Capital Markets Tribunal | Tribunal des marchés financiers | 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 ONCMT 28
Date: 2022-10-07
File No. 2019-40

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

REASONS AND DECISION

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

Adjudicators:	Timothy Moseley (chair of the panel) Geoffrey D. Creighton Dale R. Ponder	
Hearing:	By videoconference, June 17, 2022	
Appearances:	Erin Hoult Jacob Millar	For Staff of the Ontario Securities Commission
	Max Muñoz	For VRK Forex & Investments Inc. and Radhakrishna Namburi

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REASONS AND DECISION

1. OVERVIEW

[1] In a decision on the merits dated January 24, 2022 (the **Merits Decision**),[1] this Tribunal found that the respondents Radhakrishna Namburi and his company VRK Forex & Investments Inc. (**VRK Forex**) had:

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 *Securities Act*[2] (the **Act**); and

b. engaged in the business of advising with respect to investing in, buying or selling securities without being registered to do so and without an exemption, contrary to s. 25(3) of the Act.[3]

[2] The respondents' contraventions arose from their extensive promotion of a trading program of contracts for difference (**CFDs**). The respondents solicited investors, provided advice related to CFD trading, and conducted CFD trading in investor accounts, sometimes on a discretionary basis. As a result of that activity, the respondents received profit-sharing payments and commission rebates totaling approximately $430,000 and the investors lost an aggregate of approximately $1.9 million.[4]

[3] Staff of the Ontario Securities Commissions asks that we impose sanctions against the respondents under s. 127(1) of the Act, and that we order them to pay a portion of the Commission's costs of the investigation and this proceeding.

[4] For the reasons we set out below, we conclude that it would be in the public interest to order that:

a. the respondents be subject to time-limited market participation bans, explained further below;

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[1] *VRK Forex & Investments Inc (Re)*, 2022 ONSEC 1

[2] RSO 1990, c S.5

[3] Merits Decision at para 158

[4] Merits Decision at para 5

b. the respondents pay an administrative penalty, on a joint and several basis, in the amount of $250,000;

c. the respondents disgorge, on a joint and several basis, $430,192.50 to the Commission; and

d. the respondents pay costs in the amount of $200,000.

2. BACKGROUND

[5] Namburi is the sole director of VRK Forex and described the company as his "own business". VRK Forex operated out of a storefront office in a shopping mall and out of Namburi's residence.[5]

[6] The merits panel found that the respondents:

a. promoted CFD trading as a form of investment with significant daily returns, *e.g.*, "Earn every day 1 to 5 percent";

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.[6]

[7] 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.[7]

[5] Merits Decision at para 7

[6] Merits Decision at paras 10 and 63

[7] Merits Decision at para 11

[8] In communications with some of the investors, Namburi repeatedly made positive statements about his successful performance in CFD trading for other clients, and the low risk associated with the investment ("100% safe").[8]

[9] The merits panel found that the CFDs were securities[9] and that the respondents' activities constituted engaging in the business of trading and advising with respect to the CFDs.

[10] Staff's undisputed evidence at the merits hearing established that the respondents received profit-sharing fees of $400,507.50 and commission rebates of $29,685.00 paid to Namburi by the operator of one of the CFD trading platforms.

3. ANALYSIS

3.1 Introduction

[11] The Tribunal may impose sanctions under s. 127(1) of the Act where it finds it to be in the public interest to do so. The Tribunal's exercise of that jurisdiction must be consistent with the purposes of the Act, which include protecting investors from unfair, improper and fraudulent practices, and fostering fair and efficient capital markets and confidence in the capital markets.

[12] Sanctions are protective and are intended to prevent future harm to investors and to the capital markets.[10]

[13] In this case, Staff seeks two types of sanctions:

a. a time-limited order restricting Namburi's and VRK Forex's participation in the capital markets (a category we refer to as **market sanctions**); and

b. financial sanctions, including an administrative penalty and an order requiring Namburi and VRK Forex to disgorge funds that they obtained improperly.

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[8] Merits Decision at para 64

[9] Merits Decision at para 14

[10] *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at para 42

[14] We will address each of these categories in turn, as well as Staff's request that the respondents pay a portion of the Commission's costs of the investigation and this proceeding.

