

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

NOTICE OF MOTION

(Plaintiff's Motion for a Further and Better Affidavit of Documents
and Re-attendance on Examination for Discovery)

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 pursuant to Rule 227 of the *Federal Courts Rules* requiring the Defendants to produce a further and better affidavit of documents within 10 days of the disposition of this motion;

2. An Order requiring the Defendants to re-attend examination for discovery to answer under oath in respect to documents now produced, and if so ordered, in respect to a further and better affidavit of documents, within 60 days of the disposition of this motion.
3. Costs of this motion; and
4. Such further or other relief as counsel may advise and as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE:

1. This motion for a further and better affidavit of documents and re-attendance on examination for discovery arises in the context of a reference proceeding commenced by the Plaintiff for an accounting of profits stemming from the Defendants' 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 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?

Further and Better Affidavit of Documents

- 4. The Defendants' affidavits of documents delivered in this reference proceeding are obviously deficient. Few relevant original documents have been produced. Of those produced, many have been redacted and were not produced as part of a properly sworn and certified affidavit of documents.
- 5. Mr. Tajdin has never complied with a Direction of this Court dated September 6, 2011 to deliver a further supplementary affidavit of documents, despite having unsuccessfully appealed this Direction up to the Federal Court of Appeal.
- 6. It is simply not credible that Mr. Tajdin, who admittedly sold thousands of books estimating revenues for infringing sales at close to \$200,000, did not maintain any sales accounts. Yet, Mr. Tajdin is capable of producing detailed receipts of his expenses associated with the book.
- 7. It is likewise not credible that Mr. Jiwa, who admittedly actively promoted and sold 24 boxes of infringing books over e-mails and otherwise, can only produce limited documentation of a single sale.
- 8. There is no question that such financial documents are relevant in the context of a reference for an accounting of profits for copyright infringement. The failure to produce such documents is a serious "gap" in the Defendants' production in this case.
- 9. At the very least, the Defendants should be obliged to deliver supplementary affidavits of documents listing all documents that have been produced subsequent to examination for discovery. These documents, including unredacted printer invoices, are known by the Plaintiff to exist.

10. The production of relevant documents is a legal obligation that is not a matter of discretion. The Defendants should be held to comply with their statutory and legal obligations to properly produce relevant documents in this proceeding.

Re-attendance on examination for discovery

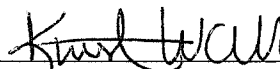
11. The Plaintiff further seeks an order requiring the Defendants to re-attend on examination for discovery to answer under oath in respect to documents now produced, and if so ordered, in respect to a further and better affidavit of documents.
12. Some of the few original and unredacted documents produced in this reference proceeding, including printer and audio bookmark manufacturer receipts and invoices, were delivered to the Plaintiff after examinations for discovery.
13. In light of the little relevant production made in this proceeding, the Plaintiff's ability to question the Defendants about these documents, and any other documents produced in a further and better affidavit of documents, if so ordered, is crucial for the Plaintiff to make out its case.
14. The Plaintiff relies on Rules 157, 222, 223, 224, 226 and 227 of the *Federal Courts Rules*, SOR/98-106, as amended.
15. Such further and other grounds 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 16th, 2014;

3. Such further and other material as counsel may advise and this Honourable Court may permit.

All of which is respectfully submitted this 16th day of June, 2014.



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AND TO: Me JEAN-PHILIPPE GERVAIS
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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

NOTICE OF MOTION

(Plaintiff's Motion for a Further and Better
Affidavit of Documents and Re-attendance on
Examination for Discovery)

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FEDERAL COURT

BETWEEN:

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Plaintiff

- and -

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Defendants

AFFIDAVIT OF CHRISTIAN LANDETA

(sworn June 16, 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.

