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Citation: *Mek Global Limited (Re)*, 2022 ONCMT 15

Date: 2022-06-21

File No. 2021-18

**IN THE MATTER OF
MEK GLOBAL LIMITED AND PHOENIXFIN PTE. LTD.**

REASONS AND DECISION

(Subsection 127(1) and Section 127.1 of the *Securities Act*, RSO 1990, c S.5)

Adjudicator: M. Cecilia Williams

Hearing: In Writing

Appearances: Aaron Dantowitz For Staff of the Ontario Securities
Vincent Amartey Commission

No submissions were made on behalf of Mek Global Limited or
PhoenixFin Pte. Ltd.

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REASONS AND DECISION

1. DECISION AND OVERVIEW

- [1] Staff of the Ontario Securities Commission alleges that Mek Global Limited (**Mek Global**) and PhoenixFin Pte Ltd. (**PhoenixFin**) (collectively, **KuCoin** or the **Respondents**), sold crypto contracts and crypto futures contracts through their global online crypto asset trading platform (**KuCoin Platform**), without complying with the registration and prospectus requirements under Ontario securities law.
- [2] This enforcement proceeding combines the merits and sanctions and costs hearings against the Respondents and is being conducted in writing, pursuant to an order dated December 13, 2021.¹
- [3] The Respondents did not participate in this proceeding and did not file any materials with respect to the merits and sanctions and costs hearing. Section 7(2) of the *Statutory Powers Procedure Act* (**SPPA**)² authorizes a tribunal to proceed without participation of a party when that party has been given notice of the written hearing. As noted below, I am satisfied that I can proceed with the merits and sanctions and costs hearing without the Respondents' participation.
- [4] Staff filed two affidavits in this proceeding. The first is from Jocelyn Wang, a Forensic Accountant with the Commission's Enforcement Branch.³ The second is from Yolanda Leung, a Law Clerk with the Commission's Enforcement Branch.⁴ No further evidence was presented.
- [5] For the reasons set out below, I find that the Respondents engaged in the business of trading securities without being registered and without an available exemption contrary to s. 25(1) of the Ontario *Securities Act* (the **Act**)⁵ and distributed securities without a prospectus contrary to s. 53(1) of the Act, and without an available exemption to the prospectus requirement. Their serious

¹ (2021) 44 OSCB 10150

² RSO 1990, c S.22

³ Exhibit 1, Affidavit of Jocelyn Wang, sworn February 15, 2022 (**Wang Affidavit**)

⁴ Exhibit 2, Affidavit of Yolanda Leung, sworn February 15, 2022 (**Leung Affidavit**)

⁵ RSO 1990, c S.5

misconduct warrants permanent market participation bans, a \$2 million administrative penalty and costs of \$96,550.35. The administrative penalty and the costs are ordered on a joint and several basis.

2. BACKGROUND FACTS

- [6] Launched in 2017, the KuCoin Platform is available to residents of Ontario. Ontario residents have opened accounts on the KuCoin Platform and have used the platform to deposit and trade in crypto asset products. Staff alleges, and I conclude below, that both Respondents are involved in operating the KuCoin Platform.
- [7] Mek Global is a corporation incorporated under the laws of the Republic of Seychelles. It has been identified on KuCoin's website (the **Website**) as the corporate entity behind the KuCoin Platform. Based on evidence presented by Staff, it appears that Mek Global remains the corporate entity behind the platform and sets the terms to which investors must agree when using the KuCoin Platform.
- [8] PhoenixFin is a corporation incorporated under the laws of Singapore and is the owner of "kucoin.com", the Website's domain name. Investors access the KuCoin Platform through "kucoin.com".
- [9] The KuCoin Platform is a significant player in the global crypto asset investment market. As of May 2021, the Website claimed that the KuCoin Platform was the top crypto asset exchange platform, with more than 760 million accumulated trades and over USD 223 billion in accumulated transaction volume. KuCoin has over six million users globally, supports 53 national currencies (including CAD), and has appeared to grow over time.
- [10] The KuCoin Platform offers investors a wide range of services and charges them fees. The major services that are offered and accessible to investors are the buying and trading of crypto asset products, the trading of crypto asset derivatives and crypto asset lending. On the KuCoin Platform, investors can use fiat currency to facilitate purchases of crypto assets, deposit their own crypto assets, engage in "spot" and margin trading, and trade perpetual futures contracts whose value is derived from crypto assets.

- [11] Ontario investors can trade on the KuCoin Platform. KuCoin does not prohibit Ontario investors from trading on the KuCoin Platform, and rather encourages them (and Canadians generally) to do so.
- [12] On March 29, 2021, the Commission issued a press release notifying crypto asset trading platforms, such as KuCoin, that was then offering trading in derivatives or securities to persons or companies located in Ontario, that they had to bring their operations into compliance with Ontario securities law or face potential regulatory action. The press release followed regulatory guidance issued by the Canadian Securities Administrators and the Investment Industry Regulatory Organization of Canada on the application of securities legislation to crypto asset trading platforms.⁶
- [13] KuCoin did not contact the Commission by the imposed deadline of April 19, 2021, or at any time after that to start compliance discussions.

3. ANALYSIS OF THE MERITS

3.1 Introduction

- [14] Staff asks that I:
- a. proceed without the participation of the Respondents;
 - b. draw adverse inferences in the absence of evidence from the Respondents;
 - c. determine that crypto asset products offered on the KuCoin Platform are securities;
 - d. determine that KuCoin has engaged in the business of trading in securities without being registered and without an available exemption, contrary to s. 25(1) of the Act;

⁶ See Joint CSA/IIROC Staff Notice 21-329 *Guidance for Crypto-Asset Trading Platforms: Compliance with Regulatory Requirements* (March 29, 2021), CSA Staff Notice 21-327 *Guidance on the Application of Securities Legislation to Entities Facilitating the Trading of Crypto Assets* (January 16, 2020) and Joint CSA/IIROC Consultation Paper 21-402 *Proposed Framework for CryptoAsset Trading Platforms* (March 14, 2019).

- e. determine that KuCoin has engaged in the distribution of securities without a prospectus, contrary to s. 53(1) of the Act, and without an available exemption from the prospectus requirement; and
- f. make an order of sanctions and costs against the Respondents in the public interest.

