claim set out in the statement of claim.
66. Rule 215 provides that a response to a motion for summary judgment shall not rest

merely on allegations or denials of the pleadings of the moving party, but must set out specific facts showing that there is a genuine issue for trial.

67. Rule 216. (1) provides that where on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim, the Court shall grant summary judgment accordingly.

68. In *Rachalex Holdings Inc. v. W & M Wire & Metal Products Ltd.*, 2007 FC 502, 157 A.C.W.S. (3d) 629 (F.C.), the court set out the test for summary judgment at para. 8 (citing the decision in *Spenco Medical Corp. v. EMU Polishes Inc.*, 2004 FC 963 (F.C.) at paras. 6-8):

...The Court is not to grant summary judgment where it is shown that there is a genuine issue for trial. However, Rule 216(3) specifically permits this Court to grant summary judgment even where there is a genuine issue for trial so long as the Court "is able on the whole of the evidence to find the facts necessary to decide the questions of fact and law"

Koslowski v. Courier, 2009 CarswellNat 2902, 2009 FC 883,
Defendant's Book of Authorities, Tab 1, at para. 15

69. In *Granville Shipping Co. v. Pegasus Lines Ltd. S.A.*, [1996] 2 F.C. 853 (Fed. T.D.), Madam Justice Tremblay-Lamer set out the general principles applicable to a motion for summary judgment at paragraph 8:

[8] I have considered all of the case law pertaining to summary judgment and I summarize the general principles accordingly:

1. the purpose of the provisions is to allow the Court to summarily dispense with cases which ought not proceed to trial because there is no genuine issue to be tried (*Old Fish Market Restaurants Ltd. v. 1000357 Ontario Inc. et al.*, [1994] F.C.J. No. 1631, 58 C.P.R. (3d) 221 (T.D.));

2. there is no determinative test [...] but Stone J.A. seems to have adopted the reasons of Henry J. in *Pizza Pizza Ltd. v. Gillespie* [(1990), 75 O.R. (2d) 225 (Gen. Div.)]. It is not whether a party cannot possibly succeed at trial, it is

whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial;

3. each case should be interpreted in reference to its own contextual framework [...];

4. provincial practice rules (especially Rule 20 of the *Ontario Rules of Civil Procedure*, [R.R.O. 1990, Reg. 194]) can aid in interpretation [...];

5. this Court may determine questions of fact and law on the motion for summary judgment if this can be done on the material before the Court [...];

6. on the whole of the evidence, summary judgment cannot be granted if the necessary facts cannot be found or if it would be unjust to do so [...];

7. in the case of a serious issue with respect to credibility, the case should go to trial because the parties should be cross-examined before the trial judge [...] The mere existence of apparent conflict in the evidence does not preclude summary judgment; the court should take a "hard look" at the merits and decide if there are issues of credibility to be resolved.

Koslowski v. Courier, Defendant's Book of Authorities, Tab 1, supra at para. 16

70. The Federal Court of Appeal affirmed this test in *ITV Technologies Inc. v. WIC Television Ltd.*, 2001 FCA 11, [2001] F.C.J. No. 400 (Fed. C.A.), and quoted it with approval in *MacNeil Estate v. Canada (Department of Indian & Northern Affairs)*, 2004 FCA 50, 316 N.R. 349 (F.C.A.), wherein the Court provided the guidelines specifically with respect to the application of Rule 216(3) at paras. 32-29. I summarized these guidelines in *Rachalex Holdings*, supra, at para. 8 as follows:

1. where an issue of credibility arises from evidence presented, the case should not be decided on summary judgment under rule 216(3) but rather should go to trial because the parties should be cross-examined before the trial judge (see paragraph 32 of *MacNeil Estate*);

2. under rule 216(3), motions judges can only make findings of fact or law provided the relevant evidence is available on the record and does not involve a "serious" question of fact or law which turns on the drawing of inferences (see paragraph 33 of *MacNeil Estate*);

3. Rule 216(3) permits a judge on a motion for summary judgment, after finding

that a "genuine issue" exists, to conduct a trial on the affidavit evidence with a view to determining the issues in the action. However, this is not always possible, particularly where there are conflicts in the evidence, where the case turns on the drawing of inferences or where serious issues of credibility are raised (see paragraph 46 of *MacNeil Estate*);

4. Parties responding to a motion for summary judgment do not have the burden of proving all of the facts in their case; rather ... responding parties have only an evidentiary burden to put forward evidence showing that there is a genuine issue for trial ... (see paragraph 25 of *MacNeil Estate*).