Pleadings

2. Attached hereto as **Exhibit "A"** to my affidavit is a copy of the Plaintiff's Statement of Claim dated April 6, 2010.
3. Attached hereto as **Exhibit "B"** to my affidavit is a copy of the Plaintiff's Statement of Issues dated March 29, 2011.
4. Attached hereto as **Exhibit "C"** to my affidavit is a copy of the Reply to Plaintiff's Statement of Issues (of the defendant Alnaz Jiwa) dated July 18, 2011.
5. Attached hereto as **Exhibit "D"** 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.

Affidavits of Documents

6. Attached hereto as **Exhibit "E"** to my affidavit is a copy of Mr. Tajdin's Affidavit of Documents dated October 2, 2010, including copies of listed documents 2, 16, 17, 19, 21 and 22.
7. Attached hereto as **Exhibit "F"** to my affidavit is a copy of Mr. Jiwa's Affidavit of Documents dated July 18, 2011, including copies of the documents listed.
8. Attached hereto as **Exhibit "G"** to my affidavit is a copy of Mr. Tajdin's Supplementary Affidavit of Documents dated August 22, 2011, including copies of the documents listed.
9. Attached hereto as **Exhibit "H"** to my affidavit is a copy of Mr. Jiwa's Supplementary Affidavit of Documents dated October 7, 2011, including copies of the documents listed.

Cross-examinations

10. Attached hereto as **Exhibit "I"** to my affidavit is a copy of the Direction of Prothonotary (then Referee) Milczynski dated September 6, 2011.
11. Attached hereto as **Exhibit "J"** to my affidavit is a copy of a letter dated September 6, 2011 from counsel for the Plaintiff to the Defendants.
12. Attached hereto as **Exhibit "K"** to my affidavit is a copy of the Affidavit of N. Tajdin sworn September 16, 2011.
13. Attached hereto as **Exhibit "L"** to my affidavit is a copy of the transcript to the cross-examination of Nagib Tajdin held October 17, 2011.
14. Attached hereto as **Exhibit "M"** to my affidavit is a copy of Exhibit 5 to the cross-examination of Nagib Tajdin held October 17, 2011.
15. Attached hereto as **Exhibit "N"** to my affidavit is a copy of Exhibit 10 to the cross-examination of Nagib Tajdin held October 17, 2011.

16. Attached hereto as **Exhibit "O"** to my affidavit is a copy of the transcript to the cross-examination of Alnaz Jiwa held October 19, 2011, including Exhibits 1 and 2.

Examination for Discovery

17. Attached hereto as **Exhibit "P"** to my affidavit is a copy of the transcript to the discovery of Nagib Tajdin held November 8, 2011.
18. Attached hereto as **Exhibit "Q"** to my affidavit is a copy of Exhibit 2 to the Examination for Discovery of Nagib Tajdin.
19. Attached hereto as **Exhibit "R"** to my affidavit is a copy of the transcript to the discovery of Alnaz Jiwa held November 8, 2011.

Documents Produced After Discovery

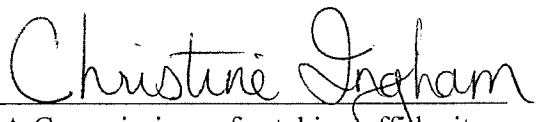
20. Attached hereto as **Exhibit "S"** to my affidavit is a copy of an affidavit sworn by Mr. Jiwa on April 18, 2012, including Exhibit "D".
21. Attached hereto as **Exhibit "T"** to my affidavit is a copy of the court docket print-out in T-514-10 for April 4, 2012.
22. Attached hereto as **Exhibit "U"** 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.
23. Attached hereto as **Exhibit "V"** 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.

24. Attached hereto as **Exhibit "W"** 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.
25. Attached hereto is as **Exhibit "X"** 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.
26. The documents of Exhibit "W" (printer invoices) and Exhibit "X" (document on Clinique Medicale Diamant) were the only documents in the file that were produced after the hearing which resulted in the production Order of Prothonotary Milczynski dated October 29, 2012.

