Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | 22nd Floor, 20 Queen Street West, Toronto ON M5H 3S8 | 22e étage, 20, rue queen ouest, Toronto ON M5H 3S8

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 AND DECISION ON A MOTION

Hearing:	December 16, 2013	
Decision:	January 17, 2014	
Panel:	Mary G. Condon	- Vice-Chair and Chair of the Panel
Appearances:	Anna Huculak Tamara B. Center	- For Staff of the Commission
	Fawad Ul Haq Khan	- On his own behalf and on behalf of Khan Trading Associates Inc. carrying on business as Money Plus

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REASONS AND DECISION ON A MOTION

I. BACKGROUND

[1] Fawad Ul Haq Khan ("**Khan**") and Khan Trading Associates Inc., carrying on business as Money Plus ("**KTA**") (collectively, the "**Applicants**"), have brought a motion to request the dismissal of the proceeding against them and an alternative request that the proceeding be heard by another panel member, based on a claim of bias (the "**Dismissal and Bias Motion**"). A hearing was held at the Ontario Securities Commission (the "**Commission**") on December 16, 2013 to hear the Dismissal and Bias Motion (the "**Motion Hearing**"). Staff of the Commission ("**Staff**") and Khan, on his own behalf and on behalf of KTA, appeared and made submissions.

[2] The Applicants are respondents in a proceeding that was initiated by a Notice of Hearing that was issued by the Commission on December 20, 2012, pursuant to sections 60 and 60.1 of the *Commodity Futures Act*, R.S.O. 1990, c. C.20, as amended (the "**CFA**"), in relation to a Statement of Allegations filed by Staff on December 19, 2012.

[3] On April 26, 2013, the Commission issued a Notice of Hearing advising that a motion brought by the Applicants would be heard on August 14, 2013. The motion requested that approximately 700 witnesses be summoned by the Commission to testify at the hearing on the merits in this matter (the "**Witness Motion**"). I presided over the Witness Motion and, on October 23, 2013, I issued the Reasons for Decision on that motion (*Re Khan* (2013), 36 O.S.C.B. 10485 (the "**Witness Motion Decision**")).

[4] On November 22, 2013, Khan sent an email to the Registrar of the Office of the Secretary (the "**Registrar**"), copied to Staff, attaching a Review Petition to request that the Commission grant a review of the Witness Motion Decision (the "**Review Petition**"). In a letter dated November 29, 2013, on my instructions, the Secretary to the Commission informed Khan, amongst other things, that I found no reason to depart from the Witness Motion Decision (the "**November 2013 Letter**").

[5] On October 30, 2013, Staff and the Applicants attended a pre-hearing conference, at which the hearing on the merits was scheduled for 25 days, commencing on May 5, 2014 and continuing until June 12, 2014, save and except for certain dates (the "**Merits Hearing**").

II. THE DISMISSAL AND BIAS MOTION

[6] The Applicants filed a Notice of Motion, dated December 6, 2013 (the "**Notice of Motion**"). In the Notice of Motion, the Applicants listed the grounds on which they have brought the Dismissal and Bias Motion:

1. Staff's allegation against the Applicants made under subsection 22(1)(a) of the CFA has no bearing on the Applicants ("**Ground 1**");

2. Staff's allegation against the Applicants made under subsection 22(1)(b) of the CFA is false ("**Ground 2**");

3. Staff's allegation that the Applicants misled the Commission, regarding the referral fees that they received, is wrong ("**Ground 3**");

4. the witness list considered in the Witness Motion is essential for the Applicants to make their case ("**Ground 4**"); and

5. my orders and decisions are biased ("**Ground 5**").

[7] Staff served and filed a responding motion record on December 10, 2013. On December 12, 2013, Staff served and filed a factum and a book of authorities.

[8] On December 13, 2013, Staff received an email from Khan indicating that he would not appear before me at the Motion Hearing for a number of reasons, including his submissions that my orders and decisions indicate that I am biased, and stated that he would attend the hearing before another panel member. On the same day, subsequent to receiving Khan's email, Staff filed a supplementary book of authorities and the Registrar sent a reply email to Khan. In its email, which was copied to Staff, the Registrar informed Khan, on my instructions, that if he chose not to appear at the Motion Hearing, the Commission would consider him to have withdrawn the Dismissal and Bias Motion at that time. The Registrar also stated that the next appearance in this matter is scheduled for February 3, 2014, which would be heard before another Commissioner and that Khan would be able to raise issues in preparation for the Merits Hearing at that appearance. On December 16, 2013, Khan attended the Motion Hearing on behalf of the Applicants.

