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**IN THE MATTER OF THE *COMMODITY FUTURES ACT*  
R.S.O. 1990, c. C.20, AS AMENDED**

**- AND -**

**IN THE MATTER OF FAWAD UL HAQ KHAN and  
KHAN TRADING ASSOCIATES INC. carrying on business as MONEY PLUS**

**REASONS FOR DECISION ON A MOTION**

**Hearing:** August 14, 2013

**Decision:** October 23, 2013

**Panel:** Mary G. Condon - Vice-Chair and Chair of the Panel

**Appearances:** Fawad Ul Haq Khan - For himself and Khan Trading Associates Inc.  
Tamara Center - For Staff of the Commission

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## REASONS FOR DECISION ON A MOTION

### I. INTRODUCTION

[1] Fawad Ul Haq Khan (“**Khan**”) and Khan Trading Associates Inc., carrying on business as Money Plus (“**KTA**”) (collectively, the “**Applicants**”) brought a motion for direction, to support a request that approximately 700 witnesses be summonsed by the Ontario Securities Commission (the “**Commission**”) to testify at a merits hearing (the “**Witness Motion**”).

[2] The Applicants are respondents in a proceeding commenced by a Notice of Hearing issued on December 20, 2012 in connection with a Statement of Allegations filed by Staff of the Commission (“**Staff**”) on December 19, 2012 (the “**Statement of Allegations**”). In the Statement of Allegations, Staff alleges that the Applicants breached subsections 22(1) and 55(1)(a) of the *Commodities Futures Act*, R.S.O. 1990, c. C.20, as amended (the “**CFA**”) and engaged in conduct contrary to the public interest.

[3] Staff alleges that the Applicants engaged in unregistered trading and advising in commodity futures, made misrepresentations to Staff and misled the Commission. Staff also alleges the Applicants acted contrary to the public interest by: (i) making statements that they knew or reasonably ought to have known were misleading or untrue while advising in commodity trading, (ii) failing to disclose the compensation arrangements with various brokerages to their students, and (iii) engaging in conduct in contravention of a written undertaking provided to Staff by the Applicants on January 5, 2010.

[4] On February 5, 2013, Staff and the Applicants attended before the Commission for a first appearance on this matter and the Commission scheduled a pre-hearing conference for April 23, 2013. On April 26, 2013, the Commission issued a Notice of Hearing advising that the Witness Motion application would be heard on August 14, 2013.

[5] Khan filed brief written submissions in an email sent on August 5, 2013. In response, Staff filed a factum, the Affidavit of Louisa Fiorini, sworn August 7, 2013, and a brief of authorities. Khan and Staff appeared and made submissions with respect to the Witness Motion on August 14, 2013 (the “**Motion Hearing**”).

### II. ISSUES

[6] The Applicants argue that they have a legal right to bring before the Commission and examine the following categories of witnesses: (i) 679 account holders referenced in the Statement of Allegations; (ii) five Staff members; (iii) several chief executive officers (“**CEOs**”) and staff at brokerage houses; (iv) Staff’s witnesses; and (v) account holder A.N. and 12 of A.N.’s family members.

[7] Addressing the Witness Motion involves determining whether the Applicants are entitled to call, and consequently have summonsed, every proposed witness.

### III. ANALYSIS

#### A. Preliminary Matters

[8] As a preliminary matter, Rule 3.2 of the *Rules of Procedure* (2013), 35 O.S.C.B. 10071 (“*Rules of Procedure*”) requires that the motion record be served on each party and filed at least 10 days before the day on which the motion is to be heard. Staff argues that the Applicants failed to comply with the *Rules of Procedure*.

[9] Khan filed a brief one-page document by email on August 5, 2013 containing general submissions in relation to five categories of individuals that he argued would be required to appear for the merits hearing. Khan did not identify all the names and addresses of the proposed witnesses or provide detailed submissions on the relevance of the witness categories. Nor did Khan provide authorities for his claim that the Applicants are entitled to call all these witnesses.

