Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
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IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

- AND -

IN THE MATTER OF
FACTORCORP INC., FACTORCORP FINANCIAL INC. AND
MARK TWERDUN

REASONS AND DECISION ON SANCTIONS AND COSTS
(Sections 127 and 127.1 of the Act)

Hearing:	April 18, 2013 May 22, 2013	
Decision:	September 30, 2013	
Panel:	Christopher Portner	- Commissioner and Chair of the Panel
Appearances:	Cullen Price	- For Staff of the Commission
	Mark Twerdun	- For himself
	No one appeared on behalf of FactorCorp Inc. and FactorCorp Financial Inc.	

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REASONS AND DECISION ON SANCTIONS AND COSTS

I. INTRODUCTION

[1] This was a hearing (the "**Sanctions and Costs Hearing**") before the Ontario Securities Commission (the "**Commission**") pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") to consider whether it is in the public interest to make an order with respect to sanctions and costs against FactorCorp Inc. ("**FCI**"), FactorCorp Financial Inc. ("**FFI**") and Mark Twerdun ("**Twerdun**" and, together with FCI and FFI, the "**Respondents**"). In these Reasons, the term "**FactorCorp**" means FCI or FFI, as the context requires, and FCI and FFI together will be referred to as the "**Companies**".

[2] The Sanctions and Costs Hearing was held on April 18, 2013 following the hearing on the merits in this matter in October and November 2011 (the "**Merits Hearing**") and the issuance of the decision on the merits on February 22, 2013 (*Re FactorCorp Inc.* (2013), 36 O.S.C.B. 2059) (the "**Merits Decision**"). At the Sanctions and Costs Hearing, Staff of the Commission ("**Staff**") appeared and made oral submissions and provided written submissions, a brief of authorities and a compendium of evidence. Staff's compendium included the Affidavit of J. Bradley Butcher ("**Butcher**") relating to payments made by the Companies to individuals or companies related to Twerdun which was sworn on April 8, 2013 (the "**Butcher Affidavit**"), the Affidavit of Julia Ho relating to the costs sought by Staff which was sworn on March 18, 2013 (the "**Ho Affidavit**") and a bill of costs.

[3] Twerdun appeared on April 18, 2013 and made oral submissions. No one appeared on behalf of the Companies, although KPMG Inc. ("**KPMG**"), the Trustee of the consolidated estate of the Companies (the "**Trustee**"), received notice of the hearing in accordance with subsection 6(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "**SPPA**"). I proceeded with the Sanctions and Costs Hearing in accordance with subsection 7(1) of the SPPA.

[4] Following oral submissions by the parties on April 18, 2013, I issued an order inviting the parties to provide written submissions with respect to the following three questions:

(a) Is the Affidavit of Butcher sworn on April 8, 2013, including the Exhibits to the Affidavit, admissible evidence in the Sanctions and Costs Hearing, and if so, what weight should be given to such evidence?

(b) Does the clause in the Notice of Hearing issued by the Commission and dated May 12, 2009 (the "**Notice of Hearing**") stating that the Commission may make "such other order as the Commission may consider appropriate" allow the Commission to impose market prohibition orders that were not requested in the Notice of Hearing?

(c) On what basis has Staff requested an order for the disgorgement of the amounts set out in subparagraph 9(i) and paragraph 34 of Staff's Written Submissions on Sanctions and Costs, considering that paragraph 10 of subsection 127(1) of the Act authorizes an order for disgorgement of "any amounts obtained" as a result of

the non-compliance by the Respondents with Ontario securities law and considering the findings in the Merit Decision?

(collectively, the "**Three Questions**").

[5] I adjourned the Sanctions and Costs Hearing to May 22, 2013 to permit the preparation, service and filing of written submissions and further oral submissions in response to the Three Questions. On May 10, 2013, Staff served and filed its Further Written Submissions ("**Staff's Further Written Submissions**"), with supporting materials, in response to the Three Questions. On May 17, 2013, Twerdun served and filed written submissions in response to the Three Questions ("**Twerdun's Further Written Submissions**"). I did not receive any submissions from the Companies in response to the Three Questions. The Sanctions and Costs Hearing resumed on May 22, 2013, at which time each of Staff and Twerdun made oral submissions.

[6] Having considered the submissions of the parties, I answer the Three Questions as follows:

(a) The Butcher Affidavit is admissible only for the limited purpose of determining the appropriate amount of any disgorgement order to be made under paragraph 10 of subsection 127(1) of the Act, based on Twerdun's non-compliance with Ontario securities law, as determined in the Merits Decision, and not for any other purpose (see paragraph 82 below).

(b) Fairness requires that the sanctions ordered against the Respondents be limited to those requested prior to the commencement of the Merits Hearing in the Notice of Hearing, and therefore, I need not consider Staff's requests, made after release of the Merits Decision, in Staff's written submissions on sanctions and costs (see paragraph 56 below).

(c) In considering Staff's request for an order that Twerdun disgorge at least $420,000, I have considered only the evidence in the Butcher Affidavit that Twerdun and Related Parties obtained at least this amount as a result of Twerdun's non-compliance with Ontario securities law, and I have not considered Staff's submissions with respect to the propriety of such payments (see paragraph 83 below).

II. THE MERITS DECISION

[7] This case involves the sale and distribution of debentures issued by FFI (the "**Debentures**") to more than 600 Ontario investors by means of which FFI raised approximately $50.4 million during the period from 2004 to 2007 (the "**Material Time**") (Merits Decision at paragraph 75).

[8] The Debentures were sold to investors using offering memoranda (collectively, the "**OMs**") and other promotional documents (collectively, the "**Promotional Materials**"). I found that FFI failed to file the OMs with the Commission contrary to Rule 45-501, subsequently amended on September 14, 2005 to section 6.4 of Rule 45-501, and subsection 122(1)(c) of the Act and contrary to the public interest (Merits Decision at paragraphs 257-258).

[9] The OMs and Promotional Materials contained a number of representations, including that the proceeds derived from the sale of the Debentures would be used in factoring, asset-backed lending and leasing or similar secured short-term loan transactions with tangible security, and that FactorCorp would employ what could only be described as exemplary standards of diligence, documentation and security (Merits Decision at paragraphs 265 and 277). In the Merits Decision, I found that these representations were materially untrue or misleading for a number of reasons, including that the loans made by FactorCorp:

> (i) were not short-term; (ii) substantially exceeded any advance rate that would be considered prudential for the level of risk represented to the investors, including the 70% advance rate that FFI represented in the OMs that it would use; (iii) were routinely unsecured or inadequately secured by unenforceable or unperfected security instruments; and (iv) failed to meet the majority of the lending standards which FFI represented to investors would be employed and maintained. It is also clear that neither Twerdun nor FactorCorp took any meaningful steps to preserve or protect the assets that had been purportedly secured when it became evident that the Borrowers or the sub-lenders were in financial difficulty.
>
> (Merits Decision at paragraph 267)

Accordingly, I found that the Companies made materially untrue or misleading statements in the OMs, which were documents required to be filed with the Commission, contrary to subsection 122(1)(b) of the Act and contrary to the public interest, and that the Companies made materially untrue or misleading statements to investors in the Promotional Materials, contrary to subsection 126.2(1) of the Act and contrary to the public interest (Merits Decision at paragraphs 273 and 279).

