



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

Citation: VRK Forex & Investments Inc (Re), 2022 ONSEC 1

Date: 2022-01-24

File No.: 2019-40

**IN THE MATTER OF
VRK FOREX & INVESTMENTS INC. and RADHAKRISHNA NAMBURI**

**REASONS AND DECISION
(Subsection 127(1) of the *Securities Act*, RSO 1990, c S.5)**

Hearing: February 1, 3, 4, 5, 9, 10, 11 and 12, 2021; written submissions received March 12, April 19, and December 6 and 20, 2021

Decision: January 24, 2022

Panel:	Wendy Berman	Vice-Chair and Chair of the Panel
	Timothy Moseley	Vice-Chair
	Frances Kordyback	Commissioner

Appearances:	Gavin MacKenzie	For Staff of the Commission
	Erin Hoult	

Radhakrishna Namburi	For himself and VRK Forex & Investments Inc.
----------------------	--

TABLE OF CONTENTS

I.	OVERVIEW	1
II.	BACKGROUND FACTS.....	1
III.	ANALYSIS.....	2
	A. Introduction	2
	B. Were the CFDs “securities”?.....	3
	C. Did the respondents engage in the business of trading or advising in securities without being registered?	5
	1. Was the activity “trading”?	6
	(a) Directly Trading	7
	(b) Acts in Furtherance of a Trade.....	8
	i. Promotional activities and meetings with investors	8
	ii. Information sessions about the CFD trading program	11
	iii. Facilitation of the opening and funding of trading accounts ..	11
	iv. Placing orders on behalf of clients and sharing profits	11
	v. Conclusion	12
	2. Was the activity “advising”?	13
	(a) Introduction	13
	(b) The Circumstances and Conduct related to CFD trading in Investors Accounts	13
	(c) Conclusion	15
	3. Was the trading or advising activity carried out for a business purpose?	16
	(a) Engaging in activities similar to a registrant	17
	(b) Repetitive, regular or continuous activity	18
	(c) Receiving or expecting to receive compensation.....	18
	(d) Soliciting securities transactions	19
	(e) Conclusion	19
	D. Did the Respondents fail to comply with the terms of the Undertaking and if so, is it in the public interest to sanction such conduct?	19
	E. Conduct contrary to the public interest.....	21
IV.	CONCLUSION.....	21

REASONS AND DECISION

I. OVERVIEW

- [1] Staff of the Commission alleges that from September 2016 to September 2019 (the **Material Time**), the respondents Radhakrishna Namburi and VRK Forex & Investments Inc. (**VRK Forex**) engaged in the business of trading and advising in securities without being registered to do so.
- [2] Staff alleges that the respondents entered into agreements with at least 19 investors, by which the investors authorized the respondents to make discretionary trades in contracts for difference (**CFDs**) in their online trading accounts. As a result of this activity, the respondents received profit-sharing payments totaling approximately \$400,000 and the investors lost an aggregate of approximately \$1.9 million.
- [3] Staff also alleges that by engaging in this activity, Namburi and VRK Forex failed to comply with the terms of a written undertaking they gave to Staff in September 2016 (the **Undertaking**), by which they promised to cease similar activity and to obtain registration or retain the services of a registrant prior to accepting new funds or entering Ontario's capital markets.
- [4] The respondents deny Staff's allegations. In particular, they dispute that the CFDs in this case were securities. If they are correct in their position, all allegations against the respondents should be dismissed.
- [5] For the reasons set out below, we find that the CFDs in this case were securities. We also find that the respondents extensively promoted a CFD trading program, solicited investors, provided advice related to CFD trading, and conducted CFD trading in investor accounts, sometimes on a discretionary basis. The respondents received significant compensation for these activities from investors. In so doing, the respondents engaged in the business of trading and advising in securities without being registered to do so, and thereby contravened Ontario securities law.
- [6] As for the Undertaking, we dismiss the allegations against the respondents. We find that the Undertaking lacks sufficient clarity to support a conclusion that the respondents breached it, or to support an order for sanctions under s. 127 of the *Securities Act*¹ (the **Act**) arising from it.

II. BACKGROUND FACTS

- [7] Namburi is the sole director of VRK Forex and described VRK Forex as his "own business".² VRK Forex operated out of a storefront office in a shopping mall in Mississauga and out of Namburi's residence. For convenience in these reasons, we often speak about Namburi's activities without referring to VRK Forex. However, all our findings about Namburi apply equally to VRK Forex.
- [8] In 2016, Staff investigated the activities of the respondents, including whether the respondents were trading securities on behalf of others without being

¹ RSO 1990, c S.5

² Exhibit 8, Affidavit of Radhakrishna Namburi sworn December 7, 2020, at para 3

registered to do so. As part of its investigation, Staff communicated with Namburi.

- [9] On September 1, 2016, following those communications, Namburi signed the Undertaking, which was entitled “Acknowledgment and Undertaking” and was directed to Staff. Namburi signed the Undertaking on his own behalf and on behalf of VRK Forex. In the Undertaking, the respondents acknowledged that they had contravened Ontario securities law by engaging in the business of trading in securities and represented that they had ceased such activities. The undertaking also addressed the respondents’ future activities. We address the specific language of the Undertaking, and its implications, in our analysis below.
- [10] During the Material Time, the respondents:
- a. promoted CFD trading as a form of investment with significant daily returns;
 - b. agreed with the investors to work in their accounts in respect of CFD trading and to receive 50% of the monthly net realized profits from the CFD trading;
 - c. assisted investors in the opening and funding of online accounts with CFD providers;
 - d. accessed investors’ accounts and monitored and executed trades in CFDs in the investors’ accounts based on certain instructions; and
 - e. received approximately \$400,000 from investors as profit-sharing payments.
- [11] At least 19 Ontario-resident investors engaged the respondents and deposited approximately \$3.8 million into accounts on two online trading platforms, both of which were recommended by the respondents. The two entities that provided the trading platforms were Oanda (Canada) Corporation ULC (**Oanda**) and Vantage Global Prime Pty LLP (**Vantage**).
- [12] Each of the two entities played two roles simultaneously. The entity not only provided the platform on which the CFDs were traded; it was also the counterparty to the investor for every CFD traded on that platform.