3.2 Restrictions on participation in the capital markets (market sanctions)

3.2.1 Introduction

[15] Staff asks that we impose an order restricting the respondents' participation in the capital markets. Specifically, Staff asks for an order:

a. requiring that Namburi resign any position he holds as a director or officer of an issuer or registrant, and

b. providing that for a ten-year period, or whenever all financial sanctions are paid, whichever is later:

i. Namburi and VRK Forex be prohibited from trading in any securities or derivatives, and from acquiring any securities;

ii. the exemptions contained in Ontario securities law not apply to Namburi or VRK Forex;

iii. Namburi be prohibited from acting as a director or officer of an issuer, registrant, or investment fund manager; and

iv. Namburi and VRK Forex be prohibited from becoming or acting as a registrant, investment fund manager, or promoter.

[16] The respondents agreed to these market sanctions, subject to their request that once all financial sanctions and costs orders are paid, Namburi be permitted to trade for himself in accounts in his name only in which he has the sole legal and beneficial interest. Staff agreed to that limited exception.

[17] When parties are able to agree on issues before a hearing, the process is made more expeditious and efficient. We commend Staff and the respondents for their work in reaching an agreement about these sanctions.

[18] However, even if parties agree on what they consider to be the appropriate sanctions, the Tribunal will not necessarily order those sanctions. The Tribunal must still determine that such an order would be in the public interest, as required by s. 127(1) of the Act.

[19] In this case, we accept the parties' joint submission as being within a reasonable range of market sanctions, and we determine that it would be in the public interest to make the requested order. In coming to that conclusion, we considered all the relevant factors for sanctions, as discussed by the Tribunal in previous decisions.[11] The particular factors that influenced our decision about the market sanctions are set out in the following paragraphs.

3.2.2 Seriousness of the misconduct

[20] The respondents' misconduct was serious. Registration is a key element of investor protection under the Act. It is designed to ensure that those who engage in the business of selling securities, or advising about them, are proficient and solvent and that they act with integrity. Engaging in the business of trading and advising about securities without being registered is contrary to these necessary protections and undermines investor protection and the integrity of the capital markets.

[21] The respondents raised approximately $3.8 million from at least 19 investors, all of whom were inexperienced with respect to CFDs. These investors subsequently lost approximately $1.9 million. Meanwhile, the Respondents received $430,192.50 in profit-sharing fees and commission rebates.

[22] The seriousness of the respondents' misconduct was exacerbated by their misleading promotional tactics, *e.g.*, promises that investors could earn 1 to 5 per cent per day and that any account with a balance of more than $100,000 was 100% safe. These kinds of representations demonstrate the importance of a registration regime that prescribes communication standards.

3.2.3 Recurrent nature of the misconduct

[23] The respondents' misconduct was recurrent, not isolated. It continued for three years out of the respondents' established storefront operation. Namburi conducted regular information sessions, facilitated the opening and funding of trading accounts, met with investors, distributed promotional materials, and traded in investors' accounts.

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[11] *York Rio Resources Inc (Re)*, 2014 ONSEC 9 at para 34

[24] Staff also relies on what it says is Namburi's history of violating Ontario securities law. In support of this submission, Staff refers to the Acknowledgement and Undertaking to Staff signed by Namburi in September 2016, in which the respondents admitted to having contravened Ontario securities law by engaging in the business of trading without being registered.

[25] The merits panel in this proceeding found that the undertaking portion of the Acknowledgment and Undertaking lacked sufficient clarity to support any finding of a breach of the undertaking. However, that conclusion did not relate to the acknowledgment portion, which is clear and unambiguous:

> Radhakrishna NAMBURI and VRK Forex & Investments Inc. engaged in the business of trading in securities contrary to section 25 of the *Securities Act*… and the requirements of National Instrument 31-103 – *Registration Requirements, Exemptions and Ongoing Obligations*…

[26] In response, the respondents rely on what Namburi says were oral representations made to him in 2016 by a member of Staff to the effect that he did not need to be registered to trade CFDs. The respondents submit that they would have sought registration if Staff had been clear from the outset in explaining the respondents' obligations.

[27] We are not persuaded by this submission and we give it no weight. Having expressly acknowledged that they had breached the registration requirements, the respondents were clearly aware of the existence of a registration regime for trading in securities. To then operate a business focused on the promotion of, and trading in, complex instruments such as CFDs without seeking expert advice about registration requirements was at least reckless.

[28] We agree with Staff's submission that the respondents' September 2016 acknowledgment amplifies the recurrent nature of the respondents' misconduct.