[10] The Debentures were sold to investors purportedly in reliance on the accredited investor exemption. However, I found that FFI and Twerdun were not entitled to rely on the accredited investor exemption because the criterion or criteria selected by a number of investors were, on their face, incorrect and warranted further investigation. I also found that the failure of FFI and Twerdun to ensure that the investors were accredited in those circumstances was contrary to the public interest (Merits Decision at paragraphs 310-315).

[11] In addition, Twerdun and FFI redeemed certain FFI securities following the issuance by the Commission of a temporary cease trade order (the "**Temporary Order**") that prohibited such redemption, contrary to subsection 122(1)(c) of the Act and contrary to the public interest (Merits Decision at paragraphs 286-288).

[12] I also found that Twerdun, as the sole officer and director of the Companies, authorized, permitted or acquiesced in the contravention by the Companies of subsections 122(1)(b), 122(1)(c) and 126.2(1) of the Act, described in paragraphs 8 and 11 above, and was therefore liable for their contraventions pursuant to subsection 122(3) and section 129.2 of the Act (Merits Decision at paragraphs 295-296).

[13] In the Merits Decision, I concluded that:

> (a) FFI used the OMs in connection with the sale and distribution of FFI securities and accordingly was required to file them with the Commission in

accordance with section 4.3 of Rule 45-501, subsequently amended on September 14, 2005 to section 6.4 of Rule 45-501. FFI failed to file the OMs with the Commission, contrary to subsection 122(1)(c) of the Act and contrary to the public interest.

(b) The Companies made materially misleading or untrue statements in the OMs which were used in connection with the sale and distribution of FFI's securities and were therefore documents required to be filed with the Commission, contrary to subsection 122(1)(b) of the Act and contrary to the public interest.

(c) The Companies made materially misleading or untrue statements in the Promotional Materials, contrary to subsection 126.2(1) of the Act and contrary to the public interest.

(d) FFI and Twerdun breached the Temporary Order by redeeming certain FFI securities on July 13, 2007, contrary to subsection 122(1)(c) of the Act and contrary to the public interest.

(e) Twerdun, as the sole director and officer of the Companies, authorized, permitted or acquiesced in their contraventions of subsections 122(1)(c), 122(1)(b) and 126.2(1) of the Act, and is therefore liable for such contraventions pursuant to subsection 122(3) and section 129.2 of the Act.

(f) Twerdun failed to ensure that investors were entitled to rely on the accredited investor exemption, contrary to the public interest.

(Merits Decision at paragraph 316)

III. THE POSITIONS OF THE PARTIES

A. Staff

1. Sanctions and Costs Requested

[14] In the Notice of Hearing issued by the Commission on May 12, 2009, Staff asked the Commission to order that:

(a) pursuant to clause 2 of subsection 127(1), trading in any securities by Factorcorp Inc. ("FCI"), Factorcorp Financial Inc. ("FFI") (collectively, the "Companies") and Twerdun cease permanently or for such other period as specified by the Commission;

(b) pursuant to clause 3 of subsection 127(1), any exemptions contained in Ontario securities law do not apply to the Companies or to Twerdun permanently or for such other period as specified by the Commission;

(c) pursuant to clause 8 of subsection 127(1), Twerdun be prohibited from becoming or acting as a director or officer of any issuer, registrant, investment fund manager or promoter;

(d) pursuant to clause 9 of subsection 127(1), Twerdun pay an administrative penalty of not more than $1 million for each failure to comply with Ontario securities law to the Commission or to KPMG in its capacity as Trustee ("Trustee") over the estates of the Companies, for allocation to or for the benefit of third parties;

(e) pursuant to clause 10 of subsection 127(1), Twerdun disgorge to the Commission any amount obtained as a result of non-compliance with Ontario securities law, for allocation, through the Trustee, if appropriate, to or for the benefit of third parties;

(f) pursuant to clause 6 of subsection 127(1), that Twerdun be reprimanded;

(g) pursuant to section 127.1, that Twerdun be ordered to pay the costs of the investigation and the costs of or related to the hearing incurred by or on behalf of the Commission;

…

(i) such other order as the Commission may consider appropriate.

[15] In its written submissions, Staff requested the following sanctions with respect to the Companies:

(a) pursuant to paragraph 1 of subsection 127(1) of the Act, that FCI's registration under Ontario securities law be terminated;

(b) pursuant to paragraph 2 of subsection 127(1) of the Act, that trading in any securities by the Companies cease permanently;

(c) pursuant to paragraph 2.1 of subsection 127(1) of the Act, that acquisition of any securities by them is prohibited permanently;

(d) pursuant to paragraph 3 of subsection 127(1) of the Act, that any exemptions contained in Ontario securities law do not apply to the Companies permanently; and

(e) pursuant to paragraph 8.5 of subsection 127(1) of the Act, that the Companies are prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter.

[16] In its written submissions, Staff requested the following sanctions with respect to Twerdun:

(a) pursuant to paragraph 1 of subsection 127(1) of the Act, that his registration under Ontario securities law be terminated;

(b) pursuant to paragraph 2 of subsection 127(1) of the Act, that trading in any securities by him cease permanently;

(c) pursuant to paragraph 3 of subsection 127(1) of the Act, that any exemptions contained in Ontario securities law do not apply to Twerdun permanently;

(d) pursuant to paragraph 6 of subsection 127(1) of the Act, that he be reprimanded;

(e) pursuant to paragraph 8 of subsection 127(1) of the Act, that Twerdun be prohibited from becoming or acting as an officer or director of any issuer permanently;

(f) pursuant to paragraph 8.2 of subsection 127(1) of the Act, that he be prohibited from becoming or acting as an officer or director of a registrant;

(g) pursuant to paragraph 8.4 of subsection 127(1) of the Act, that Twerdun be prohibited from becoming or acting as an officer or director of an investment fund manager;

(h) pursuant to paragraph 8.5 of subsection 127(1) of the Act, that he be prohibited from becoming or acting as a registrant, investment fund manager or as a promoter;

(i) pursuant to paragraph 10 of subsection 127(1) of the Act, that Twerdun disgorge to the Commission the minimum amount of $420,000, which shall be designated for allocation or for use by the Commission in accordance with subsections 3.4(2)(b)(i) or (ii) of the Act;

(j) pursuant to paragraph 9 of subsection 127(1) of the Act, that Twerdun pay an administrative penalty in the amount of $500,000 to $750,000, which shall be designated for allocation or for use by the Commission in accordance with subsections 3.4(2)(b)(i) or (ii) of the Act; and

(k) pursuant to section 127.1 of the Act, requiring [*sic*] Twerdun to pay a portion of Staff's costs incurred in investigating and litigating this matter in the amount of $263,645.37.

2. Staff's Submissions

[17] Staff submits that this case involves multiple and sustained contraventions of the Act and conduct contrary to the public interest, and that the misconduct is of the most serious nature that can come before the Commission. Staff submits that Twerdun had a great deal of experience as a registrant in the capital markets and it must be concluded that he was or ought to have been aware of and understood his and the Companies' obligations under Ontario securities law. Staff submits that Twerdun has never recognized the seriousness of his misconduct and the responsibility involved in the handling of investor funds, as demonstrated by Twerdun's submissions at the Merits Hearing and the Sanctions and Costs Hearing, which were to the effect that he relied on others and had done nothing wrong. Staff also submits that it is not aware of any mitigating factors.