[15] I address each of these points below. In addition, I address the issue of Mek Global's and PhoenixFin's involvement with KuCoin and in the operation of the KuCoin Platform.

3.2 Preliminary Matters

3.2.1 Should I proceed without the Respondents?

[16] Section 7(2) of the SPPA provides that where notice of a written hearing has been given to a party to a proceeding, the tribunal may proceed without the party's participation.

[17] On December 13, 2021, I issued an order that the merits and sanctions and costs hearings would be heard together in writing. The order included a timeline for the Respondents to provide written submissions for the hearing. They failed to do so.

[18] Similarly, the Respondents also failed to participate in any of the oral attendances in this matter, including the first attendance on July 6, 2021. At that time, I determined that they had been properly served with notice of the hearing and have proceeded in their absence ever since.

[19] Rule 21(3) of the Capital Markets Tribunal *Rules of Procedure and Forms* also provides that if a Notice of Hearing is served on a party and the party does not attend a hearing, the proceeding may continue in the party's absence. The Registrar has provided notice to the Respondents of all of the attendances in this proceeding and a copy of all orders issued. Staff provided evidence of comments on the "kucoin_moderator" Reddit account (the platform's official account) that appear to me to indicate that the Respondents are aware of this proceeding,

including a claim on June 26, 2021, that “[We] are aware of this issue and are following up on it”.⁷

[20] Given that the Respondents have been notified and have chosen not to participate in this proceeding, I conclude that it is appropriate to proceed in their absence.

3.2.2 Should I draw adverse inferences against the Respondents?

[21] Staff submits that because the Respondents have failed to adduce any evidence in this proceeding, I should draw an adverse inference against the Respondents wherever necessary.

[22] Previous panels have held that where Staff establishes evidence that appears to be credible and reliable and that is sufficiently strong for a respondent to be called on to answer it regarding a particular factual conclusion, it would be appropriate to draw an adverse inference against a party for their failure to testify, in respect of that conclusion.⁸ The Respondents’ failure to call evidence amounts to an implied admission that their evidence would not have been helpful to their case.⁹

[23] Staff submits that in a written hearing such as this one, where a participating party may not anticipate a particular concern the Panel may have about the evidence, it is sufficient for that party to ask that an adverse inference be drawn regarding any factual point on which the Panel is not otherwise convinced that the requesting party’s evidentiary burden has been met.

[24] I disagree with the broad nature of this submission. In the absence of the Respondents, Staff retains the burden of establishing all elements of their case. If the panel does not consider Staff’s evidence to be cogent, reliable and requiring a response from the Respondents, the basis for drawing an adverse inference has not been satisfied.

⁷ Exhibit 1, Wang Affidavit, Reddit post by kucoin_moderator on June 26, 2021

⁸ *Hutchinson (Re)*, 2019 ONSEC 36, (2019) 42 OSCB 8543 at para 76 (**Hutchinson**), citing *Dwyer v Mark II Investments Ltd*, 2006 CanLII 9406 (ON CA) at para 4

⁹ *Sextant Capital Management Inc (Re)*, 2011 ONSEC 15, (2011) 34 OSCB 5829 at paras 245-246; *Hutchinson* at paras 64-65, 268 and 388; *Money Gate Mortgage Investment Corporation (Re)*, 2019 ONSEC 40, (2020) 43 OSCB 35 at paras 71 and 77 (**Money Gate**); *Mega-C Power Corporation (Re)*, 2010 ONSEC 19, (2010) 33 OSCB 8290 at paras 275-276

[25] However, as noted in my analysis, where I conclude that Staff has provided cogent and reliable evidence on a factual point, in the absence of any evidence from the Respondents I draw an adverse inference.

[26] Before I turn to the remaining substantive issues in this matter, I address Mek Global's and PhoenixFin's relationship with KuCoin and the KuCoin Platform.

3.2.3 Mek Global's and PhoenixFin's involvement with KuCoin and the operation of the KuCoin Platform

[27] I conclude that Mek Global is the corporate entity behind the KuCoin Platform, based on the following evidence in the Wang Affidavit:

- a. the Website's Terms of Use from August 2019 identifies the terms as Mek Global's, including statements such as:

"We Mek Global Limited (hereinafter referred to as "KuCoin", "we" or "us"), summarize below our Terms of Use to give an overview of the key terms that apply to your use of our website and trading services" and

"These Terms of Use and any terms expressly incorporated herein ("Terms") apply to the website operated and maintained by Mek Global Limited";¹⁰

- b. the Website's updated Privacy Policy, posted in February 2022, states that "This privacy notice applies to the processing of personal data by Mek Global Limited in connection with: a) Use of any of our product, services or applications (together the "Services") b) Visit or use of our websites or mobile application ("APP")";¹¹
- c. the current Terms of Use and Privacy Policy both make reference to being governed by the law of the Seychelles, Mek Global's jurisdiction of incorporation;
- d. in February 2021, the Seychelles Financial Services Authority issued an alert and advisory indicating that Mek Global appeared to be associated

¹⁰ Exhibit 1, Wang Affidavit, KuCoin Privacy Policy dated February 6, 2022

¹¹ Exhibit 1, Wang Affidavit, KuCoin Privacy Policy dated February 6, 2022

with the KuCoin Platform, that Mek Global was not licensed to conduct such activities and that Mek Global was removed from the Seychelles Register of International Business Companies but was yet to be dissolved; and

- e. on June 22, 2021, the KuCoin Platform's subreddit account, the platform's official account, in response to a question about whether the Chinese government's ban on cryptocurrency businesses could affect KuCoin, stated that "KuCoin is a global platform registered in the Seychelles. We take our responsibilities under the Constitution of the Seychelles [sic] and strictly comply with the applicable law, order of regulatory body, governmental or regulatory requirements of the country".¹²

[28] I conclude that, as the owner of the domain name, PhoenixFin ultimately controls the gateway through which investors pass in order to trade on the KuCoin Platform through the Website. PhoenixFin is an integral facilitator of all investor activity conducted on the KuCoin Platform through the Website.

