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REASONS FOR DECISION ON A MOTION

1. OVERVIEW

- [1] This decision relates to a motion brought by respondents in an enforcement proceeding. The Ontario Securities Commission alleges that the respondents engaged in the business of trading without being registered, and that they carried out extensive manipulative trading. The Commission also alleges inadequacies in the respondents' systems of control and supervision.
- [2] The proceeding is in its early stages. The merits hearing is scheduled to begin in January 2025. The Commission has made voluminous disclosure to the respondents, including summaries of the anticipated testimony of the Commission's witnesses. The respondents sought wide-ranging relief:
- a. new witness summaries that comply with the Tribunal's *Rules of Procedure (Rules)*;
 - b. production of unredacted transcripts of examinations referred to in the Commission's witness summaries;
 - c. production of an unredacted version of an exhibit, and of other exhibits, marked in those examinations; and
 - d. disclosure of other documents that have not been produced.
- [3] On August 27, 2024, we issued an order granting some of the requested relief, for reasons to follow.¹ In these reasons for that decision, we explain why we found the witness summaries to be deficient in some respects, and why we ordered the Commission to serve revised witness summaries that address those deficiencies.
- [4] The respondents also requested that we order the Commission to produce unredacted versions of transcripts that had been produced, and all the exhibits (in unredacted form) to those transcripts, to the extent not already produced.

¹ (2024), 47 OSCB 6865

We dismissed that request because there is no reason to believe that the redacted information is relevant.

[5] Finally, we ordered that the Commission:

- a. give the respondents a table of concordance for exhibits to a transcript that the Commission had previously disclosed, because the Commission has the necessary information; and
- b. disclose certain attachments to a letter that the Commission had previously disclosed, because the witness summary for one of the Commission's witnesses makes those attachments potentially relevant.

2. ANALYSIS

2.1 Witness summaries

2.1.1 Introduction

[6] We begin with the respondents' submission that the Commission's witness summaries are deficient, in that:

- a. the summary for a witness from Cboe Canada contemplates that another individual may be substituted, but does not identify the individual;
- b. five summaries purport to incorporate by reference examination transcripts, or discussion notes, taken during the investigation, but the summaries do not properly provide the substance of those witnesses' anticipated evidence; and
- c. the summary for the Commission's investigator lacks specificity in some respects.

[7] We address each of these in turn. In assessing the sufficiency of the Commission's summaries, we reject the Commission's submission that we should take into account the quality of the respondents' witness summaries. The Commission did not bring a cross-motion about the adequacy of the respondents' witness summaries, so the quality of those summaries is not before us.

2.1.2 Summary for a witness from Cboe Canada

[8] Rule 28(3) of the *Rules* requires that each party identify the witnesses the party intends to call, and provide a summary of each witness's expected testimony,

along with the witness's name and address, or the name and address of a person through whom the witness can be contacted.

- [9] The Commission intends to call André Goguen, a representative of Cboe Canada. That organization previously acquired Aequitas, which had provided a self-trade prevention feature potentially relevant to the allegations in this case. Goguen is expected to testify about the technical aspects of that feature, and about related trading configurations.
- [10] The respondents object to the portion of the summary that states that another (unnamed) representative of Cboe Canada may testify instead of Goguen. We agree that this reference does not give the information that the *Rules* require, if indeed the Commission will substitute another witness.
- [11] However, the Commission does not know now whether it will substitute another witness. As this Tribunal held in *BDO Canada LLP (Re)*,² the scrutiny of witness summaries is necessarily more limited at this early stage than it would be during the merits hearing, when evidence might be led that was not properly disclosed. Any indication in the Cboe Canada witness summary that a different but unnamed individual might be called is of little to no value to the respondents at this time. If the Commission does call a different person at the merits hearing, it will be open to the respondents to object. If the respondents object, the merits panel may inquire into the relevant background, including the reasons for the substitution, the timing of the decision to substitute, the presence or absence of timely disclosure about the substitution, and any prejudice the respondents identify.
- [12] With these principles in mind, we cannot find now that the summary for the Cboe Canada witness is deficient.