[18] Staff provided affidavit evidence regarding the size of the profit made from, or loss avoided by, the illegal conduct. According to Staff, while it was difficult to ascertain accurately the size of the Respondents' gain, the Butcher Affidavit shows that Twerdun and related parties consistently profited from their participation in the Companies through the repayment of shareholder loans and the payment of salary, bonuses and unexplained amounts, and, in the end, fared far better than most of the Debenture holders.

[19] In Staff's submission, given the serious nature of his misconduct, significant sanctions are appropriate to deter Twerdun and like-minded individuals in similar positions from abusing the position of trust held by registrants. Staff submits that the market prohibitions requested by Staff against Twerdun will restrict him from participating in the capital markets in a way that is closely related to Twerdun's misconduct in his roles as a registrant and as an officer and director of a registrant. Staff states that it has been mindful of the possibility of shame, financial pain and the impact of the sanctions on the future livelihood of Twerdun. According to Staff, these factors have been taken into account in the requested sanctions and balanced against the very real risk of further market abuses.

[20] Staff has also asked me to consider the impact on investors as a sanctioning factor. Staff submits that the impact of Twerdun's misconduct on investors was enormous, as demonstrated by the evidence that investors received only four cents on the dollar through the realization efforts of the Trustee.

[21] Staff states that it does not seek any monetary orders against the Companies in order to avoid depleting the assets that may be available for the compensation of or the payment of restitution to investors who lost money as a result of the Respondents' non-compliance with the Act.

B. Twerdun

[22] Twerdun takes the position that the sanctions requested by Staff are unjust and extreme. In his written submissions, Twerdun stated that "first and foremost, [he] acknowledges and is remorseful for the losses incurred by the investors of FactorCorp." He also stated that he was "disappointed in the lawyers and managers he entrusted to act in the best interests of the investors." However, he submits that it is unclear to him why he is held solely responsible for the breaches of the Act and investor losses. He submits that he relied on counsel to ensure compliance with Ontario securities law, including filing the OMs with the Commission. He also questions why the Commission granted FactorCorp's application for registration as a Limited Market Dealer if required OMs were not filed. He submits that he relied on the borrowers to which FFI made loans (the "**Borrowers**") as well as counsel to ensure that security was taken with respect to the lending transactions engaged in by FactorCorp. He further submits that he contracted with dealers such as Farm Mutual Financial Services ("**Farm Mutual**") to ensure that investors were accredited. Twerdun says that, while he takes responsibility for making the decisions to rely on his counsel, the Borrowers and the dealers, he "did not act alone", and he does not understand why he is held accountable while the Borrowers, who mismanaged the funds, in his view, were allowed to continue to operate their respective businesses. He submits, in essence, that the sanctions requested are not proportionate to his conduct.

[23] With respect to the Panel's finding that he and FFI breached the Temporary Order, Twerdun submits that he should not be penalized for redeeming the cash-backed securities, which resulted in the holders of those securities recovering 100% of their funds.

[24] Twerdun submits, but without supporting evidence, that he took a number of steps to recover investor funds. For example, he submits that he filed a lawsuit against Farm Mutual which was subsequently abandoned by KPMG. He further submits that he then assisted the investors in the class action against Farm Mutual, referred to in paragraph 79 of the Merits Decision, which resulted in $21 million being returned to investors.

[25] Twerdun also submits that he is "personally out approximately $1.5 million in terms of trying to recover debenture holders monies by, one, leaving money in the company and, two, taking money out of [my] pocket to try to recover those funds on their behalf" (Hearing Transcript, April 18, 2013, page 59, lines 20-24).

[26] Twerdun also made submissions about investor losses and the recovery of funds. In his written submissions, he states:

> ...the evidence shows that KPMG and Grout[1] were in breach of their fiduciary duty in representing [sic] the recovery of assets on behalf of the Factorcorp Debenture Holders. They made no attempt to recover assets. They did not act in a timely manner. They spend more time looking for evidence of wrong doing then [sic] they did recovering assets. The lawsuit filed against [Farm Mutual] by Twerdun of Factorcorp was not acted on, and ignored by KPMG, forcing the Debenture Holders to take their own action under the same premise and successfully recovered $21 Million of the $50 Million. The evidence against [Farm Mutual] unmistakingly shows that [Farm Mutual] caused intented [sic] harm to Factorcorp and its investors. Twerdun aided in those efforts by providing documentation and information. KPMG and Grout billed extensive and unscrupulous rates netting very little recovery on behalf of the creditors and misdirected Inspectors to allow 'witch hunts' and settle for smaller payouts from entities with substantial assets.
>
> [Emphasis in original]

[27] Twerdun also made submissions regarding the failure by Staff to disclose certain documents, which submissions were not supported by any evidence.

C. The Companies

[28] As Staff is not seeking any monetary orders against the Companies so as not to deplete the assets available to investors, the Trustee took no position with respect to the sanctions and costs requested by Staff.

[1] James H. Grout, counsel for KPMG. [footnote added]

IV. ANALYSIS

A. Sanctions

1. The Law

[29] The Commission's mandate, set out in section 1.1 of the Act, is to (i) provide protection to investors from unfair, improper or fraudulent practices; and (ii) foster fair and efficient capital markets and confidence in capital markets.

[30] In exercising its public interest jurisdiction, the Commission must act in a protective and preventative manner, as stated by the Commission in *Re Mithras Management Ltd*. (1990), 13 O.S.C.B. 1600 ("***Mithras***"):

> …the role of this Commission is to protect the public interest by removing from the capital markets – wholly or partially, permanently or temporarily, as the circumstances may warrant – those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts… We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all.
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> (*Mithras*, *supra*, at pages 1610 and 1611)

[31] The Supreme Court of Canada has described the Commission's public interest jurisdiction as follows:

> …the purpose of an order under s. 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The role of the [Commission] under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets.
>
> (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 ("***Asbestos***") at paragraph 43)

[32] The Supreme Court of Canada has recognized that general deterrence is an important factor in imposing sanctions by stating that "… it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative" (*Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 at paragraph 60).

[33] The Commission has previously identified the following as factors that the Commission should consider when imposing sanctions:

(a) The seriousness of the conduct and the breaches of the Act;

(b) The respondent's experience in the marketplace;

(c) The level of a respondent's activity in the marketplace;

(d) Whether or not there has been recognition by a respondent of the seriousness of the improprieties;

(e) Whether or not the sanctions imposed may serve to deter not only those involved in the matter being considered, but any like-minded people, from engaging in similar abuses of the capital markets;

(f) The size of any profit obtained from or loss avoided by the illegal conduct;

(g) The size of any financial sanction or voluntary payment;

(h) The effect any sanctions may have on the ability of a respondent to participate without check in the capital markets;

(i) The reputation and prestige of the respondent;

(j) The remorse of the respondent; and

(k) Any mitigating factors.

(See, for example, *Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 at page 7746; and *Re M.C.J.C. Holdings Inc.* (2002), 25 O.S.C.B. 1133 ("***M.C.J.C. Holdings***") at page 1136.)