3.2.4 Experience in the marketplace

[29] By Namburi's own description, he has lengthy and broad experience in capital markets, extending back to India in 1987. He testified that he had been trading CFDs since 2008. He highlighted his experience and expertise related to CFD trading and CFD trading strategies.

[30] We accept Namburi's assertion that he has substantial experience in the capital markets generally, including with respect to CFDs.

3.2.5 Remorse

[31] Namburi filed an affidavit for the sanctions and costs hearing, in which he testified to his deep shame and remorse for the losses his misconduct has caused. Staff counters that this professed remorse comes at the eleventh hour, after the merits decision, and that it is unsupported by any concrete action.

[32] We are not troubled by the timing of the statement of remorse. A respondent is entitled to fully defend against allegations at a merits hearing. We should draw no adverse inference from the fact that no remorse was expressed until after the merits decision was issued.

[33] However, it is noteworthy that the respondents continue to suggest that Staff bears some responsibility for having failed in 2016 to alert the respondents to the details of their registration requirements for CFDs. That mindset indicates to us that the respondents do not understand that it was they who were responsible for understanding applicable requirements, and for getting help to understand those requirements if necessary. For us, this failure to acknowledge their responsibility to this day significantly undermines the relevance of the statement of remorse.

[34] Staff also submits that the respondents' remorse is a bald statement and is without any other expression of remorse, through words or actions. We disagree. The respondents agreed to broad and meaningful sanctions, including the abovementioned condition that the market sanctions will continue until all financial sanctions and costs are paid. This concession is more indicative of remorse than perfunctory actions would have been.

3.2.6 Whether the respondents benefited financially from their misconduct

[35] The respondents submit that they did not benefit financially from the funds they obtained. We disagree.

[36] The respondents base that submission on the fact that they invested the approximately $430,000 of profit they earned and that they eventually lost the

entire amount. They assert that this left them in a net zero position, and they should not be taken to have gained financially.

[37] We categorically reject that submission. There is no reason to distinguish between the respondents' use of the profit from the situation where a respondent spends improperly obtained funds on a boat, a car or real property that later loses some or all of its value. The respondents appropriated the profit to their own use. There is no basis to believe that if they had traded those funds successfully, the investor clients would have benefited in any way. The respondents were exclusive owners of both the upside and the downside risk. It is not a mitigating factor that the respondents lost their profit in the market.

3.2.7 Effect of failure to pay financial sanctions

[38] Before we conclude regarding market sanctions, a comment is in order regarding the two consequences that will follow if the respondents fail to pay all financial sanctions and costs. First, the ten-year period specified for the market sanctions will extend until the respondents pay all financial sanctions and costs. Second, the limited exception to permit Namburi to trade for his own account will not become effective until that condition is fully met.

[39] In the hearing, we voiced some concern that such a term might be punitive, especially in a case where the respondents assert impecuniosity. The parties identified no case in which a similar term had been ordered over a respondent's objection, but they confirmed to us that they were content with the term. We have accepted it as being within a reasonable range in this case but we leave it to panels in future cases to determine whether a similar term is in the public interest where it is requested by Staff but contested by a respondent.

3.2.8 Conclusion about market sanctions

[40] The respondents were experienced in the marketplace and engaged in conduct that was serious and recurrent, and by which they received a significant profit, despite the fact that they later lost those funds through their own actions. The respondents' expression of remorse is relevant but does not deserve significant weight, given their unwillingness to accept full responsibility for their actions. That reluctance is particularly concerning to us in light of the complexity of the regulatory environment in which the respondents chose to operate, and their

inability or unwillingness to seek expert advice to ensure that they operated in conformance with Ontario securities law.

[41] It is in the public interest to exclude the respondents from participation in the capital markets as jointly proposed by Staff and the respondents, subject to a minor exception described in paragraph [43] below. Such an order is necessary for specific deterrence, to protect other participants in the capital markets from the respondents' continued participation in the capital markets. It is also necessary for general deterrence, to send a strong message to others who might be inclined to engage in similar activity.

[42] The ten-year term of the market sanctions is proportionate to the misconduct. It is long enough to act as an effective specific and general deterrent, but it is not as long as in cases involving more egregious conduct (*e.g.*, fraud).