III. ANALYSIS

A. Introduction

- [13] We turn now to our analysis of the three principal issues raised by Staff’s allegations:
- a. Were the CFDs “securities”?
 - b. If so, did the respondents engage in the business of trading or advising in securities without being registered contrary to ss. 25(1) and 25(3) of the Act?
 - c. Did the respondents fail to comply with the terms of the Undertaking, and if so, is it in the public interest to sanction such conduct?

B. Were the CFDs “securities”?

- [14] We begin with the question of whether the CFDs were “securities”, as that term is defined in s. 1(1) of the Act. We conclude that they were.
- [15] Before we undertake the necessary legal analysis to reach that conclusion, it is important to understand who the parties to the CFDs were, and the attributes of CFDs.
- [16] A CFD is a financial instrument that allows investors to obtain leveraged exposure to assets such as equities, commodities, or currencies, without the need for ownership and physical delivery of the underlying asset. CFDs are offered to investors through online trading platforms operated by CFD providers and are generally traded “over the counter” (*i.e.*, not on an exchange).
- [17] CFDs have no standard term to expiry or contract size. CFDs allow investors to take long or short positions and are effectively renewed at the close of each day if desired.
- [18] In this case, Oanda and Vantage were the CFD providers engaged by the investors on the recommendation of the respondents. Each of Oanda and Vantage operated a proprietary online trading platform. Each offered CFDs to investors as principal and acted as counterparty to the CFD trades in the investors’ accounts on its platform.
- [19] The trading in investors’ accounts on those platforms included the purchase and sale of CFDs with underlying commodity assets such as copper, oil, wheat, sugar, and natural gas. Some CFDs had currency pairs as their underlying assets.
- [20] Generally, CFDs are traded on a leveraged basis, which amplifies both the potential for profit and the risk of loss for investors. The Oanda and Vantage platforms were no exception. They permitted investors to engage in highly leveraged trading in their online accounts, with leverage ratios ranging between 10:1 and 500:1, with most trading at 50:1 leverage.
- [21] The term “security” is broadly defined by a non-exhaustive list of 16 enumerated categories of instruments. Staff relies on one of those in submitting that each CFD was an “investment contract”.
- [22] In interpreting “security”, and by extension “investment contract” (which is not defined in the Act), we must adopt a purposive approach, which includes consideration of the objective of investor protection.³
- [23] As articulated by the Supreme Court of Canada and adopted by the Commission in numerous cases,⁴ an investment contract comprises four elements:
- a. an investment of money;
 - b. with a view to a profit;

³ *Furtak (Re)*, 2016 ONSEC 35, (2016) 39 OSCB 9731 (**Furtak**) at para 67; *Pacific Coast Coin Exchange v Ontario Securities Commission*, [1978] 2 SCR 112 (**Pacific Coin**) at 127

⁴ *Pacific Coin* at 114 and 128; *Furtak* at para 66; *Axcess Automation LLC (Re)*, 2012 ONSEC 34, (2012) 35 OSCB 9019 (**Axcess**) at paras 140-141

- c. in a common enterprise where the success or failure of the enterprise is interwoven with, and dependent on, the efforts of persons other than the investors; and
 - d. the efforts made by those others significantly affect the success or failure of the enterprise.
- [24] However, we must be careful not to approach our interpretation of whether a CFD is an investment contract in a formulaic manner based on these static elements. We must assess the attributes of the CFDs through the overarching lens of investor protection to ensure that the interpretation of investment contract is flexible and capable of adaptation to address the breadth and variability of investment schemes devised in the capital markets.⁵
- [25] There is no dispute in this case that the respondents' clients invested money with a view to a profit. The investors deposited approximately \$3.8 million into online accounts with Oanda and/or Vantage, for investment in CFDs on margin, expecting to earn profits from that trading. This expectation was based fully, or in part, on the respondents' statements about the CFD trading program as a form of investment with significant daily returns. The first two of the four elements of an investment contract are established.
- [26] In submitting that the third and fourth elements are established as well, Staff states that the investors were entirely dependent on the managerial efforts and control of the CFD provider and its ability to perform its obligation under the contract to realize any profit in their accounts. Staff submits that in this way, the investors remained exposed to counterparty risk in form of, among other things, insolvency/credit risk, misappropriation risk and performance risk on the part of the CFD provider.
- [27] The respondents submit that the CFDs were not securities, for two main reasons:
- a. the CFDs were not traded like conventional securities, in that they were not traded on any exchange, and could not be delivered to the investor; and
 - b. in any case, they were not an investment, but a form of betting, like that offered on gaming websites.
- [28] We can dispose easily of the first of those two submissions. An instrument may be a security regardless of whether it is traded on an exchange or can be delivered to the investor. The definition of "security" in the Act contains no such constraints, and the respondents' proposed approach is inconsistent with the important investor protection policy underlying the definition.
- [29] The second submission brings us to a consideration of the third and fourth elements of an investment contract. Did the CFDs constitute a common enterprise between the investors and the CFD provider, by which the efforts of the CFD provider significantly affected the success or failure of the investor's investment? We conclude that they did.
- [30] As we have noted, Oanda and Vantage provided both the platform on which the investors could buy and sell CFDs, and the CFDs themselves.

⁵ *Pacific Coin* at 127-132

- [31] The investors relied on the CFD provider:
- a. for access to CFDs with underlying exposure to assets such as equities, commodities, or currencies;
 - b. for the performance of the CFDs as there was no market for the CFDs and the CFDs were not transferable (*i.e.*, once a CFD position was opened, the investor was restricted to closing the position with the CFD provider);
 - c. to provide access to, and operate, the online proprietary trading platform; and
 - d. to hedge risk, including credit risk, performance risk and misappropriation risk appropriately so that the CFD provider could satisfy its payment and performance obligations.
- [32] The CFD providers facilitated the key attributes of the common enterprise to buy or sell CFDs, including by providing investors:
- a. CFDs, and exposure to markets and instruments that may not otherwise be directly available, or available in a cost-effective manner, and acting as counterparty;
 - b. access to leverage their investment using margin; and
 - c. an online platform for the execution of purchases and sales of CFDs.
- [33] Our conclusion that the CFDs were securities is reinforced by the investor protection concerns that CFDs present, including their complexity, the use of margin or leverage, the potential volatility of the underlying asset, the embedded fees, the lack of price transparency, and counterparty risk.
- [34] Contrary to the respondents' argument, the speculative nature of the CFDs does not detract from our determination that the CFDs are securities; rather, it raises investor protection concerns about the trading of those instruments.
- [35] For these reasons, we find that the CFDs traded in the investors' accounts were investment contracts and were therefore securities within the meaning of the Act.