[34] In determining the appropriate sanctions to be ordered, the Commission will also consider the specific circumstances in each case and ensure that the sanctions are proportionate to those circumstances (*M.C.J.C. Holdings*, *supra*, at page 1134).

[35] Further, in imposing financial sanctions, the overall financial sanctions imposed on each respondent is a relevant consideration (*Re Sabourin* (2010), 33 O.S.C.B. 5299 ("***Sabourin Sanctions and Costs***") at paragraph 59). The Commission has also held in prior decisions that ability to pay, while not a predominant or determining factor, is relevant in determining the appropriate financial sanctions to be imposed (*Sabourin Sanctions and Costs*, *supra*, at paragraph 60).

2. Specific Sanctioning Factors Applicable in this Matter

[36] In considering the factors set out in paragraph 33 above, I find the following specific factors and circumstances to be relevant in this matter:

(a) Seriousness of the conduct

[37] In my view, the Respondents engaged in very serious misconduct through multiple transactions over an extended period of time. As mentioned in paragraph 8 above, the Respondents made statements in the OMs and Promotional Materials that the proceeds derived from the sale of the Debentures would be used in factoring, asset-backed lending and leasing or similar secured short-term loan transactions with tangible security, and that FactorCorp would

employ what could only be described as exemplary standards of diligence, documentation and security. Having made these statements to induce investors or prospective investors to purchase the Debentures, the Respondents failed to ensure that the funds were used in the manner represented in the OMs and Promotional Materials. The Respondents failed to follow minimal industry standards in documenting and securing the loans made to the Borrowers and failed to ensure that the same standards were followed by the Borrowers when making loans to their clients. Indeed, the loans made by the Companies to one of the Borrowers, Mohawk Business Solutions Group, can only be described as a "shocking dereliction" by the Respondents of their duties to the investors (Merits Decision at paragraph 242).

[38] I concluded in the Merits Decision that reasonable investors would almost certainly have based their decisions to purchase the Debentures, at least in substantial part, on the representations concerning security, oversight and risk set out in the OMs and Promotional Materials (Merits Decision at paragraphs 272 and 277). In addition, investors invested in the Debentures on the basis that they qualified as accredited investors although a number of them did not in fact meet the criteria to be accredited (Merits Decision at paragraphs 311 and 312). In fact, although it should have been obvious to Twerdun, a registrant for more than 12 years, that the criteria selected by certain investors were clearly inappropriate, he failed to ensure that investors qualified as accredited investors. As a result, many investors, including those who should not have had access to the investment, suffered significant losses. In the Merits Decision, I found that, of the approximately $50.4 million raised, $7.4 million was returned to investors by way of redemptions and approximately $17.4 million was returned to investors who purchased Debentures through Farm Mutual as a result of a class action against certain directors and officers of entities related to Farm Mutual (Merits Decision at paragraph 79). Investors only received four cents on the dollar through the realization efforts of the Trustee.

[39] FFI also failed to comply with certain filing requirements under Ontario securities law which are intended to ensure that those involved in the securities industry provide fair and accurate information to investors.

[40] In addition, Twerdun admitted that he redeemed certain FFI securities at a time when the Temporary Order expressly prohibited the Respondents from doing so. Any contravention of the Commission's Orders is regarded as serious misconduct, contrary to the public interest. Twerdun justified the redemption on the basis that the securities that were redeemed were distinct from the Debentures and their redemption did not, therefore, constitute a breach of the Temporary Order. He also submitted that the issue was discussed with counsel, however, he did not provide any evidence in this regard.

[41] Although the evidence is not precise, it would appear that Ontario investors lost approximately $25.6 million (Merits Decision at paragraphs 75 and 79) as a result of the Respondents' contraventions of Ontario's securities law.

(b) The Respondents' experience in the marketplace

[42] FCI was registered under the Act as a limited market dealer from 2004 to 2007. Twerdun, who was the directing mind of the Companies, had been registered under the Act in various categories since May 1991, including as a salesperson from May 1991 to January 2002, as a trading officer and director of another entity from October 2002 to January 2004 and as a trading

officer and director of FCI during the Material Time (Merits Decision at paragraphs 16-20). FCI and Twerdun were experienced registrants, and were, or should have been, fully familiar with their obligations under Ontario securities law.

(c) The level of the Respondents' activity in the marketplace

[43] The level of the Respondents' activity in the marketplace was significant given that they raised approximately $50.4 million from more than 600 investors during the Material Time.

(d) Remorse and recognition of the seriousness of the conduct

[44] As set out in paragraph 22 above, in his submissions, Twerdun expressed remorse for the losses suffered by investors. However, his written and oral submissions at the Sanctions and Costs Hearing demonstrate again that he does not recognize the seriousness of his misconduct. As mentioned above, Twerdun maintained at the Sanctions and Costs Hearing that he relied on others, including the Borrowers and the dealers which sold the Debentures, to ensure compliance with Ontario securities law. As such, according to Twerdun, he should not be held solely responsible for investor losses. In his submissions, he also stated that he does not understand why he has been subjected to regulatory proceedings unlike some of the Borrowers who are still operating their businesses.

[45] Twerdun fails to appreciate that, as a registrant, he, and not the Borrowers, was directly involved in selling to investors the securities issued by FFI, of which he was the sole director and officer. As a registrant, Twerdun had obligations under, and was responsible for complying with, Ontario securities law and to ensure such compliance by the Companies. It was clearly not the responsibility of the Commission to oversee compliance by the Borrowers with the private contracts between them and the Companies.

(e) Mitigating Factors

[46] In his submissions, Twerdun made frequent reference to his reliance on legal advice. However, as he provided no written opinion or other evidence to support that claim, I cannot accept that reliance on legal advice is a mitigating factor in this case. I expect that Twerdun was being truthful when he described his attempts to ensure some level of recovery by investors of the amounts they invested in his written and oral submissions, and I accept that this is a mitigating factor.

3. Specific Sanctions to be Ordered in this Case

(a) Trading and Other Market Prohibitions

(i) Staff's Submissions

Trading and Other Market Prohibitions

[47] In its written submissions, Staff requests the termination of the registrations of FCI and Twerdun, permanent trading, acquisition, exemption and registrant bans against the Companies and permanent trading, exemption, director and officer and registrant bans against Twerdun. In Staff's submission, the misconduct of the Respondents showed an utter disregard for investors and incompetence that suggests that the Respondents cannot be trusted to participate in the

capital markets in the future. Staff submits that these market prohibitions will have the effect of restricting the Respondents from participating in the capital markets in a way that is closely related to their misconduct.

[48] Staff submits that if an exception (carve-out) is granted for the purpose of permitting Twerdun to trade in securities for the account of his registered retirement savings plan ("**RRSP**"), such an exemption should only be permitted after all monetary orders against Twerdun have been satisfied.

The New Sanctions Requests

[49] During the Sanctions and Costs Hearing, I noted that certain sanctions requested in Staff's written sanctions and costs submissions were not requested in the Notice of Hearing, namely (i) the request for termination of the registration of the Respondents, pursuant to paragraph 1 of subsection 127(1) of the Act; (ii) the request for a ban against the Companies relating to the acquisition of any securities, pursuant to paragraph 2.1 of subsection 127(1) of the Act; (iii) the request for a ban on any of the Respondents becoming or acting as a registrant, investment fund manager or promoter, pursuant to paragraph 8.5 of subsection 127(1) of the Act; and (iv) the request for a ban on Twerdun becoming or acting as an officer or director of a registrant or investment fund manager, pursuant to paragraphs 8.2 and 8.4 of subsection 127(1) of the Act (collectively, the "**New Sanctions Requests**") (see paragraphs 15-16 above).