The Golden Edition

27. 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.
28. We maintain a copy of the MP3 audio book mark for the Golden Edition in our files. No manufacturer is identified on the bookmark.
29. Attached hereto as **Exhibit "Y"** to my affidavit is a copy of the affidavit of Christine Miroslavich sworn June 21, 2013 with respect to a copy of the Golden Edition on www.dropbox.com, exhibits excluded.
30. I make this affidavit in support of the Plaintiff's motion for a further and better affidavit of documents and for re-attendance on examination for discovery and for no other purpose.

SWORN before me at the City of
Toronto, this 16th day of June 2014.


A Commissioner for taking affidavits

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


CHRISTIAN LANDETA

000491

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

AFFIDAVIT OF CHRISTIAN LANDETA
(sworn June 16th, 2014)

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Solicitors for the Plaintiff

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

WRITTEN SUBMISSIONS OF THE PLAINTIFF

(Plaintiff's Motion for a Further and Better Affidavit of Documents and
Re-attendance on Examination for Discovery)

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. The Defendants’ affidavits of documents delivered in this Reference Proceeding are obviously deficient. Few original documents have been produced, and those that have been produced have in many cases been redacted.
3. Some of the few original documents produced in this case, were not produced as part of a properly sworn and certified affidavit of documents, and were delivered after the

examination for discovery of the Defendants.

4. Mr. Tajdin has never complied with a Direction of this Court to deliver a further supplementary affidavit of documents, despite unsuccessfully appealing this Direction up to the Federal Court of Appeal.
5. The production of relevant documents is a legal obligation, and not a matter of discretion. By this motion, the Plaintiff therefore seeks an order requiring the Defendants to comply with their statutory obligations by delivering a further and better affidavit of documents listing documents produced to date, as well as any additional relevant documents.
6. The Plaintiff further seeks an order requiring the Defendants to re-attend on examination for discovery to answer under oath in respect to documents now produced, and if so ordered, in respect to a further and better affidavit of documents.

(b) **Action for Copyright Infringement**

7. 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 is the sole and original author.

Affidavit of C. Landeta sworn June 16, 2014 (“**Landeta Affidavit**”), para. 2, Exhibit “A”; Plaintiff’s Motion Record, Tab 2A, p. 13.

8. On April 6, 2010, after lengthy efforts to seek an internal resolution failed, the Plaintiff commenced an action for copyright infringement with respect to the Golden Edition.

Landeta Affidavit, para. 2, Exhibit “A”; Plaintiff’s Motion Record, Tab 2A, p. 13.

9. 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 on appeal, and 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 S.C.C. denied, [2012] S.C.C.A. No. 119.

(c) **The Reference Proceeding**

10. The Harrington Judgment provided for a reference for the determination of damages or profits.

Harrington Judgment, *supra*.

11. 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 filed 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. 3, Exhibit “B”; Plaintiff’s Motion Record, Tab 2B, p. 25.

13. The Statement of Issues sets out 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-judgment and judgment interest under sections 36 and 37 of the *Federal Courts Act* are applicable?

Landeta Affidavit, para. 3, Exhibit “B”; Plaintiff’s Motion Record, Tab 2B, p. 31.

(d) **Inadequate Document Production of Mr. Tajdin**

14. On July 18, 2011, Mr. Tajdin served and filed a “Reply to the Plaintiff’s Statement of Issues”. Mr. Tajdin attached the following documents as schedules to his Reply:

Schedule A – spreadsheet purporting to be travel expenses incurred by N. Tajdin for collecting Infringing Materials;

Schedule B – spreadsheet purporting to be revenue and expenses associated with the Infringing Materials;

Schedule C – cheque and associated correspondence purporting to be with respect to the payment of costs, as ordered by the Harrington Judgment.

Landeta Affidavit, para. 5, Exhibit “D”; Plaintiff’s Motion Record, Tab 2B, p. 41.