C. Did the respondents engage in the business of trading or advising in securities without being registered?

- [36] Having found that the CFDs were securities, we turn to the second of the three issues; namely, whether the respondents engaged in the business of trading those securities, or of advising about them, without being registered. We conclude that they did engage in the business of both trading and advising.
- [37] A person or company must be registered under Ontario securities law to engage in the business of trading in securities and the business of advising with respect to investing in, buying, or selling securities, unless an exemption applies.⁶
- [38] The registration requirement is a cornerstone of the securities regulatory regime designed to ensure that those who engage in trading or advising related to securities are proficient and solvent, and that they act with integrity. Unregistered trading or advising defeats some of these necessary legal

⁶ Act, ss. 25(1) and (3)

protections and undermines investor protection and the integrity of the capital markets.⁷

[39] Neither Namburi nor VRK Forex was ever registered in any capacity under the Act. Neither argued that any exemption contained in the Act applied to their activities.

[40] Therefore, the only question we must answer is whether the respondents engaged in the business of trading or advising. That requires us to first decide whether the respondents' conduct constituted "trading" or "advising", and if so, whether that conduct was carried out for a business purpose.

1. Was the activity "trading"?

[41] The concept of "trading" under the Act is broad and includes any sale or disposition of a security for valuable consideration, as well as any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of such a sale or disposition.⁸

[42] In determining whether a person has engaged in acts in furtherance of trading in securities, we must take a contextual approach and consider the totality of the conduct, including the surrounding circumstances, the impact of the conduct and the proximity of the acts to actual or potential trades in securities.⁹

[43] The Commission has previously found that a variety of activities constitute acts in furtherance of trading in securities (and are thereby trades, as that term is defined in the Act), including:

- a. meeting with investors;
- b. distributing promotional materials concerning investment programs;
- c. conducting information sessions with investors;
- d. assisting investors with opening trading accounts and transferring funds to those accounts;
- e. placing online orders on behalf of investors; and
- f. accessing client accounts for the purpose of trading in securities through powers of attorney or obtaining account information.¹⁰

[44] Staff alleges that the respondents engaged in trading activity by directly trading CFDs in the investors' accounts and by engaging in various acts in furtherance of such trading, including the solicitation of investors.

[45] The respondents submit that they did not engage in any trading activity. They say that the investors did not provide any funds to them but rather invested funds in their individual online accounts with the CFD providers. Further, Namburi's role was limited to working as an employee of each investor in

⁷ *Meharchand (Re)*, 2019 ONSC 7, (2019) 42 OSCB 1135 (**Meharchand**) at para 47; *Money Gate Mortgage Investment Corporation (Re)*, 2019 ONSC 40, (2020) 43 OSCB 35 (**Money Gate**) at para 140

⁸ Act, s. 1(1); *Khan (Re)*, 2014 ONSC 41, (2015) 35 OSCB 61 (**Khan**) at para 80; *Axxess* at paras 143-145

⁹ *Simba (Re)*, 2018 ONSC 41, (2018) 41 OSCB 6487 (**Simba**) at para 26; *Axxess* at paras 143-146

¹⁰ *Simba* at para 27; *Axxess* at para 144; *Khan* at paras 102-108

executing trades as per the investors' instructions and to providing education to them on how to trade CFDs and "work with high-risk leverage investments".¹¹

- [46] We will first consider whether the respondents were directly trading on behalf of the investors. We will then consider whether any of the respondents' activities constituted acts in furtherance of trades.

(a) Directly Trading

- [47] We conclude that when the respondents effected transactions in the investors' accounts, the respondents were trading. We do not accept the respondents' submission that Namburi was acting as an employee of the investor.
- [48] In most instances, the respondents' contractual arrangements with the investors were formalized in a written agreement entitled "Mutual Agreement for working for Forex, Commodities CFDs and ETFs". The written agreement referred to the investor as "Employer/Investor" and the respondents as "Employee". Under these arrangements, the investors agreed to:
- a. open and fund online accounts with the CFD providers for investment in CFDs on margin (the written agreement referred to these funds as "total investment");
 - b. give the respondents access to the investors' accounts for the purposes of trading CFDs and monitoring the CFD holdings in their accounts; and
 - c. pay the respondents 50% of the monthly net realized profits for all CFD trading in their accounts.
- [49] The investors deposited approximately \$3.8 million into their online accounts. They shared with the respondents the usernames and passwords necessary to access these accounts.
- [50] All six investors called as witnesses at the hearing (three by Staff and three by the respondents) confirmed that Namburi accessed their online accounts and traded CFDs on margin as well as monitored the CFD holdings on their behalf. These witnesses also confirmed that they made payments to the respondents based on the respondents' calculation of monthly net realized profits from the CFD trading in their accounts.
- [51] Two investor witnesses testified that they placed some of the CFD trades in their accounts and that they received guidance or training from the respondents on these CFD trades. These investors acknowledged that the respondents were entitled to profit sharing from all trading, including trades placed by the investors and trades placed by the respondents.
- [52] The respondents acknowledge that they accessed the investors' online accounts and purchased and sold CFDs on margin in these accounts. The respondents submit that these activities were based on standard instructions from the investors to "buy at a low price, sell at a high price and if it comes to profit, close the transaction".
- [53] The respondents state that they prepared and provided calculations of monthly net realized profits from CFD trading to the investors. The respondents also

¹¹ Written Submissions of VRK Forex & Investments Inc and Radhakrishna Namburi dated April 19, 2021, paras 219 and 220

admit that they received approximately \$400,000 as profit-sharing payments from the CFD trading in the investors' accounts.