[50] In response, Staff submits that paragraph (c) of the Notice of Hearing, which provides that, "pursuant to clause 8 of subsection 127(1), Twerdun be prohibited from becoming or acting as a director or officer of any issuer, registrant, investment fund manager or promoter", deals broadly with the types of prohibitions provided in paragraphs 8.2, 8.4 and 8.5 of subsection 127(1) of the Act. Staff further submits that paragraph (i) of the Notice of Hearing, which requests "such other order as the Commission may consider appropriate", allows the Commission to make orders that are not expressly set out in the Notice of Hearing. Relying on the Supreme Court of Canada's decision in *Asbestos*, *supra*, Staff argues that the Commission has the authority and broad discretion to make such orders if the Commission is of the view that they are in the public interest to prevent and protect the capital markets.

[51] In Staff's Further Written Submissions, Staff submits that paragraph (i) of the Notice of Hearing, which states that the Commission may make "such other order as the Commission may consider appropriate", allows the Commission to impose market prohibition orders that were not specifically requested in the Notice of Hearing where there is no unfairness and where the coherence of any final orders made by the Commission will be enhanced and the public interest better protected which, in Staff's submission, is the case here.

[52] Staff also submits that *Re Rex Diamond Mining Corp.* (2009), 32 O.S.C.B. 6467 ("***Rex Diamond***") is distinguishable. In *Rex Diamond*, the Commission held that it would be unfair to impose an administrative penalty on the respondents because Staff did not request such a remedy in the Notice of Hearing and did not give notice that it would do so until five days before the sanctions and costs hearing, well after the merits decision had been issued (*Rex Diamond*, *supra*, at paragraphs 23-24). Staff submits that in this case, unlike in *Rex Diamond*, the new sanctions requested in Staff's written submissions on sanctions and costs are substantively similar to the sanctions requested in the Notice of Hearing. Staff submits that the Respondents would not have

approached the Merits Hearing any differently had the New Sanctions Requests been included in the Notice of Hearing.

[53] Staff further submits, citing *Re Tindall* (2000), 23 O.S.C.B. 6889, at page 15, and *Re MRS Sciences Inc.* (2011), 34 O.S.C.B. 12288 ("***Re MRS***"), at paragraph 44, that the requirements of procedural fairness are satisfied if the respondent has the opportunity to lead evidence and make submissions concerning the proposed order at the sanctions and costs hearing. In Staff's submission, Twerdun had an opportunity to lead evidence and make submissions concerning the New Sanctions Requests at the Sanctions and Costs Hearing.

(ii) Twerdun's Submissions

[54] Twerdun takes issue with Staff's proposed trading bans and submits that he would not be causing harm to third parties if he were trading securities for his own account.

(iii) The Companies' Position

[55] As set out in paragraph 28 above, the Companies, represented by the Trustee, take no position with respect to the requested sanctions.

(iv) Analysis and Conclusion

The New Sanctions Requests

[56] Staff's New Sanctions Requests were set out in Staff's written submissions, which were served on the Respondents ten days before the Sanctions and Costs Hearing, well after the conclusion of the Merits Hearing. I do not accept Staff's submission that the New Sanctions Requests are substantively similar to the sanctions requests set out in the Notice of Hearing, which were made under different paragraphs of subsection 127(1). I am not prepared to assume that the New Sanctions Requests would not have affected the Respondents' approach to the Merits Hearing. I agree with the Commission's ruling in *Rex Diamond*, *supra*, that Staff should have amended the Notice of Hearing to include the New Sanctions Requests prior to the Merits Hearing (see *Rex Diamond*, *supra*, at paragraph 24). Had Staff requested the termination of registrations and the acquisition and registrant bans in the Notice of Hearing, my findings in the Merits Decision would have justified the imposition of such sanctions. However, in light of Staff's failure to seek these sanctions in the Notice of Hearing, I find that it would be unfair to impose them on the Respondents. I should also note that I am not persuaded by Staff's submission that paragraph (i) of the Notice of Hearing stating that the Commission may make "such other order as the Commission may consider appropriate" allows the Commission to impose market prohibition orders that were not specifically requested in the Notice of Hearing.

Trading and Other Market Prohibitions

[57] In determining the appropriate sanctions to be imposed, I have considered the factors set out in paragraphs 36-46 above. More specifically, the Respondents raised $50.4 million from the sale of Debentures to over 600 investors using the OMs and Promotional Materials that included material misrepresentations resulting, in part, from their failure to fulfill the commitments and undertakings provided to investors as an inducement to invest. In addition, in connection with the sale of the Debentures, the Respondents purported to rely on the accredited investor exemption

which was not available to them. FCI and Twerdun failed in all material respects to meet the standards required of a registrant entrusted to manage investors' funds. Accordingly, it is appropriate to order significant trading and exemption bans, both as a specific and general deterrent.

[58] I find, however, that it would not be appropriate to order permanent bans in all circumstances as requested by Staff. While the misconduct of the Respondents as described above was serious, there was no finding in the Merits Decision that the investment scheme of the Companies was anything but legitimate at the outset. However, it became almost immediately evident that the conduct of the Respondents demonstrated a shocking level of negligence and incompetence which led to my findings in the Merits Decision that the statements made in the OMs and Promotional Materials were materially untrue or misleading. In the foregoing respect, the misconduct in this matter is, in my view, distinguishable from the misconduct in cases that were referred to me by Staff, including *Re Norshield Asset Management (Canada) Ltd*. (2010), 33 O.S.C.B. 7171 and *Re White* (2010), 33 O.S.C.B. 8893.

[59] In light of the foregoing, I find that it is in the public interest to order that the Respondents cease trading securities, and that any exemptions in Ontario securities law do not apply to the Respondents, for a period of 10 years. Having considered the nature of Twerdun's misconduct, as described in paragraph 58 above, I also find it appropriate to grant a carve-out, which will allow Twerdun to trade securities through a registrant solely for the account of his RRSP, provided that he has paid in full the administrative penalty and disgorgement order set out below.

[60] As the sole director and officer of the Companies, Twerdun was found in the Merits Decision to have authorized, permitted or acquiesced in the failure by the Companies to comply with Ontario securities law. In fact, Twerdun appears from the evidence at the Merits Hearing to have managed the Companies almost singlehandedly and, accordingly, it is necessary to ensure that he is not placed in a position of control or trust with respect to any other issuer. As a result, I am of the view that it is appropriate to prohibit Twerdun from becoming or acting as a director or officer of an issuer, permanently.