15. Mr. Tajdin took the position at that time that he had no further documents to produce in the Reference Proceeding. He had previously submitted an Affidavit of Documents dated October 2, 2010, in the proceeding on the merits.

Landeta Affidavit, para. 5, Exhibit “D”; Plaintiff’s Motion Record, Tab 2D, p. 47.

Landeta Affidavit, para. 6, Exhibit “E”; Plaintiff’s Motion Record, Tab 2E, p. 61.

16. Mr. Tajdin’s Affidavit of Documents did not contain an executed solicitor’s certification indicating that a lawyer had advised Mr. Tajdin of the necessity of making full disclosure under Rule 223 and the possible consequences of failing to do so.

Landeta Affidavit, para. 6, Exhibit “E”; Plaintiff’s Motion Record, Tab 2E, p. 61.

17. Mr. Tajdin’s Affidavit of Document pre-dates the Reference Proceeding and thus is primarily addressed to the case on its merits. Of the approximately 23 documents produced:

- (i) only 6 are possibly relevant to the Reference Proceeding (2, 16, 17, 19, 21, 22);
- (ii) 3 of 4 original documents are redacted (16, 21, 22); and

- (iii) 2 documents are spreadsheets prepared by Mr. Tajdin (17, 19).

Landeta Affidavit, para. 6, Exhibit "E"; Plaintiff's Motion Record, Tab 2E, pp. 68-79.

18. Mr. Tajdin delivered a Supplementary Affidavit of Documents in the Reference Proceeding on August 22, 2011. His Supplementary Affidavit of Documents did not contain an executed solicitor's certification indicating that a lawyer had advised Mr. Tajdin of the necessity of making full disclosure under Rule 223 and the possible consequences of failing to do so.

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

19. Mr. Tajdin's Supplementary Affidavit of Documents lists 7 documents. Of the 7 documents produced:

- (i) Only 5 documents are possibly relevant to the Reference Proceeding (1, 2, 3, 5, 7);
- (ii) The only 3 original documents provided are redacted (1, 2, 7)
- (iii) 3 documents are spreadsheets prepared by Mr. Tajdin (3, 4, 7)

Landeta Affidavit, para. 8, Exhibit "G"; Plaintiff's Motion Record, Tab 2G, p. 96.

(e) **Inadequate Document Production by Mr. Jiwa**

20. Mr. Jiwa delivered an Affidavit of Documents on July 18, 2011. His Affidavit of Documents does not contain an executed solicitor's certification indicating that a lawyer has advised Mr. Jiwa of the necessity of making full disclosure under Rule 223 and the possible consequences of failing to do so.

Landeta Affidavit, para. 7, Exhibit "F"; Plaintiff's Motion Record, Tab 2F, p. 81.

21. Mr. Jiwa's Affidavit of documents identified 5 documents, including: (i) two e-mails advertising the purchase of the book; (ii) a single copy of a Canada Post way bill; (iii) a single cheque; and (iv) further to the Judgment, a copy of a letter to the Ismaili Tariqah

and Religious Education Board for Ontario enclosing 18 copies of the book. 3 of the 5 documents produced are redacted (2, 3, 4).

Landeta Affidavit, para. 7, Exhibit “F”; Plaintiff’s Motion Record, Tab 2F, pp. 85-92.

(f) **The Referee Direction**

22. On September 6, 2011, the Referee issued the following Direction (the “**Referee Direction**”):

Further to the case management teleconference held on August 26, 2011 and upon reading correspondence from the parties, the following timetable shall govern the next steps in the proceeding:

1. Counsel for the Plaintiff will deliver a letter to the Defendants by September 2, 2011, listing the categories of relevant documents and specific documents to be produced in this Reference.
2. The Defendants, Mr. Tajdin and Mr. Jiwa, will deliver a supplementary affidavit of documents, including delivery of 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, to Counsel for the Plaintiff by October 7, 2011. [Emphasis added].
3. Mr. Tajdin and Mr. Jiwa will make themselves available for discovery in Toronto on November 8 to 9, 2011.
4. A case management conference will be held with the parties at the Federal Court at 180 Queen Street West, 4th Floor, Toronto, Ontario on November 15, 2011 at 9:30 a.m.