[10] The Commission requires parties to adhere to the *Rules of Procedure* and act accordingly during a hearing. Compliance with the rules promotes fair, timely and efficient hearings. Nevertheless, a certain degree of latitude may be afforded to self-represented respondents if the circumstances warrant (Rule 1.4(3) of the *Rules of Procedure*). In this matter, I determined that the Applicants should be afforded the opportunity to be heard, despite their non-compliance with the *Rules of Procedure*. I also find that the questions raised are important to clarifying the scope of the proceeding. Specifically, if it is appropriate for the Applicants to call approximately 700 witnesses, it will materially affect the length of the hearing. Therefore, it is necessary for the parties to make submissions on the matter and to resolve it at this stage in the proceeding.

[11] Also as a preliminary matter, I note that one of the categories of witnesses listed by Khan in his written submissions is a list of Staff witnesses, whom Khan submits he must examine. There is no question that the Applicants are entitled to cross-examine Staff’s witnesses at the merits hearing and no summonses are required for that purpose. As a result, no further analysis of that category of witnesses shall be elaborated below.

#### B. *Are the applicants entitled to call, and consequently have summoned, every proposed witness on their witness list?*

[12] Khan submits that the Applicants’ Witness Motion for approximately 700 witnesses to be called is based on the fact that these witnesses are important for the defence’s case. Staff opposes the Witness Motion on the basis that the Applicants’ request is unwarranted, unreasonable and impractical and that the Applicants have not satisfied the legal test for allowing witnesses to give evidence.

##### 1. Applicants’ Position

[13] In his written submissions, Khan states that Staff is using 679 account holders against him and that he has the legal right to bring them before the Commission and examine them “one by one, trade by trade, date by date, entry by entry, exit by exit, profit by profit, loss by loss”. In addition, Khan indicates that, among other things, he wishes to examine account holders on stop losses, the commission charged for each trade by the broker and the rules of trading that were followed and ignored. In oral submissions, Khan

took the position that he was away from the office for months and should be entitled to show that he is not responsible for trades occurring in that time.

[14] Khan also submits that five Staff members, including Staff counsel Tamara Center (“**Center**”), are required to be called as witnesses at the merits hearing. In his written submissions, Khan’s justification is that they are “Staff members who hatched the plan” and that he needs “to find out the truth by examining them one by one”. At the Motion Hearing, Khan argued that Staff has “cooked witnesses” and conspired with account holder A.N. (Khan – Transcript of August 14, 2013 at p. 6). Khan also submits that Staff’s interview style is strange and must be examined.

[15] In his written submissions, Khan also argues that CEOs and staff of brokerage houses are required as witnesses for the merits hearing because they will provide evidence on whether appointing an “introducing broker”, referred to by Staff as an “international broker” (for the purpose of this motion, collectively referred to as “**IB(s)**”) is permitted by the brokerage house rules. Further, Khan argues that these witnesses can speak to whether paying referral fees is in accordance with the law. At the Motion Hearing, Khan submitted that the brokerage house witnesses can frame the policy of the company with respect to qualification requirements and approval of IBs. Further, Khan submits that the CEOs of the brokerages could prove that they followed the rules of their companies when they appointed him as an IB.

[16] The last category of witnesses that the Applicants propose to be required includes account holder A.N. and twelve of A.N.’s family members and friends, who Khan argues misled Staff, (collectively, the “**A.N. witnesses**”). At the Motion Hearing, Khan claimed that Staff conspired with A.N. and that the A.N. witnesses must be examined because A.N. lost money due to his own mistakes and Khan intends to expose A.N. through his family.

[17] In conclusion, Khan took the position that if a single witness that he requested was not examined, justice will not be done.

## 2. Staff’s Position

[18] Staff submits that it would not be appropriate to call many of the witnesses listed by the Applicants as many do not have relevant evidence to the subject matter as framed in the Statement of Allegations and others would provide evidence that is unduly repetitious. Further, Staff argues that listing an unreasonable and excessive number of witnesses is a tactic to disrupt the setting and hearing of this matter on the merits.