(b) Reprimand

[61] Although Twerdun continues to blame others for the losses suffered by the investors, I found in the Merits Decision that investors lost approximately $20 million as a result of the Respondents' non-compliance with Ontario securities law, and that Twerdun, who was the sole director and officer of the Companies, authorized, permitted or acquiesced in the Companies' non-compliance with Ontario securities law. I also found that Twerdun failed to ensure that the OMs were filed with the Commission in accordance with Rule 45-501, failed to ensure that the statements made in the OMs and Promotional Materials were not materially untrue or misleading, although he knew and in the exercise of reasonable diligence would have known that the statements repeatedly made to investors were untrue in a material respect at the time and in the circumstances made, and authorized FFI's breach of the Temporary Order by directing the redemption of securities issued by FFI (Merits Decision at paragraphs 274, 288 and 295). I also found that Twerdun and FFI failed to ensure that investors were entitled to rely on the accredited investor exemption, contrary to the public interest (Merits Decision at paragraph 315). Under the

circumstances, I find it is appropriate to reprimand Twerdun pursuant to paragraph 6 of subsection 127(1) of the Act.

(c) Disgorgement

(i) Staff's Submissions

[62] Staff requests that Twerdun disgorge to the Commission an amount of at least $420,000 on the basis that he obtained this amount as a result of his non-compliance with Ontario securities law. According to Staff, there is a strong argument that the disgorgement could be calculated based on the total amount of investor losses of approximately $20 million that resulted from the Respondents' non-compliance with the Act. However, Staff does not rely on that argument in the circumstances and, instead, relies on the Butcher Affidavit as the evidentiary basis for a finding as to the amount that Twerdun obtained as a result of his non-compliance with Ontario securities law.

[63] The Butcher Affidavit sets out payments over $1,000 from the bank accounts of the Companies (the "**Companies' Accounts**") to Twerdun and to Twerdun's wife, young children, parents and a numbered company controlled by Twerdun (2037800 Ontario Inc.) (collectively, the "**Related Parties**").

[64] In Staff's submission, the Butcher Affidavit shows that payments were made from the Companies' Accounts to Twerdun and the Related Parties, for largely unexplained reasons, in the amount of approximately $1.6 million. However, Staff does not seek disgorgement of that amount. Rather, Staff submits that Twerdun should be ordered to disgorge $420,000, which is comprised of:

(a) Bonus payments to Twerdun in the amount of $215,000;

(b) Payments to Twerdun's children, who were under the age of 10 at the time of the payments, in the aggregate amount of $55,000; and

(c) A payment to Twerdun's wife in the amount of $150,000 to repay her personal investment in one of the Borrowers, Express Commercial Services Inc. ("**ECS**"), which took place following the issuance of the Temporary Order and at a time when Twerdun knew that ECS was insolvent.

[65] Relying on the Butcher Affidavit, Staff submits that Twerdun obtained the foregoing amounts, totaling $420,000, as a result of his non-compliance with Ontario securities law, and that this amount should be disgorged based on the questionable nature of the payments and the misconduct at issue.

[66] Staff acknowledges that it would be difficult to determine precisely how much money Twerdun and the Related Parties received from the Companies because, as stated in the Butcher Affidavit, the Trustee did not obtain complete records for the Companies. In particular, while the Butcher Affidavit provides that the records of payments from the Companies' bank accounts are accurate to the best of the Trustee's knowledge, the records with respect to deposits to the Companies' bank accounts are incomplete.

[67] However, Staff submits that the Butcher Affidavit shows that Twerdun and the Related Parties profited from their participation in the Companies through the repayment of shareholder loans (with interest) and the payment of salary, bonuses and unexplained amounts. Staff submits that Twerdun and the Related Parties fared far better than most of the Debenture holders.

(ii) Twerdun's Submissions

[68] Twerdun submits that the Butcher Affidavit only shows the funds paid by the Companies to him and the Related Parties, and not the funds paid by him and the Related Parties to the Companies. Twerdun also submits that he and the Related Parties never received some of the payments that were alleged by Staff to have been made by the Companies to them.

[69] Notwithstanding Twerdun's submissions, Twerdun provided no evidence whatsoever with respect to the amounts that he alleges were invested in the Companies by him and the Related Parties or any other party.

(iii) Analysis and Conclusion

Authority for Making a Disgorgement Order

[70] Subsection 127(1)10 of the Act provides that a person or company that has not complied with Ontario securities law can be ordered to disgorge to the Commission "any amounts obtained" as a result of the non-compliance. The purpose of a disgorgement order is to ensure that a respondent does not benefit from his or her non-compliance with Ontario securities law and to deter the respondent and others from similar misconduct (*Sabourin Sanctions and Costs*, *supra*, at paragraph 65).

[71] When determining the appropriate amount of a disgorgement order, the Commission is guided by the non-exhaustive list of factors set out in *Re Limelight Entertainment Inc.* (2008), 31 O.S.C.B. 12030 ("***Limelight Sanctions and Costs***") at paragraph 52. The Commission noted in that decision that Staff has the onus to prove on a balance of probabilities the amount obtained by a respondent as a result of his or her non-compliance with the Act.

Admissibility of the Butcher Affidavit at the Sanctions and Costs Hearing

Staff

[72] Staff's request for a disgorgement order is supported by evidence (the Butcher Affidavit) which was provided shortly before the Sanctions and Costs Hearing and was not the subject of evidence at the Merits Hearing or addressed in the Merits Decision. At the Sanctions and Costs Hearing on April 18, 2013, I expressed my concern that this substantively new evidence was only presented by way of affidavit at the Sanctions and Cost Hearing, and should have formed part of the evidence at the Merits Hearing. At the conclusion of the hearing that day, I invited Staff and Twerdun to file further written submissions on the admissibility of and weight to be given to the Butcher Affidavit.

[73] In its Further Written Submissions, dated May 10, 2013, Staff submitted that at a sanctions and costs hearing, it is appropriate for Staff to introduce evidence specifically related

to sanctions issues, including the amount obtained by a respondent as a result of non-compliance with the Act. Staff relies on *Re MRS*, *supra*, in which the Commission stated, at paragraph 44:

> We agree with Staff that separate and distinct issues arise with respect to the appropriate sanctions to be applied. In our view, as long as both parties are provided with the opportunity to lead evidence and make submissions at the sanctions hearing, the requirement of the maxim of *audi alteram partem* will be satisfied. A corollary to this is that a sanctions Panel should not reopen issues that have been disposed of by the merits Panel that heard the relevant evidence as to the merits of Staff's allegations.

[74] Staff also submits that it is not uncommon for Staff and respondents to call evidence at a sanctions hearing that was not part of the evidence at the hearing on the merits, and Staff provided a number of examples of this practice.

[75] Staff submits that while the Butcher Affidavit was served on Twerdun on April 8, 2013, 10 days prior to the Sanctions and Costs Hearing, and not 20 days before, as required by the Commission's Rule 4.3(1), there was no prejudice to Twerdun, whose counsel at the time was provided with all but one of the exhibits to the Butcher Affidavit by July 2011, months before the start of the Merits Hearing, and in any event, any prejudice was cured by the adjournment of the Sanctions and Costs Hearing to May 22, 2013.

[76] Finally, Staff notes that, at the Sanctions and Costs Hearing on April 18, 2013, Twerdun declined the opportunity to require Butcher's attendance for cross-examination. When the hearing resumed on May 22, 2013, Twerdun did not request an opportunity to cross-examine Butcher on his affidavit, and Staff provided a copy of its email to Twerdun, dated May 10, 2013, to which it had not received a response, asking Twerdun to advise, at his first opportunity, whether he intended to do so.