Landeta Affidavit, para. 10, Exhibit “I”; Plaintiff’s Motion Record, Tab 2I, p. 149.

23. The Defendants appealed this Direction up to the Federal Court of Appeal. All appeals were dismissed.

His Highness Prince Karim Aga Khan v. Nagib Tajdin et al. (unreported In T-514-10) dated October 26, 2011, aff’d 2012 FCA 238.

24. In accordance with the Direction, the Plaintiff sent the Defendants a letter providing a detailed list of relevant documents in the Reference Proceeding.

Landeta Affidavit, para. 11, Exhibit "J"; Plaintiff's Motion Record, Tab 2J, p. 152.

(g) **Additional Productions made prior to Examination for Discovery**

25. Mr. Jiwa served a Supplementary Affidavit of Documents on October 7, 2011. This affidavit contained unredacted versions of the same five documents he produced in his first Affidavit of Documents.

Landeta Affidavit, para. 9, Exhibit "H"; Plaintiff's Motion Record, Tab 2H., pp. 135-147.

Jiwa Cross-Examination Transcript, pp. 8-11, Q. 35-50, Landeta Affidavit, para. 16, Exhibit "O"; Plaintiff's Motion Record, Tab 2O, p. 217.

26. Mr. Tajdin did not comply with the Referee Direction and failed to produce a further Supplementary Affidavit of Documents on October 7, 2011. To this day, Mr. Tajdin has not complied with the Referee Direction, even though it was upheld on appeal twice.

Tajdin Cross-Examination Transcript, pp. 34-35, Q. 150-151, 155, lines 8-14, 5-17, Landeta Affidavit, para. 13, Exhibit "L"; Plaintiff's Motion Record, Tab 2L, p. 179.

His Highness Prince Karim Aga Khan v. Nagib Tajdin et al. (unreported In T-514-10) dated October 26, 2011, aff'd 2012 FCA 238.

27. On November 7, 2011, one-day prior to his scheduled examination for discovery, Mr. Tajdin provided the Plaintiff with 12 documents. Of these 12 documents, 3 are redacted and 4 are spreadsheets prepared by Mr. Tajdin.

Landeta Affidavit, paras. 17-18, Exhibits "P"- "Q"; Plaintiff's Motion Record, Tabs P-Q, pp. 336-362.

28. On discovery, Mr. Tajdin insisted 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 Cross-Examination Transcript, Exhibit 5, Landeta Affidavit, para. 15, Exhibit "N"; Plaintiff's Motion Record, Tab 2N, p. 210.

Tajdin Discovery Transcript, p. 46, Q. 167-168, p. 48, Q. 172, Landeta Affidavit, para. 17, Exhibit "P"; Plaintiff's Motion Record, Tab 2P, pp. 275-276.

29. 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. 17, Exhibit "P"; Plaintiff's Motion Record, Tab 2P, pp. 274, 275 and 286.

30. 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. 13, Exhibit "L"; Plaintiff's Motion Record, Tab 2L, pp. 182-183.

Exhibit 10 Print-out of Golden Edition advertisement, Landeta Affidavit, para. 15, Exhibit "N"; Plaintiff's Motion Record, Tab 2N, p. 210.

31. 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 Materials. 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. 15, Exhibit "N"; Plaintiff's Motion Record, Tab 2N, pp. 175, 177, 178 and 210.

32. 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. 16, Exhibit "O"; Plaintiff's Motion Record, Tab 2O, p. 218.

33. 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. 16, Exhibit "O"; Plaintiff's Motion Record, Tab 2O, pp. 221-222.

34. 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. 16, Exhibit "O"; Plaintiff's Motion Record, Tab 2O, p. 221.