2.1.3 Summaries that incorporate interview transcripts or notes by reference

- [13] We turn now to the respondents' objection that five of the Commission's witness summaries incorporate by reference the transcripts or notes of interviews of those witnesses, but that the summaries fail to disclose properly the substance

² 2020 ONSEC 2 (*BDO*)

of the witness's expected testimony. We cannot conclude at this time that the summaries are deficient in that respect.

[14] One of the five witnesses is Goguen, the Cboe Canada representative. The summary says that his testimony will be "consistent with" information he gave during a call with the Commission, notes of which the Commission has disclosed to the respondents. The summary also identifies a particular topic about which Goguen is anticipated to testify, but no corresponding substance is included.

[15] The other four witnesses are Danielle Raymond, Marc Sansregret, Eric Côté and Chi Zhang. Each of those witnesses' summaries indicates that the witness will testify "in accordance with" the transcript of their respective examination. Each summary lists various topics about which the witness is anticipated to testify, but no corresponding substance is included.

[16] Before the respondents brought this motion, they asked the Commission to confirm that the substance of these witnesses' anticipated evidence about the topics listed in the summaries is contained in the transcripts (or notes, in the case of Goguen). In other words, did the Commission intend to have any of the witnesses testify beyond the scope of those transcripts or notes?

[17] The answer the Commission gave to the respondents at the time, and to us in submissions, was appropriate to some extent, but concerning in another respect.

[18] The appropriate part was the Commission's reliance on previous decisions of this Tribunal, which make clear that a witness summary that incorporates by reference earlier testimony or discussions is compliant, so long as the witness's anticipated testimony will be consistent with, and not beyond, that which is incorporated by reference.³ A summary that discloses substance (whether directly or by reference) helps ensure that the proceeding is conducted in a just, expeditious and cost-effective manner,⁴ by:

- a. allowing the parties to better understand the issues in the proceeding;
- b. facilitating the narrowing of issues;

³ *Go-To Developments Holdings Inc (Re)*, 2023 ONCMT 29 (***Go-To Developments***) at paras 21-25; *BDO* at paras 34-41

⁴ *BDO* at para 24

- c. allowing the parties to identify and resolve evidentiary issues that may arise at the hearing;
- d. facilitating settlement;
- e. permitting more reliable estimates of the time required to conduct the hearing; and
- f. minimizing the required time and resources and cost of a hearing.⁵

[19] To the extent that a summary gives the other party sufficient information to achieve these objectives, there is no problem at this stage of the proceeding, when the Tribunal has nothing to which to compare the summary. This does not preclude an objection when the witness testifies at the hearing, at which time the Tribunal will be better equipped, in that it can compare the summary to the actual testimony.⁶ But for now, if the summary provides the necessary substance, whether directly or by reference, it is compliant in that respect.

[20] The concerning part of the Commission's response to the respondents and to us was that it need not disclose "all" of the substance of the witness's anticipated testimony. We reject that position. It is inconsistent with the principles set out above, and with the plain words of rule 28(3), which requires that a summary include "the substance" (emphasis added) of a witness's anticipated evidence. That means the substance of all the witness's anticipated evidence.

[21] In stating our conclusion, we reject the Commission's reliance on *Kallo (Re)*.⁷ That decision related to particulars in a Statement of Allegations, not to witness summaries. The contexts are fundamentally different.

[22] We also reject the Commission's suggestion that the respondents' motion sought all details of the witnesses' anticipated evidence. An assessment of whether a summary discloses "the substance of" anticipated evidence is necessarily contextual. There is a continuum. The "substance of" anticipated evidence is not the same as all details of that evidence. The summary is, after all, a summary.

⁵ *BDO* at para 25

⁶ *BDO* at paras 26-30

⁷ 2024 ONCMT 13 at para 13

[23] Consistent with the above principles, every party must disclose enough substance to ensure that the other party is not surprised by the witness's testimony at the merits hearing. At this stage of the proceeding, we are not in a position to decide whether the Commission's summaries are sufficient in this regard. It is for the Commission to assess the adequacy of its summaries in light of these reasons (do they set out the substance of all the anticipated evidence?), and if the Commission attempts to introduce evidence at the merits hearing that the respondents believe was not properly disclosed, it will be for the respondents to decide whether to object.