[19] Staff relies on sections 12 and 15 of the *Statutory Powers Procedures Act*, R.S.O. 1990, c. S.22, as amended (the “**SPPA**”), reproduced below, for the proposition that persons may be summonsed and evidence may tendered only if “relevant to the subject-matter of the proceeding”. Staff argues that evidence is relevant if it renders the existence or absence of a material fact in issue more or less likely, and irrelevant if it does not make the fact more or less likely or the fact is not material (*R. v. Truscott* (2006), 216 O.A.C. 217 at para. 22 (C.A.) (“**R. v. Truscott**”)).

[20] At the Motion Hearing, Staff argued that Khan's requests demonstrate his lack of understanding of the allegations against him. Specifically, Staff noted that the allegations include that Khan engaged in unregistered trading and unregistered advising and made misrepresentations to Staff. Staff submitted that Khan appears to be unduly focused on paragraph 9 of the Statement of Allegations, which states that account holders lost millions.

[21] Staff also submits that the party seeking to call the witness has the onus of proving that it is probable the witness will give material evidence (*R. v. Fazekas*, 2010 ONSC 6571 at para. 11 ("*R. v. Fazekas*"). Staff submits Khan has failed to provide a real basis for believing that certain witnesses will provide material evidence. Staff relied on a number of cases for their submission (*Re Axxess Automation LLC* (2012), 35 O.S.C.B. 9019 ("*Axxess Automation*") at paras. 53 and 58; *Lemieux v. Guelph General Hospital*, 2011 HRTO 183 at paras. 13-14 and 16).

[22] Staff argues that the account holder trading statements speak for themselves and examination of each account holder would be unduly repetitious. Staff also argues that Khan's basis for calling Staff as witnesses demonstrates his improper purpose and that such examinations would be pure fishing expeditions.

[23] Staff also opposed a summons of Staff counsel and submitted that for counsel to be an acceptable witness it must be (1) probable that counsel's proposed evidence will be relevant and (2) necessary that counsel give evidence, meaning that no other witnesses are available and there is no possibility of admissions (*Re YBM Magnex International Inc.* (2000), 23 O.S.C.B. 43 ("*YBM*"); *R. v. 1504413 Ontario Ltd.*, 2008 ONCA 253 at para. 17 ("*1504413 Ontario*"). Staff submits that two members of Staff, George Gutierrez ("*Gutierrez*") and Center, are not necessary witnesses because there are other Staff witnesses that possess knowledge of all relevant matters.

[24] Further, Staff submits that the CEOs of the brokerages to which clients were referred are inappropriate choices as representatives because there is no evidence that they have personal or direct knowledge of the relevant evidence; namely Khan's lack of registration or misrepresentations to his students and to Staff (*Canadian Imperial Bank of Commerce v. Cigam Entertainment Inc.* (1999), 104 O.T.C. 134 at para. 23). Staff notes that a party is entitled to its choice of witness, but where the choice is for an ulterior purpose, such as being a nuisance, the courts have concluded that they may decide the examining party's choice is not appropriate (*Thorne v. AXA Canada Inc.*, 2012 ONSC 2409 at para. 13). Staff submits that it appears to Staff that Khan has listed the CEOs to cause them nuisance.

[25] Lastly, Staff takes the position that the Applicants' requests to examine the A.N. witnesses is for an ulterior and improper purpose relating to a civil lawsuit Khan has brought against them.

[26] Staff requests that the Commission deny the Applicants' request to summons witnesses who do not seem to have evidence relevant to the subject-matter of the proceeding.

### 3. Analysis

[27] In assessing whether the Applicants are entitled to receive summonses sought from the Commission for every witness on their witness list, it is important to consider the purpose of the hearing, requirements of fairness and the Commission's hearing process.