[43] The minor exception we referred to in paragraph [41] above is about Staff's request that Namburi be prohibited from acting as an investment fund manager, or as a director or officer of an investment fund manager. As the Tribunal has previously observed,[12] the term "registrant" includes an investment fund manager. Accordingly, our order that Namburi be prohibited from being a registrant, or a director or officer of a registrant, extends to investment fund managers. Therefore, we need not duplicate Staff's request in our order by referring to investment fund managers as well as registrants.

[44] We turn now to consider Staff's request for financial sanctions.

3.3 Financial sanctions

3.3.1 Introduction

[45] Staff seeks two financial sanctions:

a. an administrative penalty of $300,000; and

b. disgorgement of $430,192.50.

[46] Staff asks that Namburi and VRK Forex be jointly and severally liable for both sanctions.

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[12] See, *e.g.*, *Inverlake (Re)*, 2018 ONSEC 35 at para 39

[47] We conclude that it would be in the public interest to order:

a. that the respondents be jointly and severally liable for an administrative penalty in the amount of $250,000; and

b. that the respondents be jointly and severally liable to disgorge to the Commission $430,192.50, being the sum of the profit-sharing fees and the commission rebates received.

[48] In reaching that conclusion, we take into account the same factors (*e.g.*, seriousness, recurrence) discussed above at paragraphs [20] to [37]. In addition, we consider the respondents' alleged impecuniosity, as discussed below.

3.3.2 Administrative penalty

3.3.2.a Introduction

[49] Staff's requested administrative penalty of $300,000 is, as Staff concedes, at the higher end of the spectrum of relevant precedents. Staff highlights the aggravating factors noted above (*e.g.*, the recurrent nature of the misconduct and the respondents' experience in the marketplace) and the absence of any truly mitigating factors.

[50] The respondents submit that they are impecunious, and that we should take this into account in determining an appropriate administrative penalty. As we discuss in further detail below, we cannot accede to this submission, due to the incomplete nature of the evidence produced by the respondents in support.

3.3.2.b Alleged impecuniosity

[51] The respondents submit forcefully that they are impecunious, and that the financial sanctions and costs orders that Staff seeks "are akin to attempting to draw blood from a stone".[13]

[52] Staff counters that while a respondent's ability to pay may be a factor in determining appropriate sanctions, it is not the predominant or determining

[13] Written Submissions of the Respondents, May 5, 2022, at para 1

factor, and we ought not to attach too much weight to the respondents' circumstances at the expense of investor protection and market integrity.

[53] We agree with Staff's submission. Impecuniosity is a relevant but not determinative factor.

[54] In this case, the evidence of impecuniosity is incomplete. The respondents' evidence does address at some length the depleted nature of their bank accounts, their outstanding credit card balances, and the trading account losses that caused the dissipation of profits.

[55] Namburi also provided notices of assessment from the Canada Revenue Agency from 2014 to 2020, showing very modest total income and, in 2017, a significant loss. However, in the absence of any further evidence as to how these amounts are derived, they are not compelling evidence.

[56] The evidentiary record is further muddied by an outstanding dispute over Namburi's interest in a home he co-owned with his wife, to whom he purported to transfer his remaining share while this proceeding was underway. The Commission has commenced an action in the Ontario Superior Court of Justice alleging that the transfer was fraudulent and void as against the Commission and creditors. In that action, the Commission seeks various relief, including a declaration that Namburi is a 50% owner of the property.

[57] Namburi counters that the transfer was in respect of outstanding loans he had received from his wife for his business, VRK Forex. The court action is ongoing, and the parties agree that we should not address the issues upon which the Court will need to rule. Staff submits, however, that while the Court's determination is pending, the Tribunal should not accept the respondents' submission of impecuniosity.

[58] Like much of the evidence adduced concerning impecuniosity, the Court action raises more questions than it answers (at least until the action is disposed of), and ultimately is of little assistance either way as to whether the respondents are truly impecunious.

[59] By the same token, however, we note that despite the volume of evidence provided by the respondents, they have provided no comprehensive statement

of assets and liabilities, leaving ample scope for speculation as to what may not have been disclosed. The onus of demonstrating impecuniosity as a mitigating factor lies upon the respondents. The respondents have not produced clear and complete evidence, and they have therefore failed to meet their onus. We make no finding one way or the other about whether the respondents are impecunious.

3.3.2.c Range of administrative penalties in relevant precedents

[60] The purpose of an administrative penalty is to deter the particular respondents from engaging in the same or similar conduct in the future, and to send a clear deterrent message to other market participants that the conduct in question will not be tolerated in Ontario capital markets.