[29] There is also evidence of certain individuals being involved with both Mek Global and PhoenixFin. Chun Gan is identified in corporate documentation as the sole director and beneficial owner of Mek Global. He is also listed as a former shareholder and director of PhoenixFin. Ke Tang is identified in corporate documentation as a beneficial owner of Mek Global. He is also listed as a former shareholder and director of PhoenixFin. Michael Gan is identified on his LinkedIn profile as the Founder and former CEO of KuCoin and the Founder and Chair of KuGroup. Michael Gan's twitter page identifies him, in May 2021, as the Founder and Chair of KuGroup. On this page his contact information is listed as "@gan_chun".

[30] Staff submits that the sole director and co-beneficial owner of Mek Global, Chun Gan, is the same person as Michael Gan, the person publicly identified as a Founder and former CEO of KuCoin and the Founder and Chairman of "KuGroup". Because of the link to "gan_chun" on Michael Gan's twitter page, and in the

¹² Exhibit 1, Wang Affidavit, KuCoin's reddit post dated June 22, 2021

absence of any evidence from the Respondents to the contrary, I conclude that Chun Gan and Michael Gan are the same person.

[31] I further conclude that Mek Global and PhoenixFin are linked together in the operation of the KuCoin Platform, because Mek Global is the entity behind the KuCoin Platform, PhoenixFin controls access to the KuCoin Platform and there are two individuals holding positions with both companies.

3.3 Are the crypto asset products offered on the KuCoin Platform “securities”?

[32] As a preliminary issue, I must determine whether the crypto asset products offered by KuCoin constitute securities, as that term is defined in the Act.

[33] Staff submits that at least two categories of crypto asset products offered on the KuCoin Platform constitute securities. First, an investor’s contractual right to the assets they deposit, purchase and sell on the KuCoin Platform (the **Crypto Contracts**), constitutes a security. Second, KuCoin offers investors the ability to purchase and sell perpetual futures contracts whose value is derived from underlying crypto assets. These perpetual futures contracts (**Crypto Futures Contracts**) also constitute securities.

3.3.1 Are Crypto Contracts “securities”?

[34] “Security” is defined in s. 1(1) of the Act. The definition consists of a non-exhaustive list of 16 categories of instruments expressed in general terms, “evidencing an intention of breadth”.¹³ The Ontario Court of Appeal, in the recent case of *Tiffin*, stated that the Act uses very broad terms “and thereby captures a great many instruments and activities in its wide regulatory scope” and then provides many exemptions “to tailor this regulatory scope to its purposes”.¹⁴

[35] Staff submits that Crypto Contracts fall within several categories of “security” as defined in s. 1(1) of the Act. They constitute either “evidence of indebtedness” or “evidence of title or interest”, and additionally, constitute “investment contracts”.

¹³ *Ontario Securities Commission v Tiffin*, 2020 ONCA 217 at para 29 (**Tiffin**)

¹⁴ *Tiffin* at para 28

- [36] In interpreting “security”, the Tribunal must adopt a purposive approach. This includes considering the Commission’s investor protection objective.¹⁵ Investor protection is an “overarching lens” through which an instrument must be assessed, to ensure that the interpretation of the term “security” “is flexible and capable of adaptation to address the breadth and variability of investment schemes devised in the capital markets”.¹⁶
- [37] Staff submits that investor protection is at the heart of this proceeding. Platforms such as KuCoin, Staff submits, that allow broad public access to their trading platforms and retain control of investor assets create risk for investors. Staff cites two examples of the risks KuCoin poses to investors: i) the September 2020 systems hack of the KuCoin Platform that resulted in the theft of \$285 million; and ii) a 2022 complaint from an Ontario investor citing losses due to unauthorized activity in his KuCoin account.
- [38] In addition to the above risks inherent to investors from KuCoin’s control over investors’ crypto assets, Staff submits that KuCoin promotes high-risk trading on the KuCoin Platform. KuCoin offers leverage up to 10x for trading in an investor’s margin account, and an initial margin of up to 100x on Crypto Futures Contracts. Margin trading on the KuCoin Platform also carries the risk of forced liquidation. Promotional coupons are provided to investors to encourage the use of margin. In addition, KuCoin promotes some of the features on their platform as “games”, such as the “Futures Brawl”. This feature permits investors to bet against each other on the price change of a particular crypto asset.
- [39] For the reasons below, I find the Crypto Contracts are “investment contracts”. As Staff need only demonstrate that Crypto Contracts fall within one category of “security”, it is not necessary to consider whether Crypto Contracts constitute “evidence of indebtedness” or “evidence of title or interest”.
- [40] The well-established elements of an “investment contract” are:
- a. an investment of money,
 - b. with an intention or an expectation of profit,

¹⁵ *VRK Forex & Investments Inc (Re)*, 2022 ONSEC 1, (2022) 45 OSCB 1084 at para 22 (**VRK**)

¹⁶ *VRK* at para 24

- c. in a common enterprise in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties, and
- d. where the efforts made by those other than the investor are undeniably significant, essential managerial efforts which affect the failure or success of the enterprise.¹⁷

[41] A purposive, rather than a formulaic, approach is required when analyzing whether a product is an investment contract under the Act.¹⁸ As noted above, previous panels have held that the attributes of a product should be assessed through the overarching lens of “investor protection”.

[42] I consider the elements of the test for an “investment contract” in turn below.

3.3.1.a Investment of money

[43] In *Furtak*, the panel stated that “[a] plain reading of *Pacific Coast Coin* and other cases favour the straightforward question: Was there a payment?”¹⁹ The investors in *Furtak* paid money for software licenses. Investors on the KuCoin Platform deposited either fiat currency or crypto currency on the platform to support their trading in crypto asset products available on the platform, including Crypto Contracts. I conclude there was, therefore, a payment and that the first element of the “investment contract” test is met.

3.3.1.b Intention or expectation of profit

[44] Staff submits, and I agree, that investors who use the KuCoin Platform expect to profit from their trading.

