BRITISH COLUMBIA SECURITIES COMMISSION
Securities Act, RSBC 1996, c. 418

Citation: Re EagleMark, 2017 BCSECCOM 42 Date: 20170214

**EagleMark Ventures, LLC, Falcon Holdings, LLC,
Richard Lian (also known as Richard Terry Ruuska) and Enna M. Keller**

Panel	George C. Glover, Jr.	Commissioner
	Gordon Holloway	Commissioner
	Don Rowlatt	Commissioner
Hearing date	January 6, 2017	
Submissions Completed	January 6, 2017	
Decision date	February 14, 2017	
Appearances		
Olubode Fagbamiye	For the Executive Director	
Enna M. Keller	For Enna M. Keller	
Pamela Havird	For Richard Lian, EagleMark Ventures, LLC and Falcon Holdings, LLC	

Decision

I. Introduction

[1] This is the sanctions portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418. The Findings of this panel on liability were made on August 22, 2016 (2016 BCSECCOM 288) and are part of this decision.

[2] We found:

a) the respondents, Lian and Keller, perpetrated fraud contrary to section 57(b) of the Act;
b) each of the respondents contravened a cease trade order of this Commission dated October 1, 2009 (CTO);
c) each of the respondents contravened a temporary order of this Commission dated December 9, 2011 (TO); and
d) Keller contravened section 34 of the Act by trading in securities without registration and without any available exemptions.

II. Positions of the Parties

Executive Director

[3] The executive director seeks the following orders against Lian:

a) permanent market prohibition orders under sections 161(1)(b)(ii), 161(1)(c) and 161(d)(i through v);
b) under section 161(1)(g), that Lian pay to the Commission US$2.3 million on a joint and several basis with EagleMark and US$133,000 on a joint and several basis with Falcon; and
c) under section 162, that Lian pay to the Commission an administrative penalty of US$2.4 million.

[4] The executive director seeks the following orders against EagleMark:

a) permanent market prohibition orders under sections 161(1)(b)(ii), 161(1)(c) and 161(d)(i through v);
b) under section 161(1)(g), that EagleMark pay to the Commission US$2.3 million on a joint and several basis with Lian.

[5] The executive director seeks the following orders against Falcon:

a) permanent market prohibition orders under sections 161(1)(b)(ii), 161(1)(c) and 161(d)(i through v);
b) under section 161(1)(g), that Falcon pay to the Commission US$133,000 on a joint and several basis with Lian.

[6] The executive director seeks the following orders against Keller:

a) permanent market prohibition orders under sections 161(1)(b)(ii), 161(1)(c) and 161(d)(i through v); and
b) under section 162, that Keller pay to the Commission an administrative penalty of $250,000.

[7] We note that the executive director is not seeking administrative penalties against EagleMark or Falcon on the basis that they are mere alter egos of Lian.

[8] We also note that the executive director is not seeking a section 161(1)(g) order against Keller as the amount she received from the funds invested by the friends and family program (FFP) participants, as described in paragraphs 20 to 28 of the Findings, was less than US$50,000. Although there was no evidence regarding the purpose of those payments to Keller, the executive director says they "may have been offset by the amount of time and resources she put into resolving Lexicon's issues."

Respondents

[9] The respondents submitted joint written submissions on sanctions. Keller attended the sanctions hearing by telephone and made oral submissions. Counsel for the other respondents also attended the sanctions hearing by telephone and made oral submissions.

[10] The written submissions of the respondents failed to address appropriate sanctions but rather focused on their position that the Findings on liability were in error. No specific sanctions were suggested nor did the respondents' written submissions specifically submit arguments to diminish the sanctions sought by the executive director.

[11] The oral submissions of counsel for the respondents other than Keller were adopted by Keller in her oral submissions, although Keller added brief oral submissions on her own behalf.

[12] The submissions of the respondents focused on the argument that Lian and the corporate respondents believed that the FFP participants were making loans to them and that loans are not "securities" under Nevada law. Thus, these respondents were unaware that the securities laws of British Columbia applied to the FFP program. The respondents also submitted that the Arizona court in Lexicon's bankruptcy proceedings was aware of Lian's role in the bankruptcy proceedings, certain one-time directors of Lexicon supported Lian, there were few complaints by Lexicon shareholders and those who did complain had their own agendas. The respondents acknowledged that securities regulations in British Columbia had been breached but denied that the respondents had the specific intent to commit fraud.

[13] The respondents also sought to rely on the fact that they filed documentation with this Commission in January 2013 to exempt a private placement of Lexicon securities from the restrictions of the CTO. They say that the Commission did not respond in any way to that filing.

[14] The respondents submitted that it was not a certainty that all investors' funds were lost.