35. 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. 16, Exhibit "O"; Plaintiff's Motion Record, Tab 2O, pp. 223-224.

(h) **Additional Productions made after Examination for Discovery**

36. On May 14, 2012, at the hearing of the refusals motion arising from his November 8, 2011 discovery, Mr. Tajdin provided the Plaintiff with 2 documents:

- (i) Letter of Mr. Tajdin dated May 13, 2012 authorizing the Printer to confirm the number of books printed and the total amount invoiced. This letter attached an unredacted version of previously produced correspondence and Etat de Compte from the printer. This was the first time Mr. Tajdin identified a printer to the Plaintiff.
- (ii) Letter of Mr. Tajdin dated May 13, 2012 authorizing the MP3 bookmark manufacturer to confirm the total number of bookmarks produced and the total amount invoiced. This letter attached unredacted versions of 2 previously produced invoices and a payment receipt from the bookmark manufacturer. This was the first time Mr. Tajdin identified a bookmark manufacturer to the Plaintiff.

Landeta Affidavit, paras. 22-23, Exhibits "U"- "V"; Plaintiff's Motion Record, Tabs 2U and 2V, pp. 437-435.

37. By letter dated February 18, 2013, Mr. Tajdin's newly retained counsel, Mr. Gervais, attached copies of 13 previously unproduced individual printer invoices represented in the printer's Etat de Compte.

Landeta Affidavit, paras. 24, Exhibit "W"; Plaintiff's Motion Record, Tab 2W, pp. 446-473.

38. 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.

Tajdin Affidavit sworn March 20, 2013, Exhibit "T", Landeta Affidavit, para. 25, Exhibit "X"; Plaintiff's Motion Record, Tab 2X, pp. 482-487.

39. Mr. Tajdin has not produced a single advertisement advertising the price of the book at \$50 or at any price. Notwithstanding, he has admitted to printing and selling over 5,000 books.

Landeta Affidavit, paras. 6, 8, Exhibits “E”, “G”; Plaintiff’s Motion Record, Tab 2E, 2G, pp. 61, 94.

40. With respect to Mr. Jiwa, in a motion record dated April 18, 2012, that was subsequently adjourned, Mr. Jiwa attached a small bundle of previously unproduced e-mail correspondence. Some of these documents are redacted.

Landeta Affidavit, para. 20, Exhibit “S”; Plaintiff’s Motion Record, Tab 2S, pp. 397-433.

PART II – ISSUES

41. The following issues are raised on this motion:
- (a) Whether the Defendants should be ordered to produce a further and better Affidavit of Documents in the Reference Proceeding.
 - (b) Whether the Defendants should be compelled to re-attend examination for discovery to answer under oath in respect to documents now produced, and if so ordered, in respect to a further and better affidavit of documents.

PART III - SUBMISSIONS

(a) **Further and Better Affidavit of Documents Required**

Documentary Disclosure Obligations

42. Every party to an action is required to serve an Affidavit of Documents listing all relevant documents that are or were in that party's power, possession or control. This obligation is a “matter of law, not a matter of discretion”.

Federal Courts Rules, SOR/98-106 (“*Federal Courts Rules*”), Rule 223.

Apotex Inc. v. Wellcome Foundation Limited, 2003 FC 1229 (“*Wellcome*”) at para. 16.

43. A document is relevant if it might reasonably be expected to contain information which may directly or indirectly enable the party seeking production to advance its case or harm the case of its adversary.

Federal Courts Rules, supra, Rule 223(2).

Wellcome, supra at para. 16.

44. If a portion of a document is relevant, the entire unredacted version of the document must be made available for inspection.

Horn v. Canada, 2006 FC 280 at para. 17, aff'd 2006 FCA 234.

45. An affidavit of documents is a “very solemn document” and contains a “solemn statement” that:

- (a) further relevant documents than those listed do not exist, *or if they do*;
- (b) they are not likely to assist the other party or hurt the disclosing party’s case *AND* that the disclosing party has made the decision that it will not rely on that document at trial. [Emphasis original].