[61] We have discussed several of the factors to be considered in determining an appropriate administrative penalty: the seriousness of the misconduct, its recurrent nature, the respondents' experience in the marketplace, whether the respondents benefited financially from their misconduct, and potential mitigating factors such as remorse and impecuniosity.

[62] There is no formulaic approach to determine the quantum of an administrative penalty. However, we are guided by administrative penalties that this Tribunal has imposed in other cases. While no two cases are exactly alike, and the determination of appropriate sanctions is highly fact-specific, previous decisions help establish a range of reasonable outcomes.

[63] Of the decisions cited by the parties, we found the following to be particularly relevant. All of them involved unregistered trading or advising about securities:

a. In *Simba (Re)*, the respondent placed 440 buy/sell orders in an investor's locked-in retirement account over the course of 14 months incurring $56,000 in losses. In addition to 10-year market sanctions, Simba was ordered to pay an administrative penalty of $100,000 and costs;[14]

b. In *Doulis (Re)*, the respondents engaged in the business of advising in respect of securities without being registered. They conducted trades on behalf of investors worth between $15 million and $17 million, and

[14] 2018 ONSEC 56

received approximately $50,000 in fees. The Tribunal found that they also made misleading or untrue statements to Staff. It imposed a 15-year market ban, ordered disgorgement of the fees, and imposed administrative penalties of $200,000 against the individual respondent;[15]

c. In *Khan (Re)*, the respondents' unregistered trading and advising in commodity futures contracts led to 32 investors losing over $366,000. In addition to permanent market sanctions, disgorgement and costs, the respondents were each ordered to pay an administrative penalty of $200,000;[16]

d. In *MP Global Financial Ltd (Re)*, the respondents raised approximately $25 million (of which $8 million was lost) from 150 investors. Fifteen-year market sanctions, disgorgement and costs were ordered, along with administrative penalties of $250,000 against each individual and corporate respondent.[17]

3.3.2.d Conclusion about administrative penalty

[64] In our view, it would be in the public interest to require the respondents to pay an administrative penalty of $250,000. Staff asked that any administrative penalty be payable jointly and severally by the respondents, and we will so order.

[65] In concluding that $250,000 is an appropriate amount, we were particularly influenced by the seriousness of the conduct as evidenced by the significant losses suffered by investors and by the recurrent nature of the respondents' conduct, in light of their earlier undertaking. We also take into account the fact that there is no evidence Namburi set out to deprive the investors in any way. Despite that, the misconduct was serious and warrants a strong response.

[15] 2014 ONSEC 40
[16] 2015 ONSEC 15
[17] 2012 ONSEC 35

3.3.3 Disgorgement

3.3.3.a Introduction

[66] Paragraph 10 of s. 127(1) of the Act authorizes the Tribunal to make an order requiring a person or company who has failed to comply with Ontario securities law to disgorge "any amounts obtained" through its non-compliance.

[67] Staff asks that we order the respondents, jointly and severally, to disgorge the sum of $430,192.50, an amount that is made up of both the profit-sharing fees they withheld ($400,507.50) and the commission rebates paid to them by the operator of one of the CFD trading platforms under an Introducing Broker Agreement ($29,685.00). The respondents submit that no disgorgement order is warranted, because they did not benefit from their misconduct and because they are unable to pay.

[68] For reasons discussed above, we reject these submissions by the respondents. They obtained the amount sought by Staff, and there is no good reason for us to reduce that amount. We therefore grant the order requested.

3.3.3.b Analysis

[69] The purpose of a disgorgement order is not to provide restitution; rather, it is a remedy that seeks to fulfill the goals of specific and general deterrence by preventing those found to be in non-compliance with Ontario securities law from benefiting from their non-compliance.[18]

[70] The Tribunal has set out a non-exhaustive list of factors to be considered in determining whether a disgorgement order should be made, and if so, in what amount:

a. whether an amount was obtained by a respondent as a result of the non-compliance with Ontario securities law;

b. the seriousness of the misconduct and whether that misconduct caused serious harm, whether directly to individual investors or otherwise;

[18] *Sabourin (Re)*, 2010 ONSEC 10 at para 65

c. whether the amount obtained as a result of the non-compliance is reasonably ascertainable;

d. whether those who suffered losses are likely to be able to obtain redress; and

e. the deterrent effect of a disgorgement order on the respondents and other market participants.[19]