[15] The respondents suggested that a more appropriate remedy for investors, rather than sanctions under sections 161(1) and 162 would be to have documentation prepared and filed for approval by the relevant securities regulators that would allow investors to choose between maintaining their positions as lenders with the right to be repaid in Lexicon shares and warrants or have their invested funds returned. While there is nothing to prevent such a filing and application to our Commission and other appropriate securities regulatory bodies, it is not within the scope of the panel's authority under sections 161(1) and 162 to issue an order of the kind suggested by the respondents. Furthermore, the misconduct of the respondents as set out in our Findings requires appropriate sanctions under sections 161(1) and 162 regardless of any future filings on behalf of Lexicon.

[16] Keller, in her oral submissions, continued, as she did in the liability hearing, to try to blame Commission staff for misleading her in their investigation as to how her testimony and document production could be used against her. She continued to assert that she had done nothing wrong and only acted in the best interests of Lexicon and its shareholders. Keller again asserted that there were no investments- only private loans- and that a significant number of investors had delivered statements of support for Lian and her. We previously considered these submissions among others in the liability portion of these proceedings. For the purposes of the determination of sanctions, these submissions are not relevant.

[17] At the oral hearing, the panel made it clear to all parties that the panel is not bound by the submissions of any party and the panel is the sole determiner of the appropriate sanctions.

III. Analysis

A. Factors

[18] Orders under sections 161(1) and 162 of the Act are protective and preventative, intended to be exercised to prevent future harm. See *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37.

[19] In *Re Eron Mortgage Corporation*, [2000] 7 BCSC Weekly Summary 22, the Commission identified factors relevant to sanction as follows (at page 24):

> In making orders under sections 161 and 162 of the Act, the Commission must consider what is in the public interest in the context of its mandate to regulate trading in securities. The circumstances of each case are different, so it is not possible to produce an exhaustive list of all of the factors that the Commission considers in making orders under sections 161 and 162, but the following are usually relevant:
>
> - the seriousness of respondent's conduct,
> - the harm suffered by investors as a result of the respondent's conduct,
> - the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct,
> - the extent to which the respondent was enriched,
> - factors that mitigate the respondent's conduct,
> - the respondent's past conduct,
> - the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia,
> - the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers,
> - the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,
> - the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
> - orders made by the Commission in similar circumstances in the past.

B. Application of Factors

Seriousness of the Conduct

[20] This Commission has repeatedly found that fraud is the most serious misconduct under the Act. As noted in *Manna Trading Corp Ltd. (Re)*, 2009 BCSECCOM 595, "nothing strikes more viciously at the integrity of our capital markets than fraud". Lian and Keller have been found liable for fraud under section 57(b) of the Act.

[21] The fraud in this case involved a scheme operated in tandem by Lian and Keller through which some 315 persons, including approximately 140 residents of British Columbia, sent approximately US$3.2 million to Lian or the corporate respondents. The investors thought their funds would be used by Lian to assist Lexicon in resolving various impediments to developing its business and relieving itself of various barriers to conducting that business and resuming its status as a reporting issuer in good standing. Of the US$3.2 million, approximately US$180,000 was repaid to investors who demanded return of their funds and approximately US$600,000 was outlaid by Lian to pay liabilities, expenses and debts of Lexicon. The approximately US$2.4 million of investors' remaining funds were fraudulently expended by Lian for matters unrelated to Lexicon.

[22] Lian also authored numerous false and misleading information emails which were forwarded by Keller to FFP participants and prospective FFP participants. Keller actively facilitated the fraud in multiple ways including informing FFP participants and prospective FFP participants of the opportunity to invest in Lexicon shares and warrants through the scheme, providing investors with false and misleading updates on progress in rehabilitating Lexicon, recording the purported entitlements of the investors to Lexicon shares and warrants and failing to inform investors of the TO.

[23] Contraventions of the CTO and TO by each of the respondents were also inherently serious. CTOs and TOs are designed to protect existing and prospective investors from further harm from actual or alleged breaches of our securities regulation. All respondents blatantly continued to solicit and accept investments in their scheme long after the CTO was issued and raised at least an additional US$400,000 after the TO was issued.

[24] Keller's breach of section 34 of the Act by her failure to be registered for trading in securities over a prolonged period was also inherently serious. Section 34 requires that those who trade in securities are properly registered to do so. This requirement ensures that those who purchase securities do so from or through persons who fulfill certain obligations (including knowing their clients' circumstances and investment objectives and ensuring that any clients' investments are suitable for them) in connection with those transactions. This section is one of the Act's foundational requirements for protecting investors and preserving the integrity of the capital markets.

[25] Securities legislation provides exemptions from section 34 if the issuer and those who trade in securities meet certain specified requirements. These requirements are designed to protect investors and markets, so persons who intend to rely on the exemptions must

ensure that they are met.