[45] The Terms of Use on the Website state that “you must rely on your own judgement for any investment decision you make in relation to your KuCoin Account”.²⁰ The Website’s guide on margin trading identifies the increased prospect of profit as an advantage of margin trading: “Compared with spot trading, the biggest advantage of margin trading is that it can leverage large

¹⁷ *Furtak (Re)*, 2016 ONSEC 35, (2016) 39 OSCB 9731 at para 66 (***Furtak***), citing *Pacific Coast Coin Exchange v Ontario Securities Commission*, [1978] 2 SCR 112 (***Pacific Coast Coin***)

¹⁸ *VRK* at para 22; *Furtak* at para 67; *Pacific Coast Coin* at 127

¹⁹ *Furtak* at para 78

²⁰ Exhibit 1, Wang Affidavit, KuCoin Terms of Use dated August 13, 2019

capital through small one [sic], increase position and enlarge profit”.²¹ KuCoin encourages investors to trade on margin by issuing promotional coupons.

[46] I conclude that investors trading Crypto Contracts on the KuCoin Platform expected to earn a profit from their trading. Therefore, the second element of the “investment contract” test is met.

3.3.1.c Common enterprise and reliance on KuCoin’s significant efforts

[47] I consider the third and fourth elements of the investment contract test together, as has been done in other decisions. Staff submits, and I agree, that investors are dependent on KuCoin’s actions, custody and solvency to manage and deliver on the Crypto Contracts issued to investors.

[48] Crypto assets deposited onto the KuCoin Platform are held in wallets controlled by KuCoin. Investors must rely on KuCoin to operate, maintain and provide access to the online platform and properly hedge its credit, performance and misappropriation risks to successfully hold or trade client assets and satisfy its payment and performance obligations.

[49] KuCoin’s Terms of Use state that KuCoin is not required to honour requests to withdraw assets from the KuCoin Platform. Once on the platform, therefore, an investor’s chance of failure or success (including the return of the investor’s initial investment) is strictly tied to, and within, KuCoin’s control.

[50] I conclude that investors in Crypto Contracts were engaged in a common enterprise with KuCoin and were dependent on KuCoin’s significant efforts for the failure or success of their investment.

3.3.1.d Conclusion

[51] I conclude that all the elements of the test of whether a product is an investment contract have been met. The investors paid money into the enterprise, expected a profit and were completely dependent on KuCoin for the success of the enterprise.

²¹ Exhibit 1, Wang Affidavit, Guide by KuCoin titled “The Descriptions for margin trading” captured on May 4, 2021

[52] In addition, in coming to this conclusion, I considered the overarching investor protection concerns presented by this product. The inherent risks Staff identified (broad public access to the platform and the risk of hacking linked to the platform's retaining control of the investor's assets) are not sufficiently distinct from the risks associated with other products not generally considered to be securities to assist in my analysis in this instance. However, the availability of significant leverage in margin accounts and the encouragement to use margin through promotional coupons raises serious investor protection concerns.

[53] The Crypto Contracts are investment contracts and, therefore, securities within the meaning of the Act.

3.3.2 Are Crypto Futures Contracts "securities"?

[54] Staff submits that in addition to Crypto Contracts, the Crypto Futures Contracts offered on the KuCoin Platform meet the definition of "investment contract" and are, therefore, securities under the Act. I agree. I apply the elements of the test for an investment contract to the Crypto Futures Contracts in turn below.

3.3.2.a Investment of money

[55] The first element of the investment contract test is met as, in order to trade Crypto Futures Contracts on the KuCoin Platform, clients must first deposit their funds or assets into a KuCoin account.

3.3.2.b Expectation of profit

[56] The Crypto Futures Contracts are structured such that investors do not expect any delivery of the underlying asset. An investment in a Crypto Futures Contract is a bet on the future price of the underlying asset in hopes of turning a profit.

[57] The Website's guide on futures trading describes the use of leverage as a means to enhance earnings. "The leverage is utilized to multiply your earnings. The higher the leverage is, the greater the earnings you will have and so does the losses you will have to bear...".²² Initial leverage of up to 100x is available for these contracts on the KuCoin Platform.

²² Exhibit 1, Wang Affidavit, KuCoin Futures New User Guide dated July 9, 2019

[58] I conclude that investors in Crypto Futures Contracts on the KuCoin Platform expected to earn a profit from their trading. Therefore, the second element of the “investment contract” test is met.

3.3.2.c Common enterprise and reliance on KuCoin’s significant efforts

[59] In *VRK*, the panel relied on the following attributes of an online platform to determine that investors were in a common enterprise with the platform and that they relied on the platform operator’s efforts:

- a. the respondent provided access to, and operated, an online proprietary platform for trading contracts for differences (**CFDs**). The CFDs gave clients exposure to underlying assets that might not otherwise be directly available;
- b. the respondent allowed clients to leverage their investment using margin;
- c. the respondent was required to hedge risk, including credit risk, performance risk and misappropriation risk, so that they could satisfy payment and performance obligations of the CFDs; and
- d. CFDs were not transferable off the platform. They could only be closed on the platform.²³

[60] Staff submits that the KuCoin Platform shares many of the same attributes, namely:

- a. KuCoin owns and operates the platform that allows clients to purchase Crypto Futures Contracts. These provide exposure to a variety of underlying crypto assets, without the need for clients to purchase or hold the underlying assets directly;
- b. KuCoin clients can leverage their purchases of Crypto Futures Contracts;
- c. KuCoin is necessarily required to hedge risk, including credit, performance and misappropriation risk, so that KuCoin can satisfy payment and performance obligations of the Crypto Futures Contracts; and

²³ *VRK* at paras 31-32

d. Crypto Futures Contracts must be closed on the KuCoin Platform as there is no mechanism to transfer them off the platform.

[61] In addition, the value of the Crypto Futures Contract is directly related to KuCoin's design efforts to ensure the contracts' value closely tracks the spot market.

[62] I conclude that investors in Crypto Futures Contracts were engaged in a common enterprise with KuCoin and were dependent on KuCoin's significant efforts for the failure or success of their investment.

3.3.2.d Conclusion

[63] I conclude that all the elements of the "investment contract" test have been met regarding Crypto Futures Contracts. Investors paid money into the enterprise, expected a profit and were completely dependent on KuCoin for the success of the enterprise.

[64] In addition, in coming to this conclusion, I have considered the overarching investor protection concerns presented by this product. There are serious investor protection concerns with offering retail Ontario investors a product like the Crypto Futures Contracts. These include their inherent risks, complexity, the use of margin or leverage, and the potential volatility of the underlying assets. The underlying assets are themselves Crypto Contracts that are wholly dependant on the solvency and willingness of KuCoin to redeem under its Terms of Use.