[71] With respect to the first factor, we conclude that the respondents obtained the requested amount as a result of their non-compliance with Ontario securities law. The profit-sharing fees and commission rebates arose directly from the illegal trading that the respondents conducted. Had they not conducted that trading, they would not have obtained the impugned funds. Further, we note that the statute refers to amounts "obtained by" the respondent, not profit earned by the respondent. We have already rejected the respondents' contention that they earned no profit, but even if we accepted that characterization, there can be no dispute that the respondents "obtained" the funds in the first place.[20] The amount of a disgorgement order ought not to be affected by how the funds were subsequently used.[21]

[72] We addressed the second and fifth of these factors above in our discussion of sanctioning factors generally. We conclude that the serious and harmful nature of the respondents' non-compliance in this case, and the need for both specific and general deterrence, support a disgorgement order in this matter.

[73] The third factor is non-controversial – there is no dispute that the amount sought by Staff represents the total of the profit-sharing fees and commission rebates that the respondents received.

[74] Finally, with respect to the fourth factor, there is no apparent prospect that the investors would recover any of those funds.

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[19] *Pro-Financial Asset Management (Re)*, 2018 ONSEC 18 (***PFAM***) at para 50

[20] *PFAM* at para 49

[21] *Phillips (Re)*, 2015 ONSEC 36 at para 19

[75] Accordingly, we conclude that a disgorgement order would be appropriate. The amount obtained by the respondents is readily ascertainable, and the respondents have offered no persuasive basis for us to reduce that amount.

[76] Even if the respondents had persuaded us that they are impecunious, we would not reduce the amount of the disgorgement order. In this regard, we agree with the analysis of the Alberta Securities Commission in *Magee (Re)*, in which the panel observed that it would seem perverse that disgorgement could be ordered against a respondent who retains amounts illegally obtained, but could not be ordered against a respondent who squanders those amounts.[22]

[77] We find that it is in the public interest to require the respondents to disgorge, jointly and severally, the sum of $430,192.50 to the Commission.

3.4 Costs

3.4.1 Introduction

[78] Finally, we consider Staff's request that the respondents pay certain of the costs associated with this matter. Staff seeks costs of $251,997.71, representing fees for Staff time of $242,031.38 and disbursements of $9,966.34. For the reasons we set out below, we will order that the respondents be jointly and severally responsible for costs in the amount of $200,000.

3.4.2 Analysis

[79] Section 127.1 of the Act permits the Tribunal to order a person or company to pay the costs of an investigation and/or hearing if it 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 rather a means of recovering investigation and/or hearing costs. A costs order will not necessarily lead to the recovery of all of the costs incurred by the Commission, but it is appropriate for respondents to contribute to such costs when it is their contravention of Ontario securities law that caused the costs to be incurred.

[22] 2015 ABASC 846 at para 191, quoted in *Rustulka (Re)*, 2021 ABASC 15 at para 105

[80] Staff supports its request in this case with evidence regarding the time spent by various members of Staff during its investigation and this proceeding. Staff also seeks reimbursement for disbursed court reporter fees during the investigation.

[81] Staff reduced the total costs requested by limiting the list of Staff members for whom costs are claimed to only two: the lead investigator and counsel, defined as the investigator and counsel who recorded the highest number of hours. Staff further reduced the costs sought in the litigation phase by an additional $74,647.50. Staff then further reduced the net costs by applying a discount of 10% in recognition of the respondents' success on the issue of whether there was a breach of the undertaking given to the Commission concerning the respondents' registration obligations.

[82] Overall, Staff's claim represents a discount of approximately 47.95% on the actual costs it incurred during its investigation and this proceeding.

[83] The respondents submit that we should not order costs given:

a. the lack of clarity of communications by Staff with the respondents during the course of discussions resulting in the Acknowledgment and Undertaking;

b. the lack of clarity of the undertaking itself;

c. Staff's mixed success in the merits hearing; and

d. the respondents' financial circumstances.

[84] The first three of those submissions are related, and we have addressed them above. In the context of Staff's request for costs, we note that the allegation of a breach of the undertaking was an independent allegation, and the dismissal of that allegation does not detract from the fact that Staff proved the significantly more substantive allegations relating to the respondents being in the business of trading and advising about securities without registration.