2.1.4 Identification of documents in summaries

[24] The respondents raised another concern about the witness summaries for Raymond, Sansregret, Côté and Zhang. Specifically, the summaries mention documents that were referred to in their respective examinations and "other documents, including...". The summaries then list one or more categories of documents without specifically identifying any particular documents. Examples of these listed categories of documents are:

- a. "documents relating to JitneyTrade/Canaccord's relationship with and supervision of Oasis";
- b. "policies and procedures of JitneyTrade/Canaccord";
- c. "documents relating to Oasis policies and procedures"; and
- d. "communications with Oasis Traders".

[25] The respondents submit that: (i) the word "including" makes it clear that the Commission is not being exhaustive in identifying the documents to which the witnesses will refer; and (ii) the listed categories of documents are not sufficiently specific and therefore do not comply with rule 28(3). We agree.

[26] On the first point, the Commission acknowledges that the use of the word "including" was inartful. Wording like that must be disregarded and may not be relied on, because it is of no value to the respondents.

[27] As to whether the enumerated categories of documents are described with sufficient precision, we conclude that they are not. We do not accept the Commission's reliance on *BDO*, in which the Tribunal found that a witness

summary that identified an entire audit file and related email communications was sufficiently specific. At the heart of that case were questions about what was and was not in the audit file, so the entirety of the audit file was at issue. Even though the audit file may have been voluminous, the parties could easily determine with precision what the file's contents were.

[28] The same cannot be said of the categories (examples of which are listed above) set out in these four witness summaries. As the respondents' evidence and submissions on this motion demonstrate, the scope of each category is imprecise.

[29] We agree with the Commission's submission that rule 28(3) does not necessarily require a witness summary to list, separately, every single document to which the witness will refer. A party may use a clearly defined and precisely limited category of documents the party expects the witness to refer to without listing every document in that category. However, if the category description is so imprecise that the respondents cannot ascertain the scope of the case they will have to answer, it will likely be insufficient.⁸ Again, context is essential. For example, one can know with precision what the boundaries of an audit file are. One cannot know with precision what the boundaries of "documents relating to" a relationship are.

[30] The categories as described in these witnesses' summaries are imprecise. The Commission must revise the summaries so that the respondents have sufficient certainty about what documents those categories include.

2.1.5 Alleged deficiencies of the witness summary of the Commission's investigator

[31] One of the Commission's witness summaries is that of Yu Chen, the Commission's investigator. It is long, and it contains many footnotes and references to specific documents. The respondents raise a number of concerns, each of which we address in the following paragraphs, often applying principles set out earlier in these reasons.

⁸ *Go-To Developments* at paras 33-36

- [32] In many places, the summary improperly purports to reserve the Commission's right to introduce evidence beyond the substance set out in it. Language such as "including, but not limited to", "broadly consistent with", and "shall testify generally in accordance with" (emphasis added) is of no value, shall be disregarded, and may not be relied on.⁹
- [33] Chen's summary also frequently introduces a topic with a general sentence, and then follows that general sentence with paragraphs containing detail. For example, paragraph 11 of the summary states that Chen "will provide information regarding Oasis, including its organization, business, level of market activity. [*sic*]" The paragraph provides no further detail, but the paragraphs that follow do. The Commission submitted that paragraph 11 introduces the paragraphs that follow, and we read the summary that way. Therefore, we do not accept the respondents' complaint that paragraph 11 lacks substance. The substance of the evidence for the topics raised in paragraph 11 is in the paragraphs that follow it. The summary must be read in its entirety. At the merits hearing, if the Commission attempts to introduce evidence relating to Oasis's organization, business or level of market activity, and the substance of that evidence is not covered in the paragraphs that follow paragraph 11, it will be for the merits panel to assess admissibility in light of the summary. The same reasoning applies to the numerous other similar examples raised by the respondents.
- [34] Similarly, the summary states in many places that Chen will describe or refer to unspecified "related documents" (or similar words). In some instances, the reference appears merely to introduce specific document references that come immediately afterward. In other instances, there is no apparent connection to greater detail (or documents) specifically referenced elsewhere.
- [35] At this stage of the proceeding, we cannot assess whether Chen's expected testimony about "related documents" will surprise the respondents, or whether the detail in the paragraphs that follow give sufficient notice. All we can do is observe that the phrase "related documents" is imprecise and therefore unhelpful on its face. The Commission cannot rely on it to justify the admission

⁹ *BDO* at paras 36-41; *Go-To Developments* at paras 22-25

of additional documents, unless at the time of Chen's testimony, it is evident that in the context of a particular document, the summary gave the respondents sufficient notice of, and clarity about, his intention to refer to that document. That will be for the merits panel to determine.