Apotex Inc. v. Sanofi-Aventis, 2010 FC 77 at para. 14.

46. The solicitor of record for a party shall explain the necessity of making full disclosure in an affidavit of documents, and the consequences for failing to do so. The solicitor shall certify on the affidavit of documents that these explanations have been made.

Federal Courts Rules, supra Rule 224(3).

47. There is a continuing obligation to disclose relevant documents. A party who becomes aware that an affidavit of documents is deficient shall, without delay, deliver a supplementary affidavit of documents.

Federal Courts Rules, supra Rule 226(1).

Samson Indian Nation & Band Canada, [1999] F.C.J. No. 2011 at para. 30.

Ordering a Further and Better Affidavit of Documents

48. Where the Court is satisfied that an affidavit of documents is inaccurate or deficient, the Court may order that an accurate or complete affidavit be served and filed.

Federal Courts Rules, supra, Rules 157, 227(b).

49. A Court may order further production where “common business practice” suggests that relevant documents exist but have not been produced, or where there are “gaps” in a party's productions. Specific actual knowledge of the existence of documents is not required of the moving party.

Wellcome, supra at para. 17.

Pharmascience Inc. v. GlaxoSmithKline Inc., 2007 FC 1261 at para. 36.

50. It is clear from the affidavits of documents delivered in this case that the Defendants either fail, or choose not, to understand the basic principles of relevant document disclosure. For example, Mr. Tajdin included the following documents in his Supplementary Affidavit of Documents in this Reference Proceeding:

- (a) Photocopy of payment for \$30,000 cost alleged to have been paid to the Plaintiff pursuant to the Harrington Judgment (Schedule 1, document 5);
- (b) Paper copies of draft transcripts (Schedule 3, not produced as disposed); and
- (c) Audio tapes of Farmans (Schedule 3, not produced as disposed).

Clearly, none of these documents are relevant to the issues identified in this Reference Proceeding.

Landeta Affidavit, para. 8, Exhibit “G”; Plaintiff’s Motion Record, Tab 2G, p. 96.

51. For his part, Mr. Jiwa produced additional documents on April 18, 2012, after discovery, despite having previously attested on cross-examination, examination for discovery and in two affidavits of documents that no other relevant documents were in his possession.

Landeta Affidavit, para. 20, Exhibit “S”; Plaintiff’s Motion Record, Tab 2S, p. 409-433.

52. Both Defendants have delivered redacted documents, despite being repeatedly ordered to do otherwise.

Landeta Affidavit, para. 8, Exhibit "G"; Plaintiff's Motion Record, Tab 2G, p. 94-133 and Tab 2S, p. 409-433.

53. The Defendant Mr. Tajdin has never complied with the Referee Direction dated September 6, 2011 to deliver a further Supplementary Affidavit in this case that includes:

- (a) Delivery of complete and unredacted copies of all relevant documents;
- (b) An explanation for any documents missing or lost; and
- (c) Enquiries that have been made of others to locate relevant documents.

Landeta Affidavit, para. 10, Exhibit "I"; Plaintiff's Motion Record, Tab 2I, p. 149.

54. Neither Defendant has ever delivered an affidavit of documents containing a solicitor's certification that the necessity of making full disclosure has been explained. Now that the Defendants have retained counsel, this basic obligation can be fulfilled.

Federal Courts Rules, Rule 224(3).

55. It is simply not credible that an experienced business man such as Mr. Tajdin:

- (a) who himself estimates Golden Edition revenues upwards of \$182,850;
- (b) who admittedly dealt with thousands of books, and provided some individual distributors with hundreds of copies; and
- (c) is capable of producing detailed receipts of his expenses,

yet, claims he did not maintain any accounts in respect of the sale of the book.

Russell Order, *supra* at paras. 41-43, 46.