[65] Staff submits that the Crypto Futures Contracts are analogous to CFDs. CFDs have previously been accepted as securities (and derivatives) under the Act.²⁴ While I agree that the Crypto Futures Contracts are analogous to CFDs, I find that the elements of the investment contract test are met by the attributes of the Crypto Futures Contracts and by the overarching investor protection concerns. I do not need to consider whether they are akin to CFDs.

²⁴ *VRK* at para 35; *eToro (Europe) Limited (Re)*, 2018 ONSEC 49, (2018) 41 OSCB 8179 at para 8 (**eToro**); *Vantage Global Prime Pty Ltd (Re)*, 2021 ONSEC 18, (2021) 44 OSCB 6401 at para 7 (**Vantage**); *Ava Trade Ltd (Re)*, 2019 ONSEC 27, (2019) 42 OSCB 6520 at para 3 (**Ava Trade**); *International Capital Markets Pty Ltd (Re)*, 2019 ONSEC 28, (2019) 42 OSCB 6522 at paras 3-5 (**IC Markets**)

[66] For these reasons, I conclude the Crypto Futures Contracts are an investment contract and, therefore, a security within the meaning of the Act.

3.4 Did the Respondents engage in the business of trading in securities without being registered and without an available exemption?

[67] A person or company must be registered under Ontario securities law to engage in the business of trading in securities unless an exemption applies.²⁵

[68] The registration requirement is a cornerstone of the securities regulatory regime designed to ensure that those who engage in trading in securities are proficient and solvent, and that they act with integrity. Unregistered trading defeats these necessary legal protections and undermines investor protection and the integrity of the capital markets.

[69] Neither of the Respondents was ever registered in any capacity under the Act or claimed an exemption from the registration requirements.

[70] I must determine whether the Respondents engaged in the business of trading in securities. To do so, I must determine whether their conduct constituted “trading”, and if so, whether that conduct was carried out for a business purpose – this threshold is often referred to as the “business trigger”.

[71] Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations*, sets out criteria to be considered in determining whether the business trigger requirement has been met. The criteria include:

- a. trading with repetition, regularity or continuity;
- b. directly or indirectly soliciting securities transactions;
- c. receiving, or expecting to receive, compensation for trading; and
- d. engaging in activities similar to those of a registrant, such as by setting up a company to sell securities or by promoting the sale of securities.

[72] Previous panels have adopted these factors and applied them in assessing possible contraventions of s. 25(1) of the Act.²⁶ While these factors are helpful, it

²⁵ Act, s 25(1)

²⁶ See, for example, *Meharchand (Re)*, 2018 ONSEC 51, (2018) 41 OSCB 8434 at para 111 and *Money Gate* at para 145

is important to ask whether the evidence viewed as a whole indicates that a respondent engaged in the business of trading in securities.

[73] Staff submits that as the corporate entity behind the KuCoin Platform, Mek Global operates the securities trading business conducted on that platform and is therefore engaged in the business of trading securities. PhoenixFin owns and maintains the Website *kucoin.com*. The Website houses the KuCoin Platform on which all KuCoin's securities trading occurs. For this reason, PhoenixFin is also engaged in the securities trading business conducted on that platform.

[74] Staff submits that Mek Global engaged in direct trading as well as acts in furtherance of trading, and PhoenixFin engaged in acts in furtherance of trading.

[75] I conclude that Mek Global directly engages in securities trading with the investing public. Mek Global engages in a "sale or disposition of a security for valuable consideration" in each instance when an investor:

- a. deposits crypto assets on the KuCoin Platform or trades crypto assets for other assets; and
- b. opens or closes a position in a Crypto Futures Contract on the KuCoin Platform.

[76] I also conclude that Mek Global engaged in numerous acts in furtherance of trading, including by:

- a. creating and maintaining a securities trading market on the KuCoin Platform;
- b. carrying out trade matching functions;
- c. creating and maintaining means for investors to create and fund accounts on the KuCoin Platform;
- d. providing information to investors to assist them in accessing and trading on the platform; and
- e. promoting the platform.

- [77] Previous panels have held that creating and maintaining a website to solicit investors or setting up a website to offer securities to investors, are acts in furtherance of a trade.²⁷
- [78] I found above that PhoenixFin is the owner of the kucoin.com domain. Therefore, PhoenixFin owns and maintains the Website that houses the KuCoin Platform. All KuCoin’s trading business is carried out on the KuCoin Platform. The existence and maintenance of the Website are critical to KuCoin’s securities trading business. I conclude that PhoenixFin is engaged in acts in furtherance of trading.
- [79] Staff submits that all of the factors of the “business trigger” test are satisfied as they relate to the KuCoin Platform. They take this position because the central purpose of the platform is to trade in, and facilitate the trading in, securities, and KuCoin collects fees for that trading. These factors are:
- a. KuCoin trades with regularity – each day, billions of dollars of trading in Crypto Contracts and Crypto Futures Contracts is carried out on the KuCoin Platform;
 - b. KuCoin solicits investors – KuCoin makes the KuCoin Platform broadly available to the investing public through their Website and app and makes public statements and offers designed to attract investors to trade on the platform;
 - c. KuCoin is compensated for trading – KuCoin charges its users fees to trade on its platform; and
 - d. KuCoin acts similar to a registrant – by establishing and maintaining a securities trading platform, KuCoin’s activities fall squarely within conduct similar to that of a registrant.
- [80] The Respondents bear the burden of establishing any possible entitlement to available exemptions from the registration requirement. The Respondents have neither claimed an exemption nor filed any evidence that would support such a

²⁷ *XI Biofuels Inc (Re)*, 2010 ONSEC 6, (2010) 33 OSCB 3077 at para 120; *Winick (Re)*, 2013 ONSEC 31, (2013) 36 OSCB 8202 at para 99; *Al-Tar Energy Corp (Re)*, 2010 ONSEC 11, (2010) 33 OSCB 5535 at para 85

claim. I draw an adverse inference against the Respondents and conclude that no exemption was available to them.

[81] I find that the Respondents were engaged in the business of trading in securities within the meaning of the Act without being registered to do so and without an available exemption. As a result, the Respondents contravened s. 25(1) of the Act.

3.5 Did the Respondents engage in the distribution of securities without a prospectus and without an available exemption?