[28] Section 60 of the CFA confers jurisdiction on the Commission to make orders in the public interest. Pursuant to subsection 60(3) of the CFA, no such order in the public interest shall be made without a hearing. There is no dispute that the Applicants are entitled to a fair hearing.

[29] Procedural fairness dictates that the Applicants should have the opportunity to be heard in order to respond to Staff's allegations (Section 10.1 of the SPPA). The manner in which the hearing is conducted is determined by the Commission (section 25.0.1 of the SPPA). The Commission's *Rules of Procedure* are similarly flexible, including discretion with respect to the issuance of summonses. The language of the *Rules of Procedure* is permissive on this issue and does not require the tribunal to accede to all requests to summons witnesses. Rule 4.7(1) of the *Rules of Procedure* provides:

**4.7 Request to Issue a Summons – (1)** At the request of a party, a summons to a witness may be issued pursuant to section 12 of the SPPA.  
[emphasis added]

[30] The issuance of a summons is conditional upon the relevance of the evidence to be provided by the witness and the admissibility of such evidence at the hearing. Subsection 12(1) of the SPPA provides that

#### **Summonses**

**12.** (1) A tribunal may require any person, including a party, by summons,  
(a) to give evidence on oath or affirmation at an oral or electronic hearing; and  
(b) to produce in evidence at an oral or electronic hearing documents and things specified by the tribunal,  
relevant to the subject-matter of the proceeding and admissible at a hearing. [emphasis added]

[31] With respect to the admissibility of evidence, subsection 15(1) of the SPPA provides:

#### **What is admissible in evidence at a hearing**

**15.(1)** Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,  
(a) any oral testimony; and  
(b) any document or other thing,

relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious. [emphasis added]

[32] Therefore, while the Applicants are entitled to call and examine witnesses and present evidence at the hearing, the decision to issue a summons is at the discretion of the Commission. Admissibility is conditional upon the relevance of the evidence. Furthermore, relevant evidence may be excluded by the Commission if it is unduly repetitious. While the threshold for issuing a summons is generally considered to be low, the Commission may request that the party seeking a summons articulate the basis for calling the witness. In *Axcoss Automation*, the Commission required the Applicants to provide details with respect to certain witnesses sought to be summonsed after the hearing had commenced. It requested:

a list of their proposed witnesses, their locations, witness summaries and submissions regarding relevance of the proposed witnesses to assist us [the panel] in determining whether to grant leave to permit certain witnesses to testify pursuant to subrule 4.5(4) of the *[Rules of Procedure]*

*(Re Axcoss Automation LLC, supra at para. 53)*

[33] The predominant considerations in determining whether to issue a summons should be procedural fairness, and specifically whether the Applicants are being afforded an opportunity to be heard, the relevance of the evidence to be provided by the witnesses, and whether the evidence provided will be unduly repetitious.

[34] I agree with Staff's position that the relevance of evidence to the proceeding is framed by the Statement of Allegations. I also accept the test articulated in *R. v. Truscott* that evidence is relevant if it renders the existence or absence of a material fact in issue more or less likely, and irrelevant if it does not make the fact more or less likely or the fact is not material (*R. v. Truscott, supra*).

[35] While this is an administrative proceeding, I also find the court's analysis in *R. v. Fazekas* to be of assistance in these circumstances. In that case, the court found that the party seeking to call the witness has the onus of proving that it is probable the witness will give material evidence (*R. v. Fazekas, supra*).

[36] For the reasons set out below, I find that the Applicants have not satisfied me that all of the approximately 700 witnesses sought to be led have evidence that is both relevant and not unduly repetitious.

***a. Account Holders***

[37] At the hearing, Staff submitted that the core allegations against the Applicants related to unregistered advising, unregistered trading and misleading Staff and the Commission. These are the allegations which frame the relevance of evidence in the matter. With respect to his request to call 679 account holders, the Applicants' submissions focused on Khan's desire to disprove Staff's calculated losses for account



holders who were allegedly referred by the Applicants to certain brokerage firms. It is not clear that this evidence sought to be tendered by the Applicants would be relevant to the determination of this matter on the merits.