- [36] Paragraph 39 of the summary states that Chen will "describe the methodology used to determine the level of Oasis's trading activity on Canadian markets and the facts obtained from that methodology" and will also "describe and introduce the available trading data relating to Oasis." Without expressing a view about the admissibility at the merits hearing of the first of those two categories of evidence, we do conclude that the summary is deficient on its face with respect to both categories. More substance is required for the first, and more precision is required for the second.
- [37] The same applies to paragraphs 47 and 54 of the summary, which refer to Chen's approach in identifying instances of market manipulation or wash trading, "related trading data", and "documents relating to the cause of the wash trades". On this point, the Commission submitted that a summary need not set out the substance of anticipated testimony if the testimony is offered only for context or is peripheral to the allegations. We reject that distinction. A summary must disclose the substance of all topics that a party proposes to have a witness testify about.
- [38] As for the Commission's use, in paragraph 47, of the words "at least" (e.g., "at least 404 instances of locked and crossed market spoofing"), we conclude that the words are unhelpful, should be ignored, and may not be relied on.
- [39] Paragraph 43 of the summary states that Chen will introduce FIX messages relating to Oasis trading activity and "related documents". The paragraphs that follow contain no document references that would enable a reader to know what documents that category includes. More precision is required for this reference.
- [40] We reject the respondents' concern about the second sentence of paragraph 43 of Chen's summary, which states that he "will also describe FIX Protocol is the standardized language used in global financial markets to transmit messages containing information related to securities transactions. [*sic*]" The statement is not open-ended and there is no apparent deficiency at this time.

- [41] Finally, we reject the respondents' submission that paragraphs 86 to 93 set out the substance of Chen's anticipated testimony about alleged supervisory issues but do not identify the documents Chen intends to refer to. The paragraphs do in fact refer to various documents, including "Oasis supervision workbooks" and 260 Oasis Head Office supervision inquiries.
- [42] Before we leave our discussion of the summary of Chen's anticipated testimony, we must note that the fact that most of Chen's testimony in chief will come by way of affidavit, as the Tribunal earlier ordered. This does not alter the Commission's obligations with respect to disclosure of his anticipated testimony.

2.2 Redacted transcripts of examinations, and exhibits on those examinations

- [43] Initially, the Commission disclosed three examination transcripts (those for Raymond, Sansregret and Côté) that contained redactions. The Commission stated that all the redactions related to names or information identifying other clients of JitneyTrade/Canaccord, with no relevance to the allegations in this case. Just prior to the motion hearing, the Commission reconsidered its position and disclosed the Côté transcript in unredacted form, acknowledging that the previously redacted information was potentially relevant, as it might relate to systemic issues experienced both by Oasis and by other clients.
- [44] In addition, of the 15 documents marked as exhibits on the Raymond examination, the Commission produced only 11 to the respondents, and one of these contains significant redactions. Further, the respondents complain that the versions of the exhibits produced to them do not contain exhibit stamps or some other way to permit them to identify which document corresponds to which exhibit that is referred to in the examination transcript.
- [45] The respondents ask us to require the Commission to produce unredacted versions of the Raymond and Sansregret examination transcripts, the missing exhibits to the Raymond examination, and an unredacted version of the exhibit to the Raymond examination. The respondents say that they are entitled to these documents because the Raymond witness summary indicates that Raymond is expected to testify in accordance with her transcript and about documents referred to in her transcript and Sansregret is expected to testify in

accordance with his transcript. The respondents also submit that the redacted information is potentially relevant to their ability to mount a defence.