[9] After carefully considering and reviewing the parties' oral and written submissions, I find that it is appropriate to dismiss the Dismissal and Bias Motion in its entirety for the reasons set out below.

III. ANALYSIS

A. Preliminary Matter

[10] At the Motion Hearing, Khan submitted that the authorities submitted by Staff were baseless and misleading (Transcript, December 16, 2013 at p. 45, ll. 11-24). Given that I have considered these authorities in reaching my findings in this decision, I will first address these submissions before proceeding with my analysis of the issues raised in this motion.

[11] First, with respect to the statutory interpretation of subsection 78(1) of the CFA (revocation or variation of a decision), Khan submitted at the Motion Hearing that it was wrong and misleading of Staff to use authorities that interpret the similarly worded section 144 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**OSA**") (Transcript, December 16, 2013 at pp. 48-50). Second, he submitted that the authorities provided by Staff in support of its submissions on bias are a "waste of time" (Transcript, December 16, 2013 at p. 45, ll. 11-24). Khan further submitted that *Taucar v. University of Western Ontario*, [2013] O.H.R.T.D. No. 976 (Ont. Human Rights Trib.) ("***Taucar***"), relied on by Staff as an authority on bias, is useless since it was a matter brought before the Ontario Human Rights Tribunal (Transcript, December 16, 2013 at p. 45, l. 25; p. 46, ll. 1-3).

[12] I do not agree with Khan's submissions. The case law submitted by Staff addresses similar issues to those raised in this motion, including general principles of administrative law by which tribunals are governed, and are therefore relevant. As such, in reaching my findings below, I have relied upon decisions of the Commission under the OSA, as well as judicial decisions and those of other administrative tribunals, such as the Ontario Human Rights Tribunal.

B. The Appropriate Panel to Hear the Motion

[13] As stated by the Ontario Superior Court of Justice, the "judge being asked to disqualify himself on the basis of reasonable apprehension of bias and prejudgment is the judge who hears the disqualification motion" (*Authorson (Litigation Guardian of) v. Canada (Attorney General)*, [2002] O.J. No. 2050 (Div. Ct.) at para. 1). Accordingly, I found that it was appropriate for me to preside over the Motion Hearing, especially given that Grounds 4 and 5 specifically relate to the orders and decisions that I issued in this matter.

C. Dismissal of the Proceeding

[14] The Applicants submit that Staff's allegations are unwarranted, and therefore request that the proceeding against the Applicants be dismissed. Staff submits that the Applicants' request to dismiss the proceeding is an inappropriate attempt by the Applicants to have the Merits Hearing decided prematurely. Staff further submits that if the Commission would like additional evidence for support, Staff would request an adjournment of this motion to put forward such evidence.

[15] Staff also submits that the Commission has previously dismissed motions brought by respondents that deal with the substance of Staff's allegations in a case and has decided that these types of submissions are best addressed by the Panel conducting the hearing on the merits in the matter (*Re ATI Technologies Inc.* (2004), 27 O.S.C.B. 6859; *Re Global Energy Group, Ltd. et al.* (2010), 33 O.S.C.B. 8227; *Re Global Energy Group, Ltd. et al.* (2011), 34 O.S.C.B. 10205; *Re Uranium308 Resources Inc. et al.* (2010), 33 O.S.C.B. 12028).

[16] I accept Staff's submissions with respect to the Commission's past practice in this regard. I do not find it appropriate to grant the Applicants' request to dismiss the proceeding, based on Grounds 1, 2 and 3. This request raises issues that go to the merits of the allegations made by Staff. The issue of whether Staff has proven its case, on a balance of probabilities, is a matter to be decided by the Panel presiding over the Merits Hearing, after considering and reviewing the evidence and submissions put forward by the parties.