[38] However, even if the approximately 700 witnesses sought to be summonsed by the Applicants have arguably relevant evidence, the Applicants did not provide a sufficient basis to demonstrate the uniqueness of each of them. In other words, the Applicants have not shown that the information provided would be sufficiently different from one witness to the next in each category, to support the proposition that testimonies would not be unduly repetitious.

[39] Furthermore, Khan's submissions indicate that he intends to prove factual matters which are capable of being verified by independent third party records. Specifically, Khan submits:

CHAIR: [...] if you bring forward 10 of those people and they all say -- they all provide evidence that goes to refute the allegations of Staff that you engaged in unregistered trading or unregistered advising, if you bring forward 10 of them and they all have evidence that supports your interpretation of events, is it necessary for you to bring all of the others?

MR. KHAN: But, sir, they have -- Your Honour, they have accumulated all the figures in their account as a loss because of me, because of me. So I wanted to split. If a person says -- if out of these 679 people, if suppose 100 says, "I traded for one month and I closed my account," which would take them out, we take that figure from that account, because they have added all the figures to magnify the issue, magnify to the extent that 3 million, 4 million Mr. Khan fault. So if 100 are taken out, 200 taken out, 400 taken out, then the amount will be reduced.

Then the Court will judge what is the magnitude, what is the quantum of the case? They have magnified the case many-fold, many-fold. So each and every one is very important because each and every one is unique, is unique.

[...]

CHAIR: So, Mr. Khan, just one last clarification. You had mentioned several times that each of these account holders is unique or has unique information. Can you please clarify what is the nature of the unique information that each of these account holders has?

MR. KHAN: Okay. Unique, I mean the person himself is unique. God has created every person unique. Every human being is unique. His nature of knowledge is unique. His trading is unique. His timing of trading is unique. His approach to the market is unique, and his entry points are entirely different. I may enter the market at different price. [...] Which market they trading? Everybody has own choice. [...] He's unique person, his approach is unique to the market, his understanding unique to the market, and he trades according to his own unique situation.

So they open the account and they trade their own unique way. So if eight or 10 people come and they say something that will not be applicable to all 679 people, no. The 10 are different, but other people will have different situations.

So they all has [sic] to be brought to the court and they all has [sic] to be examined, and let's see whether I misled them, whether I don't mention that I'm getting IB fee, and the same thing I have in my interview I've said in detail. It is on the record that I'm getting IB fee, okay.

So with all these people, when they come, the majority will say in my favour, I guarantee this, and the case will crumble.

(Transcript of August 14, 2013 at pp. 35-36 and 39-41).

[40] These submissions do not provide a sufficient basis for me to determine that the evidence sought to be tendered from all 679 account holders will be relevant to the allegations. Khan has not persuaded me that the evidence that these account holders may give will be directed at rebutting the allegations of Staff that the Applicants engaged in unregistered advising, unregistered trading and misleading Staff and the Commission. Further, I am persuaded that the evidence will be unduly repetitious.

[41] There are three groups of account holders referenced by the Applicants in their submissions: 600 hold accounts at Global Futures Exchange & Trading Co., Inc. (“**Global Futures**”), 60 hold accounts at Mirus Futures, LLC (“**Mirus**”) and 19 hold accounts at Forex Capital Markets Ltd. (“**FXCM**”).

[42] Despite my doubt that all these account holders have evidence relevant to the allegations of Staff, I am prepared to allow the Applicants to call a representative sample of each group of account holders, including a maximum of ten (10) Global Futures account holders, five (5) Mirus account holders and three (3) FXCM account holders.