- [54] There is no requirement that funds be deposited directly with the respondents for such activity to constitute trading. It is sufficient that funds were invested in online accounts with CFD providers, and that the respondents accessed these accounts and purchased and sold CFDs.
- [55] We find that the respondents' actions in accessing the investors' online accounts and placing orders for purchases and sales of CFDs for significant compensation constituted "trading" within the meaning of the Act and that each sale of a CFD constituted a trade in a security. This finding is not undermined by the respondents' submission that Namburi was "working" as an employee for the investors and placing CFD trades based on standard instructions, a submission we explore further in our analysis beginning at paragraph [91] below on whether the respondents were engaged in the business of advising with respect to securities.

(b) Acts in Furtherance of a Trade

- [56] Before considering that allegation, we address Staff's allegations that in addition to effecting actual trades in investors' accounts, the respondents engaged in various activities that constituted acts in furtherance of trades (which activities would constitute trades, as that term is defined in the Act). We agree with Staff's submissions that the respondents did engage in such acts.
- [57] Staff alleges that the respondents:
- a. used materials that promoted the CFD trading program as a form of investment with significant daily returns;
 - b. met with potential investors at trade shows and VRK Forex's offices to discuss the CFD trading program Namburi had developed, his expertise, his track record trading CFDs, and expected daily profits;
 - c. directed investors to CFD providers, and assisted the investors with opening and funding online accounts with those CFD providers; and
 - d. implemented profit-sharing arrangements with the investors, for which the respondents received approximately \$400,000.

- [58] We will examine each of these allegations in turn.

i. Promotional activities and meetings with investors

- [59] Of the six investor witnesses who testified at the hearing, the three called by Staff testified that they learned of the CFD trading program through various promotional activities. One witness saw an electronic display at VRK Forex's office promoting investment opportunities and met with Namburi. Another witness responded to an online advertisement by VRK Forex about a trading training program and met with Namburi. The third witness was approached by Namburi at an investment conference about investment opportunities related to a CFD trading program developed by Namburi.
- [60] The three investor witnesses called by the respondents shared residential or office space with Namburi and testified that they learned of the CFD trading program through discussions with him.

- [61] All investor witnesses testified that they met with Namburi, some of them on multiple occasions, before opening their accounts. At these meetings, Namburi spoke of his background, education, experience and expertise trading currencies, commodities and CFDs, and of the opportunity to earn significant daily returns. Namburi also showed them the profitable CFD trading performance in his account or the accounts of other clients.
- [62] Namburi confirmed to us that he told investors about his experience and the attributes of the CFD trading program, including the potential for significant returns, and that he distributed or showed the investors the profitable CFD trading performance in his account and other client accounts.
- [63] The materials that the respondents disseminated to investors referenced investment opportunities and the potential for significant returns. These materials included:
- a. business cards describing various services offered by the respondents, including:
 - i. a business card that included the words "Forex, Commodities, Real-Time Training. Portfolio Management, Investments, Mortgage Referral Services. Gold, Silver Bars Wholesale"; and
 - ii. a business card that included the words "Buy/Sell gold, Silver, Current, Best FxGlobal Money Transfer, Guaranteed Trade Investments and Financial Advisory Services";
 - b. an electronic scrolling display in the front window of the respondents' shopping mall office, which included messages about investment opportunities, such as "Earn every day 1 to 5 percent"; and
 - c. copies of other clients' account statements showing profitable CFD trading.
- [64] In communications (primarily text messages) with some of the investors, Namburi repeatedly made positive statements about:
- a. earnings on various CFD trades;
 - b. successful performance in CFD trading for other clients (including by attaching pictures of account statements showing significant investment returns); and
 - c. the CFD trading program generally, such as "...We make profit on regular basis. If account is more than 100k. 100% safe" and "They are giving every day 5% return on investment" (related to his suggestion to open an Oanda account in the Middle East).
- [65] Namburi testified that the materials and his discussions with investors were for the purpose of promoting an opportunity to learn about a method to generate earnings on their investments. He said that the wording contained on the first business card conveyed that the respondents provided only referral services related to investments and portfolio management. The business card did not convey, and was not meant to convey, that the respondents provided investment management or portfolio management services.

- [66] Namburi acknowledged that the electronic message display at VRK Forex's offices was intended to draw individuals into the office but stated that this was only for the purpose of promoting a learning opportunity and not to solicit investors.
- [67] We heard conflicting evidence about the information provided by Namburi to investors about the risks and investment returns related to CFD trading. Two investor witnesses testified that Namburi stated that there was no risk to their invested funds, *i.e.*, either that the investment funds were "safe" or "fully protected", and that a daily return of between 1% and 5% was guaranteed.
- [68] The other four investor witnesses testified that they understood there was risk related to the CFD trading program, with three stating that Namburi told them about clients who had suffered losses in the CFD trading program or showed them accounts with losses or accounts "waiting for money to be made".
- [69] Namburi testified that he never told any investors that the CFD trading program had guaranteed returns, was safe or that there were no risks to their invested funds. Namburi stated that any references to specific returns related solely to his past performance experience. He further stated that any statements about the safety of the invested funds was a reference to the protection available in the event the CFD provider became bankrupt through the Canadian Investor Protection Fund. We note that Oanda was a member of the Canadian Investor Protection Fund as a registered order-execution-only dealer in Ontario and elsewhere in Canada, whereas Vantage was not.
- [70] The respondents submit that all investors were aware of the risks as the written agreement provided by the respondents and the documents provided by both CFD providers, Oanda and Vantage, stated clearly that the trading was highly risky.
- [71] The Oanda and Vantage documents contained cautions about the highly speculative and risky nature of CFD trading and the potential to lose some or all the invested funds. The written agreement prepared by the respondents contained statements about risk and investment returns including "Oanda FX trading is highly risky" and "Past Performance is not guaranteed for future Returns and Profits were not guaranteed by VRK".
- [72] The three investors called by Staff testified that they did not review the materials from the CFD provider, nor the written agreement prepared by the respondents, and that they were not aware of any statements related to risk in the documents. The three investors called by the respondents acknowledged the risk statements in these documents.
- [73] For the purposes of assessing whether the respondents engaged in acts in furtherance of trades, we need not determine whether they represented to investors that their invested capital would be safe or whether they guaranteed daily returns of 1% to 5%. We note the conflicting evidence of Namburi and certain investor witnesses in this regard and make no finding as to whether some or all investors were told there was no risk or that certain returns were guaranteed.
- [74] We find that Namburi engaged in a variety of activities to inform investors about CFD trading, including disseminating materials promoting CFD trading as a means to earn significant returns, advertising investment training programs and

meeting with investors to discuss the CFD trading program that he had developed.