[82] A person or company must not distribute a security without a prospectus,²⁸ unless an exemption applies.

[83] The prospectus requirement is another cornerstone of Ontario's securities regulatory regime. A prospectus is fundamental to protecting the investing public because it ensures that investors have full, true and plain disclosure of information to properly assess the risks of an investment and make an informed decision.

[84] Staff submits that KuCoin engaged in illegal distributions because it is trading in securities that have not previously been issued without having filed a prospectus or relying on any exemption from the prospectus requirement.

[85] Staff submits, and I agree, that KuCoin issued a security that had not been previously issued when an investor:

- a. deposited crypto assets into the investor's account on the KuCoin Platform and KuCoin creates and sells a Crypto Contract to the investor; and
- b. opened Crypto Futures Contract on the KuCoin Platform and KuCoin creates and sells to that investor a KuCoin security.

[86] Some of these distributions were made to Ontario investors as illustrated by the distributions of KuCoin securities to Staff's investigator witness, carried out as part of Staff's investigation, and by an investor complaint received just before the commencement of this proceeding.

²⁸ Act, s 53(1)

[87] No prospectus or preliminary prospectus was ever filed or receipted in connection with the distribution of the KuCoin securities. No discretionary relief was granted in respect of the prospectus requirement.

[88] The Respondents bear the burden of establishing any possible entitlement to available exemptions from the prospectus requirements. The Respondents have neither claimed an exemption nor filed any evidence that would support such a claim. I draw an adverse inference against the Respondents and conclude that no exemption was available to them.

[89] I find that the Respondents engaged in a distribution of securities without filing a preliminary prospectus or prospectus, and without an available exemption from the prospectus requirement. As a result, the Respondents contravened s. 53(1) of the Act.

3.5.2 Conclusion on the Merits

[90] I conclude that the Respondents have breached ss. 25(1) and 53(1) of the Act. Given this conclusion, it is not necessary for me to consider Staff's alternate argument that the Respondents engaged in conduct that engaged an animating principle of the Act. I now turn to consider the appropriate sanctions and costs in this matter.

4. SANCTIONS

[91] Having found that the Respondents breached Ontario securities law, I will now address the appropriate sanctions against them.

4.1 Introduction

[92] Staff seeks the following orders against the Respondents for their breaches of Ontario securities law:

- a. trading in any securities or derivatives by the Respondents cease permanently;
- b. the acquisition of any securities by the Respondents cease permanently;
- c. any exemptions contained in Ontario securities law do not apply to the Respondents permanently;
- d. the Respondents be reprimanded;

- e. the Respondents be permanently prohibited from becoming or acting as a registrant or as a promoter; and
- f. the Respondents, jointly and severally, pay an administrative penalty of \$2 million.

[93] Staff submits that severe sanctions, including a significant administrative penalty, are necessary to send a strong deterrence signal to the crypto sector that ignoring Ontario securities laws will not be tolerated.

[94] Staff submits that KuCoin owns and operates a top, global crypto asset trading platform, trading billions of dollars' worth of securities daily. By disregarding cornerstone provisions of the Act, KuCoin, Staff submits, is flouting Ontario securities law.

[95] Although KuCoin has acknowledged to investors that it was aware of this proceeding and is "following up on it", and that it respects local law and is focused on compliance, Staff submits KuCoin has ignored Staff's communications, has not participated in this proceeding, and is continuing its illegal activity.

[96] Staff submits that "bad actors" like KuCoin put investors at risk, undermine efforts to bring the crypto asset trading sector into compliance with Ontario securities law, and contribute to an uneven playing field among crypto asset trading platforms and other registered firms.

4.2 Legal Framework for Sanctions

[97] The Tribunal may impose sanctions under s. 127(1) of the Act where it finds it is in the public interest to do so. In imposing sanctions, the Tribunal's role is to protect investors and the capital markets from similar conduct in the future.²⁹

[98] Previous panels have identified a number of non-exhaustive factors to be considered with respect to sanctions generally, including the seriousness of the misconduct, the respondent's experience in the marketplace, whether the respondent recognizes the seriousness of the improprieties, whether the conduct

²⁹ *Bradon Technologies Ltd (Re)*, 2016 ONSC 19, (2016) 39 OSCB 4907 at para 27

is isolated, and general and specific deterrence. Sanctions must be proportionate to the respondent's conduct in the circumstances.³⁰

4.3 Appropriate Sanctions

4.3.1 Market Participation Bans

[99] Staff submits that permanent market participation bans against the Respondents are necessary for the following reasons:

- a. KuCoin and others in the crypto industry need to be deterred;
- b. KuCoin's misconduct is serious and aggravated;
- c. KuCoin's level of activity in the marketplace is exceptionally high;
- d. KuCoin's violations are recurrent; and
- e. KuCoin has not recognized the seriousness of its improprieties.

[100] I consider each of these factors in turn below.

4.3.1.a Seriousness of the misconduct

[101] Staff submits that the misconduct at issue is severe. KuCoin has been trading and distributing securities in violation of key investor protection provisions in Ontario securities law. This misconduct undermines the purposes of the Act and erodes public confidence in Ontario's capital markets. I agree. Unregistered trading and illegal distributions undermine investor protections and the integrity of the capital markets.³¹

[102] The registration and prospectus requirements play an essential role in the protection of investors. The registration requirements "ensure that those who sell or promote securities are proficient, solvent and act with integrity".³²

[103] The prospectus requirement ensures that prospective investors have the requisite information to make informed investment decisions.³³ In this instance, retail investors using the KuCoin Platform and trading in Crypto Contracts and

³⁰ *MCJC Holdings Inc (Re)*, (2002) 25 OSCB 1133 at 1134-1135; *Cartaway Resources Corp (Re)*, 2004 SCC 26 at para 60; *Norshield Asset Management (Canada) Ltd (Re)*, 2010 ONSEC 16, (2010) 33 OSCB 7171 at paras 92-93

³¹ *Vantage* at para 17

³² *Vantage* at para 17

³³ *M P Global Financial Ltd (Re)*, 2011 ONSEC 22, (2011) 34 OSCB 8897 at para 117

Crypto Futures Contracts, without the benefit of a prospectus, are at risk of not being fully informed of the risks associated with margin and being wholly dependent on a foreign-based platform for custody and delivery of their assets.