[43] Khan argues that injustice will be done if even one of his witnesses is not called. I have considered whether permitting the Applicants to call only a representative sample of the witnesses sought would result in procedural unfairness to the Applicants. I am not persuaded that any unfairness would result. The Applicants may select witnesses of their choosing from each category of account holder witness to present their case. They have a draft witness list from Staff in order to assess how best to organize their defence. The standard of proof in Commission hearings is a civil standard on a balance of probabilities and evidence must be sufficiently clear, convincing and cogent. Staff ultimately has the burden of proving its case. Therefore, it is not necessary for the Applicants to examine each and every individual on their witness list to respond to Staff’s allegations. Furthermore, it is not clear that the evidence sought to be tendered would respond to Staff’s allegations, but, even if it did, a representative sample of witnesses from each category would be sufficient.

#### ***b. Enforcement Staff***

[44] Khan takes the position that the case against him is Staff counsel Center’s “brainchild” and that Center is very important to his case (Khan – Transcript of August 14, 2013 at p. 8). Khan also submits that the investigation techniques of Staff must be

exposed. While Ms. Fiorini, Staff's investigator, will be called by Staff, Khan also requested that another Staff member in Case Assessment, Gutierrez, testify. Khan did not provide names of the other two Staff members he seeks to summons, nor did he clarify his request at the Motion Hearing.

[45] As noted above, Staff opposed a summons of Staff counsel and submitted that for counsel to be an acceptable witness it must be (1) probable that counsel's proposed evidence will be relevant and (2) necessary that counsel give evidence, meaning that no other witnesses are available and there is no possibility of admissions (*YBM, supra; 1504413 Ontario, supra*). Staff submits it is not necessary for Center or Gutierrez to provide evidence since there are other witnesses available to provide any of the evidence that they would provide.

[46] I find that the Applicants' material did not provide grounds to support issuance of a summons to Center or Gutierrez. I note from Staff's submissions that Staff counsel does not become involved until the late stages of the investigation. The Applicants' submissions did not meet the test of necessity articulated in *YBM, supra*. The Applicants will be able to cross-examine Ms. Fiorini, Staff's investigator. I am not prepared to order a summons to be issued to either Center or Gutierrez at this time.

### *c. CEOs and Staff at Brokerage Houses*

[47] At the Motion Hearing, Khan submitted that he is prepared to compromise on his request to summons the CEOs. However, he argues that he still wishes to call representatives of the brokerage firms who know about the policies and criteria for appointing an IB used by these firms.

[48] Staff identified seven individuals linked to brokerage firms from the material provided by the Applicants. Staff presumed two were brokers with Global Futures in California and another was an account manager with Mirus in Chicago. Staff had no objection to the Applicants calling those three witnesses. The remaining four were CEOs of GF, Mirus and FXCM in London, England and FXCM in Toronto. Staff argues that Khan's intention is to prove that he was properly appointed as an IB, but that the relevant issue is whether he was actually registered in Ontario. Staff also submits that it would be duplicative to call the CEOs as well as the brokers of firms.

[49] Furthermore, Staff submits that if a witness outside of Ontario is unwilling to testify voluntarily, a summons can only be issued with an order from the Superior Court of Justice, pursuant to a procedure set out in subsection 152(1) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "*Securities Act*") (*Axcess Automation, supra* at 54). Staff submits the test for granting an order under section 152 of the *Securities Act* is determining "whether the prospective application to the court has sufficient merit to be permitted to proceed" (*Re YBM Magnex* (2001), 24 O.S.C.B. 1655 at p. 2).

[50] In light of the fact that there is no disagreement as to the Applicants calling the three witnesses noted above and that Khan, at the hearing, said he was prepared to compromise regarding the calling of the CEOs, it is not clear to me who the Applicants

wish to be called in this category and what the relevance of their evidence would be. Therefore, I am unable to make a determination about these witnesses at this time.

*d. The A.N. Witnesses*

[51] Khan provided Staff with names of the A.N. witnesses, whom he states misled Staff, and argues that they are required to testify and that Staff had conspired with account holder A.N. to bring forth the case against him.

[52] As noted above, Staff submits that Khan's request to examine the A.N. witnesses is for an ulterior and improper purpose relating to a civil lawsuit Khan has brought against them. Staff also argues that Khan failed to articulate why the A.N. witnesses are relevant and that they could not have misled Staff, since Staff never interviewed those witnesses, other than A.N. himself.