ii. Information sessions about the CFD trading program

- [75] The respondents also conducted information or training sessions with investors and potential clients on the CFD trading program. Some of these sessions were “live” trading sessions during which Namburi would trade in his own account or the accounts of other clients and suggest trades to those attending the session or suggest they mimic his trading. In some sessions, Namburi demonstrated the CFD trading program by reviewing and conducting trading in several trading accounts using multiple computer monitors.
- [76] Four investor witnesses testified that they met with Namburi several times and observed Namburi trading in several accounts with multiple computer monitors. At these sessions, Namburi provided explanations and information about the CFD trading he was conducting. One of these investor witnesses also testified that in these sessions he would observe the trading in his account that Namburi was conducting.
- [77] Namburi acknowledged that investors attended his trading demonstration sessions, observed his CFD trading and “followed” that trading in their own accounts.

iii. Facilitation of the opening and funding of trading accounts

- [78] All investor witnesses testified that the respondents directed them to open and fund online accounts with either Oanda or Vantage and that they did so.
- [79] The three investor witnesses called by Staff testified that Namburi assisted them in opening their online accounts with Oanda, including by providing guidance on the completion of information and providing the banking information to transfer funds to Oanda. Electronic communications between Namburi and these investors also show that he assisted them with opening and funding the online accounts.
- [80] One of these witnesses testified that Namburi completed the Oanda account opening process and opened the account for him, including creating the username and password.
- [81] The respondents confirm that they assisted clients in opening online accounts with CFD providers. Namburi testified that he referred investors to Oanda and later to Vantage to open online accounts. Namburi estimated that during the Material Time he assisted approximately 100 individuals in opening online accounts for CFD trading with these CFD providers.

iv. Placing orders on behalf of clients and sharing profits

- [82] The respondents accessed investors’ online accounts and placed orders to purchase or sell CFDs in these accounts. The investors gave the respondents authority to place the trades, including the authority to determine some or all the aspects of the trade, including the type of CFD, price, timing, and amount of leverage.
- [83] It is undisputed that the respondents had arrangements with the investors to receive significant compensation for all CFD trading in their accounts, both trades placed by the respondents and trades placed by the investors, and that

the respondents received profit-sharing payments of approximately \$400,000 from investors.

v. Conclusion

- [84] The respondents deny that any of their actions, communications or materials promoted investment opportunities or investment management services or were designed to solicit or facilitate CFD trading. They submit that the promotional materials, the statements made by them to investors, and the meetings and training sessions with individuals were undertaken solely to provide information and educate individuals about CFDs. They further argue that such conduct was designed to solicit potential clients for the purpose of "training in trading CFDs".
- [85] We disagree. We do not accept Namburi's evidence that these activities were designed only to promote a learning opportunity for CFD investing and not to solicit trades in CFDs. In our view, these activities by the respondents were designed to:
- a. create an interest in investing in CFDs;
 - b. solicit investors to open and fund online accounts and facilitate the opening and funding of these accounts;
 - c. ensure CFD trading was conducted in these accounts, either wholly or partially by the respondents; and
 - d. earn compensation from the CFD trading in these accounts.
- [86] Although there may have been an additional purpose of training or education related to CFDs, this does not detract from the overall effect of the conduct to solicit investors to participate in a CFD trading program and to be compensated for that trading.
- [87] We also disagree with the respondents' characterization of the wording on the business cards and in the electronic messaging, in support of their submission that they were offering only training and referral services related to investment management.
- [88] We find that the respondents promoted the CFD trading program, and their services related to the CFD trading program, including monitoring and trading CFDs on behalf of investors, and that they solicited individuals to invest in the CFD trading program.
- [89] The respondents met with investors, disseminated promotional materials, and made various statements about the CFD trading program, which included statements about their expertise, successful track record and potential significant returns. In addition, they provided information sessions, placed CFD trades on behalf of the investors and received significant compensation from the investors who participated in the CFD trading program.
- [90] Considering all these activities and their effect, we find that the respondents engaged in acts in furtherance of trades, which constitute trades within the meaning of the Act.

2. Was the activity “advising”?

(a) Introduction

- [91] We now consider whether any of the respondents’ activity constituted “advising” within the meaning of the Act. We conclude that it did.
- [92] An adviser is defined in the Act as any person or company who engages or holds themselves out as engaging in the business of advising others as to investing in or buying and selling securities.¹²
- [93] The Commission has interpreted “adviser” in a broad manner. This approach is consistent with Commission’s mandate of investor protection.¹³
- [94] Giving an opinion about specific securities and the desirability of the investment or recommending the buying or selling of specific securities has been found by the Commission to constitute “advising”.¹⁴ Exercising discretionary control over a client’s investments or managing their investment portfolio has also been found to be “advising” under the Act.¹⁵
- [95] Staff submits that the respondents managed the CFD trading for the investors and engaged in unregistered advising in securities by exercising discretionary control over the CFD trading in the investors’ accounts.
- [96] The respondents submit that they did not advise the investors and did not have discretionary authority over the CFD trading in the investors’ accounts. The respondents submit that Namburi worked only in the role of an employee to implement trading instructions from each investor and to educate investors.

(b) The Circumstances and Conduct related to CFD trading in Investors Accounts

- [97] In assessing the respondents’ activities to determine whether such conduct constituted “advising”, we examine the totality of the respondents’ activities, including the surrounding circumstances and the impact of these activities.
- [98] All investor witnesses testified that they had no prior experience trading CFDs. Two testified that they had no experience trading any stocks or other securities and one testified that he had limited experience trading stocks or other securities. Three other witnesses testified that they had experience trading stocks, with one testifying that he had some knowledge of foreign exchange related trading.
- [99] The three witnesses called by Staff testified that they had no understanding of CFDs, including the complex terms and attributes, and that they relied fully on Namburi’s expertise for the CFD trading in their accounts. The other three investor witnesses called by the respondents testified that they relied on information or guidance from Namburi who had expertise with CFDs or that they learned about CFDs from observing Namburi’s trading activities.