56. It is likewise not credible that Mr. Jiwa, who admittedly actively promoted and sold 24 boxes of books over e-mails and otherwise, can only produce limited documentation on a single sale.

Landeta Affidavit, paras. 7, 9; Plaintiff's Motion Record,
Tab 2, p. 9.

57. There is no question that such financial documents are relevant in the context of a reference for an accounting of profits for copyright infringement.

Society of Composers, Authors & Music Publishers of Canada v. 1007442 Ontario Ltd. [2000] F.C.J. No. 191 at para. 24

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

58. Both parties have produced documents in piecemeal fashion, outside of any affidavit of documents, and subsequent to their examinations for discovery.
59. Certainly, some of the most important documents produced to date, including the unredacted printer invoices identifying the printer and the manufacturer of the audio bookmark, have been delivered to the Plaintiff in this manner.

Landeta Affidavit, paras. 22-23; Plaintiff's Motion Record,
Tab 2, p. 10.

60. At the very least, such further and better affidavit of documents will include all documents that have been produced by the Defendants subsequent to examination for discovery. Such documents are known by the Plaintiff to exist.

Landeta Affidavit, paras. 20-26; Plaintiff's Motion Record,
Tab 2, p. 10-11.

61. If it is in fact true that no further "relevant" documents exist, then the Defendants must attest to this fact in proper compliance with the *Federal Courts Rules* and the Referee Direction dated September 6, 2011.
62. For all of the above reasons, the Defendants should each be obliged to deliver further and better affidavits of documents in this Reference Proceeding that have been certified by legal counsel in accordance with the *Federal Courts Rules*.

(b) **Re-attendance on Examination for Discovery Required**

63. A party can be ordered to re-attend examination for discovery in respect to documents produced subsequent to the original examination for discovery.

Federal Courts Rules, supra Rules 157, 235.

Rhodia UK Ltd. v. Jarvis Imports (2000) Ltd., 2005 FC 1628 at para. 40.

Philippine Phosphate Fertilizer Corp v. Canpotex Shipping Services Ltd. [1992], F.C.J. no. 704.

64. Messrs. Tajdin and Jiwa's production throughout this Reference Proceeding has been incomplete and achieved in piecemeal fashion.
65. As set out above, some of the few original documents produced in this proceeding, including from the printer and audio bookmark manufacturer, were delivered to the Plaintiff after examinations for discovery.

Landeta Affidavit, paras. 20-26; Plaintiff's Motion Record, Tab 2, p. 10-11.

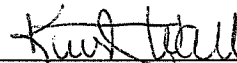
66. In light of the little relevant production made in this proceeding, much of which with any importance being produced subsequent to discovery, the Plaintiff's ability to question the Defendants about these documents, and any other documents produced in a further and better affidavit of documents, if so ordered, is crucial for the Plaintiff to make its case.
67. For all of the above reasons, the Plaintiff respectfully submits that this motion be granted. The Defendants' obstructive behaviour in this case should not lie without consequence. Nor should it be at the expense of the Plaintiff's right to make its case on the basis of proper disclosure that abides by the rules of this Court.

PART IV - ORDER SOUGHT

68. The Plaintiff respectfully requests:
- (i) An Order pursuant to Rule 227 of the *Federal Courts Rules* requiring the Defendants to produce a further and better affidavit of documents within 10 days of the disposition of this motion;

- (ii) An Order requiring the Defendants to re-attend examination for discovery to answer under oath in respect to documents now produced, and if so ordered, in respect to a further and better affidavit of documents, within 60 days of the disposition of this motion.
- (iii) Costs of this motion; and
- (iv) Such further or other relief as counsel may advise and as to this Honourable Court may seem just.

Dated at Toronto, Ontario, this 16th day of June, 2014.



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Solicitor for the Defendants

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

**WRITTEN SUBMISSIONS OF THE
PLAINTIFF**

(Plaintiff's Motion for a Further and Better
Affidavit of Documents and
Re-attendance on Examination for Discovery)

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