[77] In summary, Staff submits that the Butcher Affidavit was disclosed to Twerdun, who was given and declined an opportunity to cross-examine Butcher, that admitting the Butcher Affidavit results in no unfairness to Twerdun and that excluding it would be unfair to Staff. Staff submits that the Butcher Affidavit is admissible and should be admitted as evidence at the Sanctions and Costs Hearing.

Twerdun

[78] At the Sanctions and Costs Hearing on April 18, 2013, Twerdun stated that when he was served with the Butcher Affidavit, he was not asked to respond to it and understood only that he was required to attend at the Commission. Twerdun did not address the admissibility of the Butcher Affidavit in his oral argument on April 18, 2013, his written submissions dated May 16, 2013 or his oral argument on May 22, 2013, but challenged the evidence provided in the Butcher Affidavit, submitting that Butcher did not consider funds flowing into the Companies' Accounts, but only funds flowing out of the Companies' Accounts. For example, Twerdun stated as follows:

> Even with Mr. Paatz's testimony during the hearing with ECS, he admitted that there were bridging loans that came into place right from the very beginning in

dealing with ECS, that we had it incorporated due to timing of funding coming in to FactorCorp at that time.

(Hearing transcript, May 22, 2013, page 19, lines 19-25)

Analysis and Conclusion on the Admissibility of the Butcher Affidavit

[79] Although Staff identifies a number of cases in which Staff or respondents introduced evidence at a sanctions and costs hearing, the evidence admitted in these cases related to Staff's submissions on the impact of the respondents' conduct on specific investors,[2] a respondent's prior criminal convictions or other aggravating factors[3] or a respondent's personal and financial circumstances or mitigating circumstances[4]. In two of the cases mentioned, the Commission refused to consider new evidence relating to the issues addressed in the Merits Decision[5]. The cases referenced by Staff are consistent with the Commission's general practice of limiting the evidence admitted at a sanctions and costs hearing to evidence of aggravating and mitigating circumstances, the respondent's prior criminal convictions or securities violations, and the respondent's personal and financial circumstances.

[80] In *Re MRS*, in the passage relied on by Staff, the Commission specifically cautions that "a sanctions panel should not reopen issues that have been disposed of by the merits panel that heard the relevant evidence as to the merits of Staff's allegations" (paragraph 44). The risk of allowing Staff or a respondent to re-open, at a sanctions and costs hearing, the issues that were addressed in the merits decision is obvious; such a practice would encourage case-splitting, undermine the certainty and finality of the Commission's merits decisions and result in an inefficient use of the Commission's resources.

[81] In this case, Staff relies on the Butcher Affidavit for a finding that the payment of $420,000 to Twerdun and the Related Parties was "for largely unexplained reasons". Staff also submits that Twerdun should not have received $215,000 in bonus payments "given his abject failure to adhere to even minimal standards of conduct", that the payments totaling $55,000 to Twerdun's children "cannot be justified given the ages of the children", and that a payment of $150,000 to Twerdun's wife in repayment of her personal investment in ECS was "particularly egregious" because it was made mere days after the Temporary Order was issued, at a time when Twerdun knew ECS was insolvent and not repaying the Companies according to its obligations.

[82] In my view, Staff's submission that payments made to Twerdun and the Related Parties were improper should have been made at the Merits Hearing, at which time Twerdun would have had an opportunity to respond to the Butcher Affidavit in the context of Staff's evidence as a

[2] *Re Norshield* (2010), 33 O.S.C.B. 7171, at paragraphs 5, 17, and 92-93

[3] *Re Momentas* (2007), 30 O.S.C.B. 6475, at paragraphs 9-10 and 15-16; *Re Goldbridge Financial Inc.* (2011), 34 O.S.C.B. 11113, at paragraph 7; and *Re Shallow Oil* (2012), 36 O.S.C.B. 191, at paragraphs 10, 21, 33 and 35

[4] *Re Sabourin* (2010), 33 O.S.C.B. 5299, at paragraph 27; *Re Borealis* (2011), 34 O.S.C.B. 5261, at paragraphs 5, 26 and 40; *Re Axcess Automation LLC* (2013), 36 O.S.C.B. 2919, at paragraphs 6 and 27; and *Re Simply Wealth* (2013), 36 O.S.C.B. 5099, at paragraphs 13-18

[5] In *Re First Global Ventures S.A.* (2008), 31 O.S.C.B. 10869, at paragraphs 29-31, the Commission refused to consider new evidence offered by Staff that a respondent continued to breach a cease trade order after the release of the Merits Decision. In *Re White* (2010), 33 O.S.C.B. 8893, at paragraphs 9-10, the Commission refused to admit into evidence a letter from a respondent that was provided to Staff that post-dated the decision on the merits and attempted to re-open the case.

whole. I am also not persuaded that, by providing access in July 2011 to Twerdun's counsel at the time, of all but one of the exhibits to the Butcher Affidavit, Staff had made effective disclosure to Twerdun who represented himself at the Merits Hearing and at the Sanctions and Cost Hearing. Accordingly, I have given no consideration to Staff's submissions with respect to the propriety of the payments made to Twerdun and the Related Parties, which did not form part of Staff's Amended Statement of Allegations or its case at the Merits Hearing. I do, however, find that the Butcher Affidavit is admissible with respect to amounts obtained by Twerdun as a result of his non-compliance with Ontario securities law, as found in the Merits Decision. In this limited respect only, I find that any prejudice to Twerdun resulting from Staff's late disclosure of the Butcher Affidavit was remedied by the adjournment of the Sanctions and Costs Hearing on April 18, 2013 and its resumption on May 22, 2013, and by Twerdun's being given an opportunity, which he declined, to cross-examine Butcher on his affidavit, thereby satisfying the principles of fairness.

Amounts obtained as a result of non-compliance with Ontario securities law

[83] Twerdun provided no evidence whatsoever with respect to the amounts that he claims he and the Related Parties invested in the Companies. Staff acknowledges that the Butcher Affidavit only shows the funds paid by the Companies to Twerdun and the Related Parties and not the funds paid by Twerdun and the Related Parties to the Companies. Although I accept that the Butcher Affidavit provides an incomplete picture of the Companies' Accounts, I am persuaded, based on the Butcher Affidavit, that Twerdun and the Related Parties obtained at least $420,000 as a result of Twerdun's non-compliance with the Act, as determined in the Merits Decision. I find that the amount of $420,000 proposed by Staff to be disgorged is clearly at the low end of the amount that could be ordered and is appropriate in the circumstances. The amount paid to the Commission in satisfaction of the disgorgement order will be designated for allocation or for use by the Commission pursuant to subsections 3.4(2)(b)(i) or (ii) of the Act.

(d) Administrative Penalty

(i) Staff's Submissions

[84] Staff requests an administrative penalty against Twerdun in the range of $500,000 to $750,000. Staff submits that an amount within this range sends the message that repeated breaches of the Act will not be tolerated in Ontario's capital markets.

(ii) Twerdun's Submissions

[85] Twerdun submits that the administrative penalty requested by Staff is too high for the reasons described in paragraphs 22-26 above.

(iii) Analysis and Conclusion

[86] I find that it is appropriate to impose a significant administrative penalty against Twerdun given his misconduct as described in these reasons. In particular, he obtained significant amounts from investors through the Companies on the basis of his representations regarding FactorCorp's lending standards and practices, which proved to be materially untrue or misleading. Twerdun also caused harm to investors by failing to ensure that they were accredited prior to permitting

them to purchase Debentures, failed to comply with certain filing requirements under the Act and breached an order of the Commission.