¹² Act, s 1(1)

¹³ *Doulis (Re)*, 2014 ONSC 31, (2014) 37 OSCB 8911 (**Doulis**) at paras 211 and 216; *Khan* at para 87

¹⁴ *Doulis* at paras 190-199, *Simba* at para 31

¹⁵ *Khan* at para 120

- [100] Namburi testified that he had been trading CFDs since 2008. He highlighted his experience and expertise trading CFDs. He admitted that he suggested specific CFD trading to investors during training sessions.
- [101] In response to Staff's allegation that he exercised discretion, Namburi testified that he traded CFDs in the investors' accounts "only as per standard instructions to buy low, sell high and to book profit if it comes" and that he traded only in types of CFD's which were selected by each investor from a "favourites list" of between 10 to 20 CFDs that he created (the **CFD Favourites List**).
- [102] In sharp contrast, every investor witness testified that they granted Namburi full or partial authority over the CFD trading in their account.
- [103] Four investor witnesses (the three called by Staff and one called by the respondents) testified that they engaged the respondents to manage their investments, including to conduct all CFD trading in their accounts and to monitor the CFD holdings in their accounts. They testified that Namburi made all the decisions on the CFD trading in their accounts, including the types of CFDs to trade, the timing of the trade, the amount and at what price to open and close positions.
- [104] One witness testified that he sold a few profitable CFD positions in his account and Namburi instructed him to not place any further trades. The electronic communications between them confirm that Namburi told him not to make any trades in his account as it "created confusion". Namburi admitted telling this investor not to conduct any trading and testified that he told the investor to "take his expertise" for determinations of whether and when to close a CFD position.
- [105] The three witnesses called by Staff testified that the respondents did not seek instructions for any specific CFD trade and that they learned of the CFD trades after the fact when they accessed their online accounts, spoke with Namburi, or received notifications from the CFD provider. One testified that as his familiarity with Namburi's trading activities increased, he asked questions and made suggestions about trading strategies to Namburi. Namburi did not take any of his suggestions, except for once when he closed a CFD position.
- [106] The other witness called by the respondents testified that he gave this authority to Namburi as he did not want to "dictate or limit [Namburi's] expertise" in the CFD trading. He further testified that he did not select or create a list of the types of CFDs for his account but understood that Namburi traded based on the CFD Favourites List.
- [107] The electronic communications between the three investor witnesses called by Staff and Namburi demonstrate that Namburi made decisions regarding the CFD trading in their accounts. These communications show that at various times the investors became concerned about losses in their accounts and/or margin notices and instructed Namburi to stop trading and to close the positions to avoid further losses. Namburi did not close these positions as instructed and instead told the investors he would not book or close open positions "until comes to profit".
- [108] The remaining two investor witnesses called by the respondents testified that that they conducted some CFD trading and Namburi conducted some CFD trading in their online accounts. They testified that they authorized Namburi to

monitor the CFD holdings and conduct CFD trading in their accounts at times when they were not available to do so.

- [109] One of these witnesses testified that he authorized Namburi to trade types of CFDs from a list he prepared in consultation with Namburi and other individuals. He testified that during times when he was unable to monitor his account (either when he was working or sleeping), Namburi determined when to sell a CFD position by monitoring the price developments for the CFDs and then forming a view of the resistance level or the point at which the upward price movement was likely being impeded by the emergence of selling pressure. This investor acknowledged that Namburi's assessment of the resistance level and determination of timing to sell a CFD required experience and skill in interpreting various price movements related to the CFD, which Namburi possessed.
- [110] The other investor witness testified that Namburi conducted approximately 25% of the CFD trading in his account. He testified that he selected three types of CFDs with underlying foreign currencies and that he gave Namburi authority to purchase and sell these CFDs, including determining the amount, timing, and price to open or close positions. He also stated that sometimes Namburi would recommend a particular currency and if he felt comfortable, he would authorize Namburi to include this type of CFD in his portfolio.
- [111] With respect to the CFD trading they conducted in their accounts, these investors testified that Namburi provided guidance or suggestions on CFD trading strategies and specific CFD trading during live sessions and in other discussions, all of which they used to conduct the CFD trading in their accounts.

(c) Conclusion

- [112] We do not accept the respondents' characterization of these activities as training or "working as an employee" limited to administratively placing orders as instructed by investors. In our view, the respondents provided advice on CFD trading and exercised discretion over the CFD trading in the investors' accounts.
- [113] It is undisputed that the respondents had experience and expertise related to CFD trading and CFD trading strategies, whereas the investors had no prior experience trading CFDs and limited or no understanding of CFDs, including the complex terms and attributes, prior to engaging the respondents.
- [114] All investor witnesses testified that they relied wholly or partially on Namburi for the CFD trading strategy in their accounts, including the type of CFD, the amount and/or the price at which to open or close positions.
- [115] Namburi acknowledged that he conducted CFD trading in investors' accounts based only on general instructions to buy low and sell high. He also acknowledged that he made suggestions on specific CFD trading to investors during live training sessions. Finally, he acknowledged telling one investor not to conduct trading in his account and instead to rely on Namburi's expertise.
- [116] Many investors were fully dependent on Namburi for the CFD trading in their accounts and did not provide instructions to Namburi on any aspect of the CFD trades. Some investors provided instructions as to the type of CFD only and relied on Namburi to determine the other aspects of the trade.
- [117] It is also undisputed that Namburi provided live trading demonstration sessions on CFD trading strategies and specific CFD trading and that investors would

mimic Namburi's trading in their own accounts. Namburi stated that these trading demonstration sessions were education or training sessions and that he provided no advice as the investors were free to decide whether to place the trades.

[118] We do not accept Namburi's characterization that he provided training only in these sessions and did not provide any advice on CFD trading. The investors had no experience trading CFDs and limited or no understanding of CFDs and it was reasonable to expect that during the live demonstrations of his CFD trading expertise, investors would follow his suggested trades and rely on his expertise. Further, Namburi was well aware that investors were following or mimicking his trades during these sessions.