Koslowski v. Courier, Defendant's Book of Authorities, Tab 1, supra at para. 17

71. Mr. Gray had an obligation of bringing forth evidence to provide support to the inference he wishes this court to infer. The court in *Ruhl Estate, referring to Feoso Oil Ltd. v. Sarla*, states that:

“To this end, ... both sides are required to "put their best foot forward". The responding party cannot hold back in the hope that the motion will fall of its own weight because the evidence in support is insufficient.

Ruhl Estate v. Mannesmann Kienzle GmbH, 1997 CarswellNat 1840, 137 F.T.R. 81, 80 C.P.R. (3d) 190, [1997] F.C.J. No. 1345, Defendant's Book of Authorities, Tab 10, at para. 13

The court in *Suway* states that:

Rule 20 requires that a party put its best foot forward. It does not permit a party to put a toe in the water and then add more evidence if its case is found wanting. ... It is well settled that a party may not "repair damage" to its case by introducing new evidence on a motion in order to patch up holes in the case created by the other party's evidence or counsel's submissions: *NRS London Realty Ltd. v. Glenn* (1989), 67 O.R. (2d) 704 (Ont. Dist. Ct.); *Grant v. Kerr*, [2001] O.J. No. 5162 (Ont. Master) (Master); *Choo v. Wong*, [2005] O.J. No. 5768
Suway v. Women's College Hospital, 2008 CarswellOnt 1195, 165 A.C.W.S. (3d) 67, Defendant's Book of Authorities, Tab 5, at para. 33 & 34

72. Section 27. (1) of the *Copyright Act* provides that it is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

Copyright Act, R.S.C.. 1985, c. C-42.

73. The above section concerning the issue of consent has been clarified by the Federal Court of Appeal as follows:

“However, even if one assumes that the motion judge was right to consider the question, the difficulty is that copyright is **defined in terms of the absence of the consent of the owner of the copyright.**” [Emphasis added]

“Consequently, proof of copyright infringement requires proof of lack of consent. It is therefore illogical to conclude that there has been infringement, subject to the effect of a purported license. It may be that a party has done something which, by the terms of the Copyright Act, R.S.C. 1985, c. C-42, only the owner of the copyright may do. But, before that conduct can be defined as infringement, **the judge must find that the owner of the copyright did not consent to that conduct.**” [Emphasis added]

Positive Attitude Safety System Inc. v. Albian Sands Energy Inc., 2005 CarswellNat 3575, 2005 FCA 332, Defendant's Book of Authorities, Tab 6, at para. 39

74. Under the Copyright Act, consent can be orally given, and can also be implied from the circumstances. The learned author of *Fox's Canadian Law of Copyright and Industrial Design*, states that “Such permission for mere doing of an Act that would otherwise be an infringement of copyright may be given orally or by implication, and passes no interest.” Referring to the case of *Muskett v. Hill* (1839) 5 Bing NC 649, 9 LJCP 201, 132 ER 1267, the court said that “A mere oral licence in the form of permission to do a thing “passes no interest, but only makes an action lawful which without it would be unlawful.” The court further stated that “Such a licence, amounting to a mere dispensation, may in certain circumstances provide an equitable defence to an action of infringement.”

Netupsky v. Dominion Bridge Co. 1969 CarswellBC 76, 58 C.P.R. 7, 5 D.L.R. (3d) 195, Defendant's Book of Authorities, Tab7 at para. 98

75. The consent to publish and distribute “may be presumed from the circumstances”, so long as the inference of consent must be clear before it will operate as a defence and must come from the person holding the particular right alleged to be infringed.

Netupsky v. Dominion Bridge Co. Defendant's Book of Authorities, Tab 7, para. 99

76. There is implicit consent from Imam to all Ismailis to distribute farmans to each other, as if they were one Family. Farmans are precious guidance for Ismailis. Ismailis are bound to access them, discuss them, follow them. In this spirit, Ismailis throughout history have recorded and shared farmans with each other. Even recently, there have even been many Farman book publications by others than the defendants.

Cross-Examination of N. Tajdin p.106:#633 - #636

*Affidavit of Nagib Tajdin sworn July 13, 2010
Tajdin's Responding Record, Tab 6, Paragraph 18-20*

*Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 5, Paragraph 19-22*

77. The Imam, by blessing the First KIZ Book and returning it, gave implied consent to share it, and this would be seen in the video if it was released. Then, by saying "Continue" the Imam gave an explicit consent in the form of an order to continue the KIZ project, which the defendant is bound to obey, and which supersedes any leader, announcement, constitution, etc.