[104] I agree with Staff that KuCoin’s misconduct is aggravated by two facts. KuCoin persists in its behaviour breaching Ontario’s securities laws, despite warnings and the commencement of this proceeding. KuCoin has ignored this proceeding. Secondly, KuCoin appears to be misleading investors about its respect for local laws and regulations and its attention to this proceeding. For example, on June 26, 2021, in response to a question on Reddit about the impact of these allegations on investor accounts, KuCoin responded: “We are aware of this issue and are following up on it. We respect the laws and regulations of local markets, with compliance having always been a major part of our activities”.³⁴ KuCoin made similar claims on Reddit in November 2021, despite there having been two preliminary attendances in this matter in which KuCoin had failed to participate.

4.3.1.b Experience in the marketplace

[105] KuCoin has operated since 2017. It is a top global crypto asset trading platform. KuCoin claims that 25 percent of the world’s crypto holders are users of its platform. As of May 4, 2021, the Website claimed that the KuCoin Platform was the top crypto asset exchange platform, with more than 760 million accumulated trades and over USD 223 billion in accumulated transaction volume. On Apple’s app store, KuCoin claims to be one of the top 3 crypto exchanges.

[106] KuCoin has over six million users globally and supports 53 national currencies including Canadian dollars. As of May 4, 2021, KuCoin was ranked as the fourth largest global crypto trading platforms on CoinMarketCap for “spot” platforms and 16th for derivatives platforms with a reported daily trading volume of more than USD 2.8 billion and USD 1.3 billion, respectively. KuCoin does not appear to have curtailed its activities since this proceeding was commenced. As of January 31, 2022, KuCoin ranked fifth on CoinMarketCap for spot platforms with 24-hour spot volume of more than USD 2 billion and 11th for derivatives platforms with a 24-hour trading volume of over USD 3.2 billion.

³⁴ Exhibit 1, Wang Affidavit, Reddit post by kucoin_moderator on June 26, 2021

[107] I conclude that KuCoin is a significant and experienced presence in the emerging crypto trading sector.

4.3.1.c Is the misconduct isolated?

[108] Staff submits, and I agree, that KuCoin's misconduct is recurrent and continuing. Despite the commencement of this proceeding, investors, including those in Ontario, continue to use the KuCoin Platform to purchase, trade and withdraw billions of dollars' worth of crypto assets daily. Staff's investigator witness was able to access and conduct trades on the KuCoin Platform as recently as January 28, 2022.

4.3.1.d Recognition of the seriousness of the misconduct

[109] I conclude that KuCoin has not recognized the seriousness of its misconduct. KuCoin has not admitted the seriousness of its breaches of Ontario securities law. It has ignored this proceeding. In fact, KuCoin has exacerbated the situation by making statements to investors about its engagement with this proceeding and its commitment to compliance with local laws, when that is not the case.

4.3.1.e Conclusion

[110] Participation in Ontario's capital markets is a privilege, not a right.³⁵ Staff submits that KuCoin's conduct ought to result in the loss of that privilege. Permanent trading and acquisition bans will protect Ontario investors from KuCoin and deliver the necessary deterrent message to other members of the crypto asset sector. Staff submits that the previous panels have similarly issued permanent bans in various cases involving breaches of the registration and prospectus provisions of the Act.³⁶

[111] It is in the public interest to permanently bar the Respondents from participating in Ontario's capital markets. In my view, permanent bans are necessary to

³⁵ *Borealis International Inc (Re)*, 2011 ONSEC 11, (2011) 34 OSCB 5261 at para 51, citing *Erikson v Ontario (Securities Commission)* (2003), 26 OSCB 1622, 2003 CanLII 2451 (ON SC) at para 56; *MOAG Copper Gold Resources Inc (Re)*, 2020 ONSEC 29, (2020) 43 OSCB 9467 at para 36

³⁶ *Limelight Entertainment Inc (Re)*, 2008 ONSEC 28, (2008), 31 OSCB 12030 at paras 12, 41 & 42; *Blue Gold Holdings Ltd (Re)*, 2016 ONSEC 37, (2016) 39 OSCB 10177 at paras 2, 6 63-68, 79 & 87-89; *Miner Edge Inc (Re)*, 2021 ONSEC 31, (2022) 45 OSCB 81 at paras 78 and 110 (***Miner Edge***)

protect investors, are proportionate to the Respondents' misconduct, and would act as a necessary deterrent to other like-minded persons.

4.3.2 Reprimand

[112] With respect to the requested reprimand, Staff submits that a reprimand would further the goals of both general and specific deterrence. Staff submits that a reprimand presents an opportunity for the Tribunal to speak directly to the Respondents, drive home to them how unacceptable their conduct is to the Tribunal and Ontario's investing public, and warn them against further breaches of Ontario securities law.

[113] In my view, a reprimand is generally unnecessary, duplicative and not in the public interest when, as is the case here, there are explicit findings of breaches of Ontario securities law and the reasons for the Tribunal's decision include a clear denunciation of that conduct.³⁷

[114] I, therefore, decline to make such an order.

4.3.3 Administrative Penalty

[115] Staff submits that a significant financial sanction is necessary and points to precedent decisions, particularly settlements, involving online trading platforms for comparison.

[116] The Act states that if a person or company has not complied with Ontario securities law, an administrative penalty of not more than \$1 million for each failure to comply may be ordered.³⁸ Staff submits that an administrative penalty in the amount of \$2 million, representing \$1 million per breach, is appropriate in this case given the seriousness of the misconduct, the high amount of risk to Ontario investors, the blatant disregard for Ontario's securities laws and the strong need for general deterrence in the crypto asset sector. Further, since the amounts KuCoin obtained by contravening the Act are not readily ascertainable, disgorgement is not available in this case.