- [46] The Commission asserts that none of the withheld exhibits, or redacted information in the disclosed exhibit, are relevant to this proceeding.
- [47] The respondents did not offer any basis to conclude that the redacted information would be relevant to their ability to defend the case. We are satisfied that the redacted information and the exhibits that have been withheld are not relevant to these proceedings and that the Commission need not produce them. It would have been better for the Commission's witness summaries to have made clear that the portions of the transcripts containing the redactions and referring to the withheld exhibits will not form part of the expected testimony of Raymond and Sansregret. However, given that the information is not relevant, we are satisfied that the respondents are not prejudiced by the non-disclosure. If, at the merits hearing, a witness appears to be testifying about matters that were redacted, the respondents can revisit this issue with the merits panel.
- [48] As for reconciling documents marked as exhibits on previous examinations, disclosure must be meaningful. The respondents should not have to guess which documents in the Commission's productions correspond to the exhibits marked on the Raymond examination simply because the version of the exhibits that were produced to them do not include exhibit stamps. The Commission offered us no reason why it cannot give the respondents a table of concordance between the Document ID number(s) in its productions and the exhibit numbers in the Raymond transcript. Accordingly, the Commission shall do so.

2.3 Request for disclosure of attachments to a letter

- [49] The Commission included in its disclosure to the respondents a letter dated March 5, 2020, from the Australian Securities & Investment Commission (**ASIC**) to the Commission. The letter refers to attachments, but the Commission did not disclose the attachments. The respondents ask us to require that they be disclosed.
- [50] The March 5 letter was preceded by a February 22, 2019, letter from ASIC to the Commission. In that earlier letter, ASIC advised that it had identified more than 3,250 instances of suspected locked and crossed market spoofing by Oasis on

the Australian Securities Exchange. The Commission asked ASIC for further information. ASIC sent the 2020 letter and attachments in response.

[51] The Chen witness summary indicates that he will explain how he identified a subset of 404 instances of locked and crossed market spoofing on Australian securities exchanges, from among the more than 3,250 possible instances that ASIC identified to the Commission.

[52] The Commission submits that it properly withheld the attachments to the 2020 ASIC letter because:

- a. they contain information about thousands of instances of spoofing that go beyond the 404 instances that the Commission alleges in this proceeding; and
- b. they contain regulator work product and analysis that is not relevant to the merits, has no probative value, and is therefore not subject to disclosure.

[53] The respondents say that the attachments must be disclosed because the Chen witness summary has repeated references to the referral from ASIC, and the referral is clearly relevant.

[54] We question the relevance and admissibility of the information the respondents seek. However, that will be for the merits panel. In the meantime, the Commission has indicated that Chen will testify about his approach in culling down to 404 instances of alleged spoofing from the 3250 potential instances. We therefore concluded that the Commission must disclose to the respondents the attachments to the 2020 ASIC letter.

3. CONCLUSION

[55] For the above reasons, we ordered the Commission to:

- a. serve the respondents with revised witness summaries as follows:
 - i. with respect to paragraph 1 in each of the summaries for Raymond, Sansregret, Côté, and Zhang, the Commission shall specify (where applicable) the documents included in the following categories referred to in those summaries:

- (1) documents relating to JitneyTrade/Canaccord's relationship with, and supervision of, Oasis,
- (2) policies and procedures of JitneyTrade/Canaccord,
- (3) documents relating to JitneyTrade/Canaccord's supervisory tools,
- (4) documents relating to Oasis policies and procedures, and
- (5) communications with Oasis Traders,

either by specifically identifying every document within the category, or by amending the category description so as to enable the respondents to know which documents are included in the category;

ii. with respect to the summary for Chen,

- (1) in paragraphs 39, 47 and 54, the Commission shall provide the substance of Chen's expected testimony regarding the "methodology" or "approach" he used, as applicable; and
- (2) in paragraphs 39, 43 and 54, the Commission shall specify the documents included in "the available trading data relating to Oasis", in "related documents" and in "related trading data and documents relating to the cause of wash trades" either by specifically identifying every document within each category, or by amending the category description so as to enable the respondents to know which documents are included in the category;

- b. serve the respondents with a table of concordance that identifies the Document ID number(s) that correspond to each exhibit number in the transcript of Raymond; and
- c. serve the respondents with copies of the attachments to the March 5, 2020, letter from the ASIC to the Commission.

[56] Because the respondents' witness summaries respond, in part, to the Commission's witness summaries, we ordered that the parties file either an agreed-upon schedule for the delivery of witness summaries by all parties, or each party's brief written submissions containing proposed schedules.

Dated at Toronto this 6th day of September, 2024

"Mary Condon"

Mary Condon

"Timothy Moseley"

Timothy Moseley

"Andrea Burke"

Andrea Burke