[26] It is clear that Keller was generally aware of the requirements with respect to obligations relating to trading in securities under the Act. She was a long-time senior officer of a reporting issuer and, during the liability phase of the hearing, made frequent references to securities regulations applicable to reporting issuers and their officers. She clearly knew that both the CTO and the TO imposed restrictions on the trading in Lexicon securities that needed to be removed before trading could occur. Lian was also aware of the CTO, as one of his expressed goals was to restore Lexicon to the point when the CTO could be lifted. The FFP scheme violated the CTO. Furthermore, the TO restricted Lian and Keller from all trading in all securities. Their continued trading in securities to FFP investors after the TO was in clear violation of the TO.

[27] Even if Lian and Keller were unaware of the application of the securities regulations of the jurisdictions where the investors resided, this is not an excuse for non-compliance. Experienced executives such as Lian and Keller should have been aware of investor protection regulation and the necessity to comply with it. Further, it is not credible that Lian and Keller were unaware of the restrictions against all trading of securities by them under the TO. It is also not credible that Lian and Keller believed that Lian could be unrestricted in his use of investors' funds and that the arrangements were private loan transactions when documentation of any terms of such loans was non-existent.

Harm to investors

[28] The harm to investors in this case is significant.

[29] Of the US$3.2 million raised in the FFP scheme, only approximately US$600,000 was used for the purported purpose of assisting in the rehabilitation of Lexicon and approximately US$180,000 was repaid to a few FFP investors who demanded the return of their funds. The balance of the funds was dissipated by Lian on goods and services unconnected to Lexicon. All FFP investors' funds are gone, save for the US$180,000 which was returned. As Lian and Keller took the position that the investors' funds were loans repayable in Lexicon shares and warrants or in cash, they submitted that the FFP participants might ultimately receive return of some or all of their funds. There is no evidence to support this possibility. Several investor witnesses testified to their sense of dismay and betrayal and the impact of their losses on them and their family and friends who also suffered losses.

Enrichment

[30] The enrichment of Lian and Keller resulting from their misconduct is not similar.

[31] All of the funds raised from investors were deposited into the bank accounts of Lian or the corporate respondents, which were under the sole control of Lian and acted as his alter egos. Substantially all of the US$2.4 million in investors' funds not used for the rehabilitation of Lexicon or to repay a few investors was dissipated by Lian on expenditures unrelated to Lexicon.

[32] The evidence does not show that Keller had any control over the disbursement of investors' funds after they were received by Lian or a corporate respondent. It is also unclear how much, if any, knowledge Keller had of the details of Lian's expenditures of the funds of FFP participants.

[33] Keller certainly advised FFP participants on numerous occasions of the alleged progress being made in resolving Lexicon's issues and she was aware of approximately how much had been raised in the FFP scheme. She also maintained throughout the liability and sanctions portions of these proceedings that Lian was working diligently and effectively towards resolving Lexicon's issues. There is no evidence that Keller was aware in detail or, indeed, at all, about how the bulk of the funds was being dissipated by Lian.

[34] The evidence shows that Lian paid Keller certain amounts out of FFP participants' funds aggregating less than US$50,000 but there is no evidence as to what these payments might have been for. Keller was at all material times a substantial shareholder in Lexicon and would clearly benefit if Lian could assist Lexicon to be in a position to carry on its business and to resume its status as a reporting issuer in good standing with a stock exchange listing. This appears to be the principal way in which Keller could be enriched by her misconduct.

Aggravating and mitigating Factors

[35] There are no mitigating or aggravating factors with respect to any of the respondents.

Continued participation in the BC Capital Markets and fitness to be a Registrant or Director or Officer or Adviser

[36] Orders by the Commission should be protective and preventative and are intended to prevent likely harm to investors and the securities markets.

[37] Those who commit fraud represent a significant risk to British Columbia's capital markets. That is why permanent market prohibitions are almost always imposed when a respondent is found to have committed securities fraud. Even though Keller did not benefit to the same extent as Lian from the fraud, her ongoing fraudulent conduct was essential to the scheme. She also continued to submit that she had done nothing wrong and sought to blame others, including this Commission, for the failure to meet the FFP participants' expectations. There is no indication her future conduct will be any less of a risk to market participants than that of Lian.

[38] The nature and extent of Lian and Keller's fraud was serious and their conduct in breach of the CTO and TO and Keller's breach of section 34(1) demonstrate that they are not fit for participation in the capital markets nor to serve as a director, officer or advisor to issuers. Given the role of EagleMark and Falcon as vehicles for Lian's fraud and their involvement in the breach of the CTO and TO, the continued participation of any of the respondents in the capital markets would pose a significant ongoing risk to both investors and to the capital markets.

Deterrence and the need to demonstrate the consequences of inappropriate conduct

[39] The principles of general and specific deterrence call for significant administrative penalties in this case. Part of the Commission's mandate is to deter future misconduct by those against whom orders have been made. Any penalty which will effectively speak to all participants in the capital markets must be relatively severe to be meaningful.