D. Revoking or Varying the Witness Motion Decision

[17] The Witness Motion was heard on August 14, 2013. I reserved my decision on that motion and, on October 23, 2013, the Witness Motion Decision was issued. Based on the evidence and submissions before me, I was not persuaded that the evidence of all 679 account holders sought to be led by the Applicants would be relevant to the allegations made by Staff or would avoid undue repetition. Nevertheless, I permitted the Applicants to call a maximum of 18 account holders as witnesses at the Merits Hearing (Witness Motion Decision, *supra* at paras. 42 and 61). The Applicants now suggest that the decision be varied to allow them to bring a minimum of 50 account holders as witnesses, along with the CEOs and the principal traders of certain brokerage houses (Transcript, December 16, 2013 at p. 12, ll. 7-14; p. 41, ll. 21-25; p. 42, ll. 1-6).

[18] I do not find that such a request is appropriate. Subsection 78(1) of the CFA allows the Commission to make an order revoking or varying a decision of the Commission if certain conditions are met, including a condition that the order would not be prejudicial to the public interest. The wording of subsection 78(1) of the CFA is substantially similar to that of subsection 144(1) of the OSA. I agree with Staff's submission that the jurisprudence that interprets subsection 144(1) of the OSA may also be used to interpret subsection 78(1) of the CFA.

[19] In *Re X Inc.* (2010), 33 O.S.C.B. 11380 ("***Re X Inc.***"), the Commission considered the circumstances when it is obvious that a decision cannot stand, including:

1. a change in the law not brought to the attention of the Panel;

2. a conclusive and binding decision not brought to the attention of the Panel;

3. a misstatement of a material fact affecting the outcome; and

4. where "fresh evidence" has been discovered that would have a bearing on the outcome and which was not discoverable at the time of the hearing.

(*Re X Inc.*, *supra* at para. 32)

[20] The Commission has dealt with the Applicants' arguments in relation to their witness list on two separate occasions: (i) the Witness Motion and (ii) the November 2013 Letter. In the November 2013 Letter, the Applicants were informed that I found no reason to depart from the Witness Motion Decision for the reasons articulated in the Review Petition, and that such reasons did not raise novel issues that would warrant a reconsideration of the matter. I am presented with the same circumstances in this motion.

[21] The Commission has held that an application made pursuant to section 144 of the OSA should only be considered in the rarest of circumstances, and that if such an application is, in effect, simply an appeal, "it should be rejected as contrary to the intention of the [OSA] and contrary to the public interest" (*Re X Inc.*, *supra* at para. 35). Given that there are no novel issues or evidence presented before me that would meet the criteria established in *Re X Inc.*, I am not satisfied that it is in the public interest to revoke or vary the Witness Motion Decision, pursuant to subsection 78(1) of the CFA.

[22] In both the Witness Motion and in this Motion Hearing, Khan made submissions on general categories of witnesses. At the Motion Hearing, he also made submissions regarding the number of witnesses the Applicants are permitted to call for each group of account holders, as set out in paragraphs 42 and 61 of the Witness Motion Decision. He calculated the percentage of permitted witnesses for each group, and submitted that the resulting figures were random and were determined without any reasons (Transcript, December 16, 2013 at p. 6, ll. 2-12).

[23] I do not accept these submissions. In my reasons on the Witness Motion Decision, I allowed the Applicants to choose a "representative sample" of witnesses for each group of account holders (Witness Motion Decision, *supra* at paras. 42 and 61). Given the lack of evidence to show that the evidence of all 679 account holders would be relevant and would not be unduly repetitious (Witness Motion Decision, *supra* at paras. 40 and 61), calling up to 18 account

holders is more than adequate for the Applicants to raise a defence and provides them with flexibility to determine which witnesses to call at the Merits Hearing for this purpose. As I stated in the Witness Motion Decision, I defer to the judgement of the Panel presiding over the Merits Hearing to determine the appropriateness of summoning discrete witnesses if the Applicants wish to pursue these issues further (Witness Motion Decision, *supra* at para. 62).

[24] The Witness Motion Decision is an interlocutory decision, not a final one, and therefore cannot be appealed at this time or in this forum. If the Applicants wish to appeal a final decision of the Commission, they may appeal to the Ontario Superior Court of Justice (Divisional Court) within 30 days after the later of the making of the final decision or the issuing of the reasons for the decision, pursuant to subsection 5(1) of the CFA.