[87] These infractions are particularly significant in light of Twerdun's experience as a registrant for more than 12 years. In my view, a significant administrative penalty is necessary to deter Twerdun and others in a similar position from engaging in similar misconduct.

[88] In determining the appropriate administrative penalty, I have considered the range of administrative penalties that have been ordered by the Commission in prior cases involving similar misconduct. I find that the upper end of the range proposed by Staff to be within the range of penalties ordered by the Commission against respondents involved in similar misconduct and proportionate to the circumstances and Twerdun's conduct.

[89] For the reasons set out above, I will order that Twerdun pay an administrative penalty in the amount of $750,000. The amount paid to the Commission in satisfaction of the administrative penalty will be designated for allocation or for use by the Commission pursuant to subsections 3.4(2)(b)(i) or (ii) of the Act.

B. Costs

1. Staff's Submissions

[90] Staff requests that Twerdun pay costs in the amount of $263,645.37, representing a portion of the costs and disbursements Staff incurred in connection with the investigation and the Merits Hearing. Staff filed the Ho Affidavit and a bill of costs in support of its claim. The amount of $263,645.37 is comprised of (i) $205,497.50, representing half of the time spent by two members of Staff, namely, the senior litigation counsel and the senior investigation counsel, for the investigation and the Merits Hearing, and does not include time spent by other Staff members in connection with the Merits Hearing or time spent by any Staff member in relation to the Sanctions and Costs Hearing; and (ii) $58,147.87 of disbursements, $50,000 of which represents fees paid to the expert, Lili Shain ("**Shain**").

2. Twerdun's Submissions

[91] Twerdun submits that the costs and disbursements sought by Staff are excessive including, in particular, the fees paid to Shain. He submits that Shain did not do her job, which was to review the Companies' lending process, since she admitted that she did not review the sublenders' accounts or sublenders' agreements and failed to review the management, history and background of the sublenders "…so on that account I think the amounts she charged were excessive basically because she did not perform the task at hand" (Hearing transcript, May 22, 2013, page 20, lines 3-5). Twerdun submitted that Shain "put in maybe 10 hours of work" and he submitted, as he had at the Merits Hearing, that she is not "an expert in our field, because you can't hold us to a standard of a chartered 'A' bank" (Hearing transcript, April 18, 2013, page 63, lines 8-11).

3. Analysis and Conclusion

[92] Pursuant to section 127.1 of the Act, the Commission has authority to order a person or company to pay the costs of an investigation and hearing if the Commission is satisfied that the

person or company has not complied with Ontario securities or has acted contrary to the public interest Factors to be considered by the Commission when awarding costs are set out in Rule 18.2 of the Commission's *Rules of Procedure* (2012), 35 O.S.C.B. 10071.

[93] I find the following factors to be relevant to the determination of costs in this matter:

(a) At the commencement of the Merits Hearing, Twerdun made an adjournment request on the basis that he had forgotten about the hearing dates and was out of the country for business reasons, a basis that I considered inadequate as set out in paragraph 31 of the Merits Decision. An adjournment was nonetheless granted to provide Twerdun with an opportunity to appear, which caused a delay of three days.

(b) Following the commencement of the Merits Hearing, Staff requested leave to amend the Statement of Allegations and this request raised issues of fairness and caused further delay.

(c) The Merits Hearing, which took place over a period of nine days, raised complex issues and required that Staff retain an expert.

(d) Following the Merits Hearing, I found that Staff had proved contraventions of subsections 122(1)(b), 122(1)(c) and 126.2(1) of the Act, Twerdun's liability as a director and officer under subsection 122(3) and section 129.2 of the Act and conduct contrary to the public interest.

(e) However, Staff failed to prove its allegations relating to subsection 122(1)(a) of the Act as a result of Staff's failure to provide any submissions on the applicability of this provision to this case.

[94] Despite Twerdun's submissions regarding Shain's credentials set out in paragraph 91 above, I qualified her as an expert in commercial lending at the Merits Hearing on the basis that she had acquired specialized knowledge through her extensive experience as a senior lending officer for a major Canadian bank, and I accepted and relied on her evidence in making my determination on the merits. Accordingly, I find it appropriate to include some portion of her fees in my costs order. However, the $400 hourly rate charged by Shain appears to me to be excessive in the absence of evidence from Staff regarding the hourly rate charged by experts with similar levels of experience and expertise, and considering that Staff requests costs for the fees of its Senior Litigation Counsel and Senior Investigation Counsel at $205 and $185, respectively. In my view, it would be reasonable in the circumstances to order payment of Shain's fees in the amount of $37,500, based on an hourly rate of $300 per hour for the 125 hours she spent preparing the expert report and attending the Merits Hearing.

[95] Having considered the foregoing, and in particular, the complexity of the matter and the conduct of both Twerdun and Staff during the hearing, I find that it is appropriate to award costs in the amount of $251,145.37, comprised of half the costs for the time spent by the two Staff members in this matter in the amount of $205,497.50 and disbursements in the amount of $45,647.87.

V. CONCLUSION

[96] For the reasons set out above, I conclude that it is in the public interest to make the orders set out below. In my view, the sanctions imposed will deter the Respondents and other like-minded individuals from engaging in similar misconduct in the capital markets in the future and the sanctions are proportionate to the circumstances and conduct of each Respondent.

[97] I will issue a separate order giving effect to my decision on sanctions and costs (the "**Sanctions and Costs Order**") as follows:

1. Pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities by FCI, FFI and Twerdun shall cease for a period of 10 years, which will commence on the date of the Sanctions and Costs Order, except that Twerdun is permitted to trade securities through a registrant for the account of his Registered Retirement Savings Plan, as defined in the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.), as amended, provided that the payments set out in paragraphs 5 and 6 below have been paid in full. If any amount remains unpaid, FCI, FFI and Twerdun shall cease trading in securities until the expiry of the aforementioned period of 10 years, without exception.

2. Pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to FCI, FFI and Twerdun for a period of 10 years, which will commence on the date of the Sanctions and Costs Order, except to the extent such exemption is necessary for trades permitted pursuant to paragraph 1 above.

3. Pursuant to paragraph 6 of subsection 127(1) of the Act, Twerdun is reprimanded.

4. Pursuant to paragraph 8 of subsection 127(1) of the Act, Twerdun is prohibited from becoming or acting as a director or officer of any issuer permanently.

5. Pursuant to paragraph 10 of subsection 127(1) of the Act, Twerdun shall disgorge to the Commission $420,000 obtained as a result of his non-compliance with Ontario securities law, which shall be designated for allocation or for use by the Commission in accordance with subsections 3.4(2)(b)(i) or (ii) of the Act.

6. Pursuant to paragraph 9 of subsection 127(1) of the Act, Twerdun shall pay an administrative penalty in the amount of $750,000, which shall be designated for allocation or for use by the Commission in accordance with subsections 3.4(2)(b)(i) or (ii) of the Act.

7. Pursuant to section 127.1 of the Act, Twerdun shall pay costs incurred by the Commission in the amount of $251,145.37.

DATED at Toronto on this 30th day of September, 2013.

"Christopher Portner"

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Christopher Portner