[119] In our view, the respondents:

- a. made suggestions and recommendations to investors on CFD trading strategies;
- b. provided guidance, advice, views, or recommendations to investors regarding specific CFD trading in their accounts;
- c. conducted "live" trading sessions during which they recommended the type of CFDs and when to open and close specific CFD positions; and
- d. monitored the CFD holdings in investors accounts and made determinations on specific CFD trading, including whether and when to purchase or sell CFDs and at what price.

[120] The respondents had authority to execute purchases and/or sales of CFDs in the investor accounts, accessed the investor accounts and conducted CFD trades in these accounts. In doing so, the respondents exercised authority and discretion over key attributes of some or all the CFD trades, including the timing, extent of leverage, price, and quantity. In many cases, the respondents also determined the type of CFD.

[121] The respondents also had authority to monitor price developments for CFDs held in the investors' accounts and determine when to close CFD positions based on their opinion of the resistance level, all of which required the exercise of judgment.

[122] Even if the respondents had general instructions to "buy low, sell high and close at a profit" or instructions to trade only select types of CFDs, they still exercised authority and discretion over important aspects of the trading of CFDs in investors' accounts, such as timing, price, amount, and extent of leverage.

[123] By engaging in this conduct, the respondents were "advising" on the buying and selling of securities within the meaning of the Act.

3. Was the trading or advising activity carried out for a business purpose?

[124] The registration requirement for trading or advising applies only if the trading or advising activity is carried out for a business purpose. We turn now to consider whether the respondents "engaged in the business of trading or advising" contrary to ss. 25(1) and (3) of the Act. We find that they did.

[125] Guidance on the business purpose test, commonly described as the “business trigger”, is provided in Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations (NI 31-103CP)*. The Companion Policy sets out factors to be considered in determining whether the trading activities or provision of advice is for a business purpose. The factors include, among other things:

- a. engaging in activities similar to those of a registrant;
- b. carrying on the activity with repetition, regularity, or continuity;
- c. receiving, or expecting to receive, compensation for the activity; and
- d. soliciting securities transactions.

[126] The Commission has previously relied on the business trigger factors in NI 31-103CP to determine whether the conduct was carried out for a business purpose.¹⁶ We adopt this business purpose test as well and turn now to assessing each of these factors.

(a) Engaging in activities similar to a registrant

[127] The respondents engaged in extensive efforts to solicit investors to participate in the CFD trading program as outlined above.

[128] The respondents succeeded in signing up at least 19 investors to open and fund online accounts in the amount of approximately \$3.8 million for investment in CFDs on margin with the expectation of earning profits from such trading.

[129] The investors had no prior experience trading CFDs and limited or no understanding of CFDs, including the complex terms and attributes, prior to engaging the respondents. The investors relied wholly or partially on the ability of the respondents to trade CFDs or advise on CFD trading and earn any profits in their accounts.

[130] The respondents admit that they:

- a. provided guidance and assistance to investors on the opening and funding of online accounts;
- b. accessed the investors’ accounts and purchased and sold CFDs on margin in these accounts. In particular, the respondents generated trading instructions to the CFD providers for the trading of CFDs in the online accounts, including instructions as to the type of CFD, timing, extent of leverage, price, and quantity;
- c. provided information, guidance and/or training to some of the investors on CFD trading in their accounts;
- d. promoted and provided a service to the investors to continuously monitor the CFDs and related markets;
- e. had a 50% net realized profit-sharing arrangement with the investors on all CFD trading in their accounts;

¹⁶ *Doulis* at para 196; *Money Gate* at para 145

- f. completed calculations of monthly profits and profit-sharing amounts in the investors' accounts and provided this information to investors; and
- g. received approximately \$400,000 from investors as profit-sharing payments from CFD trading in their accounts.

[131] We find that by promoting CFD trading, conducting trades in CFDs in investors' accounts, monitoring the CFDs held in these accounts and related market developments, providing advice and guidance on the trading of CFDs and receiving compensation for such activities from the investors, the respondents engaged in activities that were similar to those of a registered advising representative.

(b) Repetitive, regular or continuous activity

[132] A second factor to be considered is whether the impugned activity was carried on repetitively, regularly or continuously. It is undisputed that this was the case.

[133] During the Material Time, a period of approximately three years, the respondents regularly promoted the CFD program, regularly provided advice and guidance related to CFD trading and repeatedly facilitated trading in CFDs for at least 19 investors for the purpose of generating, and sharing in, profits in investors' accounts over a lengthy period.

(c) Receiving or expecting to receive compensation

[134] We turn next to consider whether the respondents received, or expected to receive, compensation. The Commission has previously found that a business purpose exists when the respondent has an expectation of remuneration.¹⁷

[135] It is undisputed that the respondents expected remuneration from the CFD trading in the investors' accounts, whether conducted directly by the respondents or by the investor.

[136] The respondents implemented profit-sharing arrangements on the CFD trading in investors' accounts and received profit-sharing payments of approximately \$400,000 from investors during the Material Time.

[137] The respondents also participated in an introducing broker arrangement with at least one of the CFD providers (Vantage). Under the terms of this arrangement, the respondents agreed to introduce clients to Vantage and were entitled to receive a commission on completed trades for each client referred to Vantage who opened an online account. The respondents acknowledge the existence of this arrangement.

[138] Accordingly, the respondents also expected to, and did, receive commissions on CFD trading for accounts opened by the investors pursuant to this introducing broker arrangement. The respondents received commissions from Vantage during the Material Time.

[139] The respondents expected to receive, and did receive, significant compensation from the above activity.

¹⁷ *Doulis* at para 196 *Money Gate* at para 145

(d) Soliciting securities transactions

[140] Finally, we consider whether the respondents solicited investment in the CFDs. Again, we find that they did.

[141] The respondents repeatedly asked investors to refer new clients to them for participation in the CFD trading strategy. The respondents paid at least \$8,000 in referral fees to an investor for new client referrals. The respondents solicited securities transactions not only from existing clients, but also from others via referral.

(e) Conclusion

[142] We have concluded that the respondents:

- a. engaged in activity that constituted direct trading of, and acts in furtherance of trades of, the CFDs;
- b. engaged in advising with respect to the CFDs; and
- c. engaged in the trading and advising for a business purpose.