³⁷ *Money Gate Mortgage Investment Corporation (Re)*, 2021 ONSEC 10, (2021) 44 OSCB 2983 at para 39; *Hutchinson (Re)*, 2020 ONSEC 1, (2020) 43 OSCB 431 at para 49

³⁸ Act, s 127(1)9

[117] As panels have previously noted, there is no formulaic approach to determining the quantum of an administrative penalty. Prior decisions provide some context for considering proportionality. However, the sanctions in each proceeding must be determined based on the specific factual context and circumstances.³⁹

[118] Staff submits that although the administrative penalty requested is larger than the administrative penalties awarded in the cases they put before me, KuCoin is distinct from the respondents in those cases, who co-operated, admitted their misconduct in some cases and took steps to remedy their breaches. To the contrary, in this case KuCoin displayed a cavalier attitude towards Ontario securities law, the protection of Ontario investors and Staff's investigation and the proceeding against it.

[119] Staff submits that the administrative penalty should prevent KuCoin from reaping a windfall, especially since no disgorgement order is available in this case. Further, the administrative penalty should be large enough to act as a sufficient deterrent to KuCoin and others. There is a need for regulatory sanctions to create economic incentives to foster compliance or, alternatively, remove economic incentives for non-compliance.⁴⁰

[120] I find an administrative penalty of \$2 million against the Respondents, to be paid jointly and severally, is appropriate and proportionate to the Respondents' conduct.

[121] The administrative penalty sought in this instance would exceed the penalties levied in the settlement decisions Staff referred to in their submissions.⁴¹ Those cases are distinguishable from this case. They were all negotiated settlements and the respondents co-operated with Staff, admitted their misconduct and, in some cases, took steps to remedy their breaches.

[122] I agree it is appropriate to consider the fact that, unlike the settlements Staff highlighted in their submissions, disgorgement is not possible in this instance. KuCoin's failure to co-operate with Staff prevented Staff from obtaining

³⁹ *Miner Edge* at para 89

⁴⁰ *Rowan (Re)*, 2009 ONSEC 46, (2009) 33 OSCB 91 at para 74 (**Rowan**)

⁴¹ See *IC Capital Markets; Vantage; Ava Trade; eToro; and Coinsquare Ltd (Re)*, 2020 ONSEC 19, (2020) 43 OSCB 6267

information about what fees or other amounts KuCoin earned from its operations in Ontario. Such information was also not readily available to Staff, as Mek Global and PhoenixFin are offshore entities. Amounts KuCoin earned from operations in Ontario in breach of Ontario securities law are not reasonably ascertainable, making disgorgement unavailable.

[123] The administrative penalty sought will prevent KuCoin from reaping a windfall, considering that there is no offsetting disgorgement order.

[124] In order for an administrative penalty to act as a sufficient specific deterrent it needs to be proportionate to the benefit obtained from non-compliance.⁴² While Staff was prevented from obtaining specific information about fees and other amounts earned from their activities in Ontario, it is evident that the KuCoin Platform is a significant player in the global crypto asset investment market, with a significant user base. It supports a broad range of currencies and appears to be growing.

[125] Given the size of KuCoin's operations, I conclude that an administrative penalty of \$2 million is appropriate to act as a specific deterrent to the Respondents. It will also act as a general deterrent to others in the crypto investment industry who choose to ignore the requirements of Ontario securities law when engaging in Ontario's capital markets.

4.3.4 Conclusion on Sanctions

[1] I conclude that permanent market participation bans and a \$2 million administrative penalty are appropriate in these circumstances.

5. COSTS

[126] I will now consider Staff's request that the Respondents pay some of the costs associated with this proceeding.

[127] Section 127.1 of the Act gives the Tribunal discretion to order a person or company to pay the costs of an investigation or a hearing if the Tribunal is satisfied that the person or company has not complied with Ontario securities law or has not acted in the public interest. A costs order is not a sanction but

⁴² *Rowan* at para 74

rather a means to recover the costs of an investigation or hearing from the person or company.

[128] In this case, Staff seeks an order that the Respondents pay costs of \$96,550.35 (comprised of \$95,096.25 for fees and \$1,454.10 for disbursements).⁴³ The amount of Staff time is based on hourly rates previously approved by the Commission.

[129] The costs requested by Staff reflect time spent on this matter by various individuals, including litigation counsel, investigation counsel, a forensic accountant and a law clerk in the Enforcement Branch. Often, Staff offers a discount to the costs incurred in a matter. Staff has not done so in this instance.

[130] Staff submits that the costs incurred and requested are reasonable for a matter of this nature. KuCoin's failure to participate in this proceeding has meant that there has been no opportunity for narrowing the issues or potential agreement to streamline the proceeding, and, thus, to reduce costs.

[131] The costs sought in the precedent cases submitted by Staff were significantly less than what is sought here. Those cases are distinguishable on this point, as they were all settlements where the respondents co-operated to some degree with Staff. Staff has excluded from its claim amounts from Staff members who spent less than 35 hours on this matter. Therefore, the costs requested are not all of Staff's costs. The Respondents' decision to not engage with Staff during the investigation and their failure to participate in this proceeding meant there was no opportunity to narrow issues or reach agreements that might have led to more efficiencies, thereby reducing costs.

[132] Staff's cost request is appropriate and reasonable in the circumstances.

⁴³ Exhibit 2, Leung Affidavit at 4

6. CONCLUSION

[132] For the reasons set out above, I find that the Respondents engaged in:

- a. the business of trading in securities without the necessary registration or available exemption from the registration requirement, contrary to s. 25(1) of the Act; and
- b. the distribution of securities without a prospectus contrary to s. 53(1) of the Act, and without an available exemption from the prospectus requirement.

[133] I will therefore issue an order that the Respondents:

- a. cease trading in any securities or derivatives permanently, pursuant to paragraph 2 of s. 127(1) of the Act;
- b. are prohibited from acquiring any securities permanently, pursuant to paragraph 2.1 of s. 127(1) of the Act;
- c. are prohibited from utilizing any exemptions contained in Ontario securities law permanently, pursuant to paragraph 3 of s. 127(1);
- d. are prohibited from becoming or acting as a registrant or as a promoter permanently, pursuant to paragraph 8.5 of s. 127(1) of the Act;
- e. pay, on a joint and several basis, an administrative penalty of \$2,000,000, pursuant to paragraph 9 of s. 127(1) of the Act; and
- f. pay, on a joint and several basis, the costs of the Commission's investigation and hearing in the amount of \$96,550.35, pursuant to s. 127.1 of the Act.

Dated at Toronto this 21st day of June, 2022.

"M. Cecilia Williams"

M. Cecilia Williams