[85] We cannot accept the respondents' contention that the entire proceeding could have been avoided had Staff been clearer in its communications with the respondents and in setting out the respondents' registration obligations. Staff was not, and should not be, under any obligation to engage in detailed communications with those who participate in the capital markets (registered

and unregistered) to supplement the provisions of Ontario securities law. The respondents were free to engage their own advisors to help them comply with Ontario securities law. At no time in this proceeding did the respondents offer a valid reason why they did not do so. It was clear from Namburi's testimony that his was a one-person business, and that he worked extremely long hours doing everything himself. That was his choice, but he must bear the consequences of having made that choice.

[86] The respondents submit, in the alternative, that the costs requested by Staff are too high and reflect time spent on the matter by Staff that is patently excessive in the context of the proceeding. In particular, the respondents point to the fact that Staff's senior forensic accountant spent nearly 1,000 hours on this matter, including both the investigation and litigation stages.

[87] We agree that the time spent appears to be disproportionately high given the scope of the proceeding. We also note that there were changes of personnel assigned to this matter during its life, and while Staff has applied a reduction to reflect the inevitable duplication that comes with personnel changes, we find that it would be appropriate to apply a further reduction.

[88] Finally, the respondents further submit that Staff's "mixed success" in the merits hearing means that Staff has insufficiently reduced the amount of the costs sought. We do not accept this submission. The 10% discount applied by Staff as a result of the allegation about the undertaking not being proved is a fair discount.

3.4.3 Conclusion about costs

[89] For the above reasons, we conclude that the costs to be borne by the respondents should be further reduced, beyond the discounts that Staff has applied. We reduce Staff's claim by approximately 20% and will order that the respondents be jointly and severally liable for costs in the amount of $200,000.

4. CONCLUSION

[90] For the reasons stated above, we order:

a. with respect to Namburi, that:

i. he shall cease trading in any securities or derivatives, or acquiring any securities, for a period of 10 years, pursuant to paragraphs 2 and 2.1 of subsection 127(1) of the Act, except that, upon full payment of the amounts in subparagraphs (c), (d) and (e) below, he may trade in or acquire securities in any registered retirement savings plan accounts, and/or tax-free savings accounts, and/or other self-directed retirement savings plan in which he has sole legal and beneficial interest, solely through a registered dealer or registered advisor that has first been given a copy of the Tribunal's order;

ii. any exemptions contained in Ontario securities law shall not apply to him for a period of 10 years, pursuant to paragraph 3 of subsection 127(1) of the Act, except that, upon full payment of the amounts in subparagraphs (c), (d) and (e) below, he may rely on exemptions used in respect of trading in or acquiring securities in accordance with the exception in (i) above;

iii. he resign any positions he holds as a director or officer of an issuer or registrant, pursuant to paragraphs 7 and 8.1 of subsection 127(1) of the Act;

iv. he is prohibited from acting as a director or officer of an issuer or registrant for a period of 10 years, pursuant to paragraphs 8 and 8.2 of subsection 127(1) of the Act; and

v. he is prohibited from becoming or acting as a registrant or promoter for a period of 10 years, pursuant to paragraph 8.5 of subsection 127(1) of the Act;

b. with respect to VRK Forex, that:

i. it shall cease trading in any securities or derivatives, or acquiring any securities, for a period of 10 years, pursuant to paragraphs 2 and 2.1 of subsection 127(1) of the Act;

ii. any exemptions contained in Ontario securities law shall not apply to it for a period of 10 years, pursuant to paragraph 3 of subsection 127(1) of the Act; and

iii. it is prohibited from becoming or acting as a registrant or promoter for a period of 10 years, pursuant to paragraph 8.5 of subsection 127(1) of the Act;

c. Namburi and VRK Forex shall jointly and severally pay an administrative penalty in the amount of $250,000, pursuant to paragraph 9 of subsection 127(1) of the Act;

d. Namburi and VRK Forex shall jointly and severally disgorge to the Commission the amount of $430,192.50, pursuant to paragraph 10 of subsection 127(1) of the Act;

e. Namburi and VRK Forex shall jointly and severally pay $200,000 for the costs of the Commission's investigation and hearing, pursuant to section 127.1 of the Act; and

f. in the event that any of the payments set out in subparagraphs (c), (d) and (e) are not made in full, the orders in subparagraphs (a) and (b) shall continue in force without any limitations as to time period.

Dated at Toronto this 7th day of October, 2022

"Timothy Moseley"
Timothy Moseley

"Geoffrey D. Creighton"
Geoffrey D. Creighton

"Dale R. Ponder"
Dale R. Ponder