

IN THE MATTER OF THE *SECURITIES ACT*, R.S.O. 1990, c. S.5

- and -

IN THE MATTER OF  
MAJD KITMITTO, STEVEN VANNATTA, CHRISTOPHER CANDUSSO, CLAUDIO  
CANDUSSO, DONALD ALEXANDER (SANDY) GOSS, JOHN FIELDING AND  
FRANK FAKHRY

MOTION  
OF THE RESPONDENT FRANK FAKHRY

(For an Order Striking Out Certain Paragraphs of the Affidavits Served by Staff and for a Direction under Rule 28)

**A. ORDER SOUGHT**

The Respondent/Moving Party, Frank Fakhry, requests with notice that the Commission make the following Order:

1. Striking out those parts of the Affidavit of Christine George sworn September 11, 2020 (the “**George Affidavit**”) that refer to Mr. Fakhry’s compelled testimony;
2. Striking out those parts of the Affidavit of Anne Paiement sworn September 11, 2020 (the “**Paiement Affidavit**”) that refer to Mr. Fakhry’s compelled testimony; and
3. such further and other relief as Mr. Fakhry may advise and the Commission may permit.

**B. GROUNDS**

The grounds for this motion are:

1. The Commission issued a Notice of Hearing pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, in connection with a Statement of Allegations dated November 23, 2018;
2. On September 11, 2020, Staff served the George Affidavit and the Paiement Affidavit;
3. Certain paragraphs of the George Affidavit and the Paiement Affidavit include testimony of Mr. Fakhry given during his compelled interview with Staff;
4. In its case in chief, Staff intends to introduce into evidence the entirety of the transcript of each Respondent's compelled interview through Christine George;
5. Following established precedent by the Commission, Mr. Fakhry's compelled testimony may not be tendered by Staff in this manner as part of its case in chief;
6. Staff may only use the compelled testimony of Mr. Fakhry for two purposes:
  - i. To cross-examine Mr. Fakhry if he testifies at the hearing; and
  - ii. If Mr. Fakhry does not testify, to tender portions of Mr. Fakhry's compelled testimony as part of Staff's case in chief;
7. Mr. Fakhry is entitled to consider all evidence advanced by Staff before deciding whether he will testify at the hearing;

8. If Staff is permitted to rely on Mr. Fakhry's compelled testimony as part of Staff's case in chief, he will be deprived of that decision, which would prejudice the fairness of his hearing;
9. Accordingly, the references to Mr. Fakhry's compelled evidence in the George Affidavit and the Paiement Affidavit ought to be struck out, and Staff may not otherwise tender Mr. Fakhry's compelled testimony as part of Staff's case in chief except as identified at paragraph 6(ii) above;
10. Rule 28 of the *Ontario Securities Commission Rules of Procedure and Forms*; and
11. Such further and other grounds as Mr. Fakhry may advise and the Commission may permit.

**C. EVIDENCE**

Mr. Fakhry intends to rely on the following evidence for this motion:

1. The motion record of the Respondent/Moving Party, John Fielding; and
2. The motion record of the Respondent/Moving Party, Donald Alexander (Sandy) Goss;
3. such further and other evidence as Mr. Fakhry may advise and the Commission may permit.

**DATED** this 23<sup>rd</sup> day of September, 2020.

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**Janice Wright and Greg Temelini  
Wright Temelini LLP**

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