E. Reasonable Apprehension of Bias

[25] It is of "fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" (*Re Norshield Asset Management (Canada) Ltd.* (2009), 32 O.S.C.B. 1249 ("***Re Norshield***") at para. 54, citing *R. v. Sussex Justices, Ex parte McCarthy* (1923), [1924] 1 K.B. 256 at 259). Moreover, given the difficulty of determining actual bias, the Commission has held that the applicable test that should be applied is the reasonable apprehension of bias test (*Re Norshield*, *supra* at para. 53), which has been set out as follows:

> ... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information... [The] test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly".
>
> (*Re Norshield*, *supra* at para. 55, citing *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at 394)

[26] The Supreme Court of Canada provided further guidance on the application of this test:

> It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case.
>
> (*Re Norshield*, *supra* at para. 60, citing *R. v. R.D.S.*, [1997] 3 S.C.R. 484 at para. 111).

[27] The Commission has held that when assessing whether a reasonable apprehension of bias exists, the "test is that of a reasonable person informed of all the relevant circumstances; that is, a person who is fully informed of any safeguards in place at the Commission" (*Re Norshield*, *supra* at para. 68). The threshold for finding real or perceived bias is high – pure conjecture, insinuations or mere impressions are not sufficient – because a finding of a reasonable apprehension of bias calls into question an element of judicial integrity (*Re Norshield*, *supra* at para. 62; *Arthur v. Canada (Attorney General)*, 2001 FCA 223 at para. 8).

[28] Commissioners are presumed to act "fairly and impartially in discharging their adjudicative responsibilities" (*Re Norshield, supra* at para. 64). This presumption will stand, unless there is any evidence to the contrary (*Re Norshield, supra* at para. 64, aff'd *Re Norshield Asset Management (Canada) Ltd*., 2011 O.N.S.C. 4685 (Div. Ct.), citing *E.A. Manning Ltd. v. Ontario Securities Commission* (1995), 23 O.R. (3d) 257 (C.A.) at 267).

[29] The Applicants have the onus of proving that a reasonable apprehension of bias exists (*Re Norshield, supra* at para. 61). The Applicants, in their oral submissions at the Motion Hearing, drew my attention to the quote from *Re Norshield, supra* at para. 54, which is referred to at the beginning of paragraph 25, above.

[30] In my view, the Applicants have not provided evidence to establish a reasonable basis for a finding of apprehension of bias (*Re Norshield, supra* at para. 55). Rather, the Applicants' oral and written submissions appear to focus on their disagreement with my conclusions in the Witness Motion Decision. I find that this is insufficient to establish the existence of a reasonable apprehension of bias (*Taucar, supra* at paras. 29 and 31).

[31] On the contrary, I find that the Applicants have been treated fairly and impartially throughout this proceeding. In relation to the Witness Motion, after hearing the submissions of Staff and the Applicants, I provided Khan with several opportunities to provide further clarification on how each account holder would present unique and relevant evidence to support the Applicants' case (Transcript, August 14, 2013 at p. 31, ll. 13-25; p. 32, ll. 1-10; p. 35, ll. 7-15; p. 39, ll. 20-25). The Witness Motion Decision includes a full discussion on the issues raised in that motion, summaries of the submissions of the parties and the reasons for my decision. Moreover, on October 30, 2013, while Staff requested two weeks for the Merits Hearing during February or March of 2014, I ordered that a total of 25 days be scheduled for the Merits Hearing, beginning on May 5, 2014, after considering the availability of the Applicants and their witness list.

IV. CONCLUSION

[32] For the reasons set out above, I find that it is not appropriate in the circumstances to grant a dismissal of this proceeding or to find that a reasonable apprehension of bias existed. I am also not satisfied that it is in the public interest to revoke or vary the Witness Motion Decision.

[33] Accordingly, I dismiss the Applicants' request for a dismissal of this proceeding and their alternative request that the proceeding be heard by another panel member because of a reasonable apprehension of bias.

[34] The next scheduled appearance in this matter will be a confidential pre-hearing conference to be held on February 3, 2014 at 10:00 a.m., at which time the Applicants may raise any issues in preparation for the Merits Hearing. At the Merits Hearing, the Applicants will have the opportunity to challenge and respond to all of Staff's allegations, to cross-examine Staff's witnesses and to bring evidence forward to support their case.

DATED at Toronto this 17th day of January, 2014.

"Mary Condon"

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Mary G. Condon