78. Justice Joyal in the case of *de Tervagne*, held that:

“The third important principle to be found in the Muzak case is that it is possible to establish that a person has sanctioned, approved or countenanced an actual infringing activity (thereby rebutting the presumption that a person who authorizes an activity does so only so far as it is in accordance with the law), **if it is shown that certain relationships existed between the alleged authorizer and the actual infringer, or that the alleged authorizer conducted himself in a certain manner.**” [Emphasis added]

“Hitchcock attempted, at pages 34-43, to define the type of conduct or relationship from which it can be concluded that a person in fact authorized the infringement, within the meaning of the Act, **by his or her conduct or relationship with the person who infringed the copyright.**” [Emphasis added]

*de Tervagne v. Beloeil (Town), 1993 CarswellNat 222, [1993] 3 F.C. 227,
Defendant's Book of Authorities, Tab 11, at para 42, 44*

Justice Joyal also stated:

“... that the court may infer an authorization or permission from acts which fall short of being direct and positive; I go as far as to say that indifference, exhibited by acts of commission or omission, may reach a degree from which authorisation or permission may be inferred. It is a question of fact in each case what is the true inference to be drawn from the conduct of the person who is said to have authorised the performance or permitted the use of a place of entertainment for the performance complained of. “

79. There is a very special relationship of Love and, as described in the Ismaili constitution, "a permanent spiritual bond between the Imam and the murid" who is considered His spiritual child. Mr Tajdin pointed out a couple of times to Gray that "If you don't understand the relation between me and my Imam, it will be very difficult for you to even ask questions.". Because of this special relationship, the Defendants have consent. Because of this special relationship, Gray did not obtain any admissible evidence from the Aga Khan to back his case, not even at the discovery. And because of lack of admissible evidence from the Aga Khan, this action does not belong in a legal setting and must be dismissed.

Ismaili Constitution, Preamble, Paragraph D

Cross-examination of N. Tajdin, pp.104-105: #625-#626, p.94: #401, p.80:#454

Affidavit of Sachedina, sworn June 25, 2010, Exhibit D, page 2

80. It is well-known to all parties and witnesses that Tajdin has been printing and circulating Farmans continuously for over 18 years. The court in 1013579 Ontario Inc. said as follows:

“The key factors to consider when applying the doctrine of acquiescence and laches outlined in the Institut national des appellations d'origine des vins & eaux-de-vie v. Andres Wines (1987), 16 C.P.R. (3d) 385 (Ont. H.C.), are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.”

1013579 Ontario Inc. v. Bedessee Imports Ltd., 1996 CarswellNat 901, 68 C.P.R. (3d) 486, Defendant's Book of Authorities, Tab 13

81. This this court is obligated to look for facts found on the record for evidence. Although “the onus remains on the moving party to show that there is no genuine issue for trial, but **the responding party must present its best case or risk losing**: Pizza

Pizza Ltd. v. Gillespie (1990), 75 O.R. (2d) 225 (Gen. Div.); *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (C.A.), where Osborne, J.A. stated: "a respondent on a motion for summary judgment must lead trump or risk losing"; *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), aff'd [1997] O.J. No. 3754 (C.A.). [Emphasis added]

Suwary v. Women's College Hospital, 2008 CarswellOnt 1195, 165 A.C.W.S. (3d) 67, *Defendant's Book of Authorities*, Tab 5

In a recent judgment released by the Federal Court of Appeal on January 20, 2010:

“the principle that parties to a motion for summary judgment must put their best foot forward precludes the respondents from saying that other evidence may be adduced at trial that contradicts Mr. Harrison's statement against interest and under oath that he had sold the mats in question before 2003.” [Emphasis added]

Sterling Lumber Co. v. Harrison, 2010 CarswellNat 69, 2010 FCA 21, *Defendant's Book of Authorities*, Tab 3, para 8

In *Cselko Associates Inc. v. Zellers Inc.*, the court held that:

“. . . Rule 20 should not be eviscerated by the practice of deferring actions for trial at the mere suggestion that future evidence may be made available.” (emphasis original).

Cselko Associates Inc. v. Zellers Inc., 1992 CarswellOnt 754, *Defendant's Book of Authorities*, Tab 4, para. 16

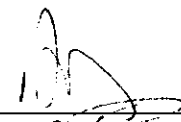
82. The question of infringement by Tajdin cannot arise because the Aga Khan has never said that he did not give consent in 1992 as described in the defendants' evidence.
83. This defendant submits that according to s. 3 of the *Copyright Act*, the complained act is an “infringement” only if it has been undertaken without the copyright holder’s consent. Since the Imam gave his consent, authorization and Blessings, on August 15, 1992, before the distribution was commenced, the activities complained of are not infringing the rights of the Aga Khan.

IV - ORDER SOUGHT

84. This defendant asks that this action be dismissed without costs.

Date: November 25, 2010

Respectfully submitted,

cv. 

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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
others persons or entities unknown to the plaintiff who are reproducing,
publishing, promoting and/or authorizing the reproduction and promotion
of the Infringing Materials.

Defendants

MEMORANDUM OF FACT AND LAW

by the defendant Nagib Tajdin
Motion returnable July 12, 2010

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