[143] We therefore find that the respondents were engaged in the business of trading and advising in securities without being registered to do so. Accordingly, the respondents contravened ss. 25(1) and 25(3) of the Act.

D. Did the Respondents fail to comply with the terms of the Undertaking and if so, is it in the public interest to sanction such conduct?

[144] We now consider Staff's allegations that by engaging in the activity described above, the respondents breached their promise in the Undertaking to cease that activity. We conclude that the language of the Undertaking is not sufficiently precise to support the allegations.

[145] The Undertaking was prepared by Staff following an investigation of certain conduct by the respondents prior to the Material Time. The respondents signed the Undertaking. The Undertaking was provided to Staff, not to the Commission itself.

[146] The Undertaking contained the following:

- a. an acknowledgment by the respondents that they had contravened Ontario securities law (prior to the Material Time) by engaging in the business of trading in securities;
- b. a representation that the respondents had ceased such activities; and
- c. a statement that Namburi "undertakes that in the future **prior to entering Ontario's capital markets and prior to accepting new monies** [our emphasis]", Namburi and VRK Forex "will obtain registration in accordance with Ontario's securities laws, and/or retain the services of a registrant under the Act that will assist Namburi and/or VRK Forex to operate and conduct their business activities in compliance with the requirements of the Act".

[147] Namburi testified that he spoke with an OSC Enforcement Staff member, Ms. Smith, before signing the Undertaking. Namburi testified that based on those discussions, he understood that the Undertaking provided that the respondents

could not continue to accept gold trade deposits from individuals without registration and that he stopped doing so. Further, he understood that the respondents did not need to be registered to trade CFDs with CFD providers and that the respondents were permitted to “teach CFDs trading to any clients”.

- [148] Ms. Smith was not called as a witness. The investigation notes of her call with Namburi were an exhibit to the affidavit of Peter Cho, a senior forensic accountant with the Enforcement Branch of the Commission, filed by Staff. The notes contained the following notations:
- a. Namburi stated he traded “forex for himself”, he was making good money and he had “friends and relatives who also wanted to trade forex, some opened accounts and gave [Namburi] money to invest for them”;
 - b. Ms. Smith informed Namburi that “forex was a security and explained that to trade securities for other people you had to be registered;” and
 - c. Ms. Smith informed Namburi that he should review the Undertaking “either himself or with counsel” and then sign.¹⁸
- [149] Namburi confirmed that notations in the investigation notes summarizing what he said to Ms. Smith about his business were accurate. However, he did not agree that the remainder of the notes accurately reflected the discussion. During cross-examination, Namburi acknowledged that Ms. Smith did not tell him he could trade CFDs in the accounts of other individuals. However, he also stated that he did not have any understanding of the registration requirements in the Act at the time he signed the Undertaking.
- [150] Staff’s allegations hinge on the words of the Undertaking emphasized above, *i.e.*, the requirement that the respondents take certain steps before “entering Ontario’s capital markets and prior to accepting new monies”. Those words are vague, and the Undertaking does not further specify the activities that would trigger the requirement to be registered or retain a registrant. It does not, for example, clearly specify that trading foreign exchange contracts would require registration; nor does it provide any details or clarification on what is meant by “entering Ontario’s capital markets” or “accepting new monies”. Those words allow a wide range of activities that would neither be prohibited by Ontario securities law nor require registration or an exemption from registration.
- [151] We note the conflict between Namburi’s testimony and the investigation notes. Given the lack of any testimony from Ms. Smith, the investigation notes were of limited assistance in dealing with this conflict.
- [152] In these circumstances, we are not prepared to find that Namburi understood or was informed that registration was required for trading in foreign exchange contracts or CFDs or that he understood he was giving any undertaking with respect to such conduct.
- [153] It is a serious matter to breach the terms of an undertaking given to the Commission or its staff. However, Staff bears the onus of proving that the actual terms of the undertaking were breached. In our view, the Undertaking lacks sufficient clarity to support any finding of a breach of its terms. Even read in the context of the rest of the Undertaking, the words quoted above are not

¹⁸ Exhibit 1, Affidavit of Peter Cho sworn September 11, 2020 at 29

sufficiently precise to give reasonable certainty to a person or company who is subject to the Undertaking.

[154] Accordingly, we dismiss Staff's allegations related to the Undertaking.

E. Conduct contrary to the public interest

[155] Finally, we address Staff's allegations that the respondents' breach of ss. 25(1) and (3) of the Act was "contrary to the public interest". Staff seeks a finding to that effect.

[156] As the Commission has previously noted, the phrase "conduct contrary to the public interest" appears nowhere in the Act.¹⁹ It is an expression based on the opening words of s. 127 of the Act, which authorizes the Commission to make certain orders if to do so would be in the public interest.

[157] Given our findings that the respondents breached ss. 25(1) and 25(3) of the Act, a finding that the same conduct was contrary to the public interest is unnecessary. We decline Staff's request.

IV. CONCLUSION

[158] For the reasons set out above, we find that the respondents:

- a. engaged in the business of trading in securities without being registered to do so and without an exemption, contrary to s. 25(1) of the Act; and
- b. engaged in the business of advising in securities without being registered to do so and without an exemption, contrary to s. 25(3) of the Act.

[159] The parties shall contact the Registrar on or before February 14, 2022 to arrange an attendance in respect of a hearing regarding sanctions and costs. The attendance is to take place on a date that is mutually convenient, that is fixed by the Secretary and that is no later than February 28, 2022.

[160] If the parties are unable to present a mutually convenient date to the Registrar, then each party may submit to the Registrar, for consideration by a panel of the Commission, one-page written submissions regarding a date for an attendance. Any such submissions shall be submitted by 4:30 p.m. on February 14, 2022.

Dated at Toronto this 24th day of January, 2022.

"Wendy Berman"

Wendy Berman

"Timothy Moseley"

Timothy Moseley

"Frances Kordyback"

Frances Kordyback

¹⁹ *Canadian Tire Corporation, Limited (Re)*, (1987) 10 OSCB 857; *Solar Income Fund (Re)*, 2021 ONSEC 2, (2021) 44 OSCB 557 at paras 72 to 75