[53] I do not have a sufficient basis to assess the relevance of the A.N. witnesses. It is not clear based on the record before me that the evidence sought to be tendered by the Applicants would be relevant to the determination of this matter on the merits.

**IV. NEXT STEPS**

[54] At the Motion Hearing, Khan stated "You can send them a summons when the time arrives" (Khan – Transcript of August 14, 2013 at p. 43).

[55] There is insufficient information upon which to issue summonses at this time. Khan made submissions on general categories of witnesses he requested to have summonsed and identified only a limited few by name. A determination of the issues discussed above was a necessary precursor to the scheduling of a hearing on the merits. Therefore, there are no merits hearing dates at this time for which witnesses can be summonsed. However, this decision does not preclude a future application to the merits panel for such a summons, if required for a proper determination of the matter.

[56] The Applicants must provide the Commission with the names and addresses of the witnesses they wish to have summonsed, bearing in mind any determinations made above about the various categories of witnesses. Once the Commission has issued the requested summonses in the prescribed form under the SPPA, it is the responsibility of the Applicants to serve those summonses upon the witnesses they intend to call, in accordance with section 12 of the SPPA.

[57] I also note that for the purpose of summoning potential witnesses who are not within Ontario, Staff cited subsection 152(1) of the *Securities Act*. This proceeding was commenced pursuant to the CFA. The equivalent and applicable provision with respect to applications for letters of request under the CFA is subsection 84(1), which provides:

- 84.** (1) The Commission may apply to the Superior Court of Justice for an order,
- (a) appointing a person to take the evidence of a witness outside of Ontario for use in a proceeding before the Commission; and

- (b) providing for the issuance of a letter of request directed to the judicial authorities of the jurisdiction in which the witness is to be found, requesting the issuance of such process as is necessary to compel the person to attend before the person appointed under clause (a) to give testimony on oath or otherwise and to produce documents and things relevant to the subject-matter of the proceeding.

[58] If the Applicants intend to pursue the summons of any witnesses from outside Ontario, they should initiate the application pursuant to subsection 84(1) of the CFA as soon as possible after the merits hearing dates are scheduled in order to ensure that such witnesses can be made available for examination.

[59] Accordingly, while the Commission will strive to accommodate respondents' requests for witness summonses in accordance with requirements of fairness and principles of natural justice, such requests must be reasonable, evidence sought must be relevant and evidence sought should not be unduly repetitious.

## V. CONCLUSION

[60] Upon considering the submissions of the parties, I conclude that it is within the Commission's jurisdiction to refuse to issue a summons where the evidence sought is not relevant to the subject-matter of the proceeding or it is otherwise excludable because it is unduly repetitious. In doing so, the Commission must consider whether any procedural unfairness would result to the Applicants.

[61] It is unclear whether the evidence sought to be tendered from all of the 679 account holders will be relevant and I am persuaded that the evidence of all 679 account holders will be unduly repetitious in this case. The Applicants are permitted to call a representative sample of each group of account holders that may provide relevant evidence, including a maximum of ten (10) Global Futures account holders, five (5) Mirus account holders and three (3) FXCM account holders.

[62] There is insufficient information upon which to actually issue any summonses at this time. As stated above, Khan made submissions on general categories of witnesses he requested to have summonsed and identified only a limited few by name. The merits hearing has not yet been scheduled for this matter. However, the Witness Motion was heard because a determination of the issues discussed above was a necessary precursor to the scheduling of a hearing on the merits. Therefore, I take no position on the appropriateness of summoning the discrete witnesses about whom I heard brief submissions. I will defer to the judgment of the merits panel in that respect, should the Applicants wish to pursue these issues further once the merits hearing is scheduled.

Dated at Toronto this 23<sup>rd</sup> day of October, 2013.

*"Mary G. Condon"*

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Mary G. Condon