[40] To address deterrence in this case, our orders must (i) demonstrate the consequences of the respondents' inappropriate conduct to other market participants, and they must also (ii) deter the respondents from engaging in future misconduct themselves.

[41] We have found multiple contraventions of our securities legislation and Commission orders in this case, the FFP investors lost approximately US$3 million to the fraud, (being the US$3.2 million raised less US$180,000 returned to a few FFP investors). The respondents continue to deny that they have committed any contraventions and have not shown any remorse for their actions. Therefore, there needs to be a strong message of specific deterrence to the respondents to curtail future misconduct.

Orders in Previous cases/Administrative penalties

[42] We agree with the executive director's position that, in this case, sanctions should be based on the entirety of the respondents' conduct, rather than on each individual contravention.

[43] With respect to the fraud committed by Lian and Keller, the executive director referred the panel to three previous decisions of this Commission which he says may inform the panel's decisions; *Re Spangenberg*, 2016 BCSECCOM 180 (CanLII), *The Falls Capital Corp. (Re*), 2015 BCSECCOM 422 (CanLII) and *Re Zhu*, 2015 BCSECCOM 264 (CanLII).

[44] *Spangenberg* involved a much smaller fraud ($171,000) than the present case but also involved illegal distributions. As appears highly likely in the present case, investors in *Spangenberg* lost all of their invested funds. Spangenberg spent the majority of investors' funds on personal expenses and utilized corporations that he controlled to help carry out his fraud, factors common to Lian in the present case. The Commission imposed permanent prohibitions on Spangenberg under section 161(1), ordered him to pay to the Commission an amount equal to the full amount of the fraud under section 161(1)(g) and imposed an administrative penalty of $225,000.

[45] Similarly in *The Falls*, the fraud committed by the individual respondent was much smaller ($517,500) than in the present case. As appears highly likely in the present case, investors in *The Falls* lost all of their invested funds. The individual respondent spent a significant portion of investors' funds on personal expenses and utilized corporations that he controlled to help carry out his fraud, factors common to Lian in the present case. The Commission imposed permanent prohibitions on the individual respondent under section

161(1), ordered him to pay to the Commission an amount equal to the full amount of the fraud under section 161(1)(g) and imposed an administrative penalty of $500,000.

[46] *Zhu* involved a much larger fraud ($14 million) than the present case but also involved illegal distributions. Investors lost substantial amounts of their invested funds. The individual respondents utilized corporations that they controlled to help carry out their fraud, factors common to Lian in the present case. The Commission imposed permanent prohibitions on the individual respondents under section 161(1), ordered them to pay to the Commission jointly and severally an amount equal to the full amount of the fraud under section 161(1)(g) and imposed an administrative penalty of $14 million against each of the individual respondents.

[47] With respect to the breaches by all respondents in this case of the CTO and TO and Keller's breach of section 34(1) through her unregistered trading, the executive director referred the panel to two previous decisions of this Commission: *McLaughlin (Re)*, 2011 BCSECCOM 202 (CanLII) and *Oriens Travel & Hotel Management Corp et al.*, 2014 BCSECCOM 352 (CanLII).

[48] In *McLaughlin*, the respondents contravened both sections 34(1) and 61(1) by raising $312,000 through the sale to 22 investors without being registered and without filing a prospectus and also breached an existing cease trade order. For this misconduct, the respondents were ordered to pay an administrative penalty of $50,000.

[49] In *Oriens*, the respondents breached a cease trade order when they distributed Oriens shares to three investors for proceeds of $58,500. These distributions were also illegal distributions. The panel made section 161(1)(g) orders requiring payment of the full amount raised in contravention of the order and ordered various administrative penalties against the respondents up to the amount illegally obtained.

[50] We also considered *Re VerifySmart*, 2012 BCSECCOM 176 and *Re JV Raleigh Superior Holdings Inc. et al*., 2012 BCSECCOM 492 as helpful in determining appropriate administrative penalties.

[51] In *VerifySmart*, the respondents raised $1.2 million from some 99 investors through illegal distributions. In addition to ordering the corporate respondents to repay the full amount raised, the individual respondents were ordered to pay administrative penalties of $50,000 each.

[52] In *JV Raleigh* the issuer and two individual respondents illegally distributed $5.7 million of JV Raleigh securities. The two individual respondents were ordered to pay administrative penalties of $750,000 as well as receiving permanent bans and section 161(1)(g) orders. Although fraud was not alleged in that case, personal enrichment and other serious misconduct were taken into account.

V. Appropriate Orders

[53] In determining the appropriate orders in the public interest, the following is our assessment of each respondent individually with respect to each of the three requested orders (market prohibitions under section 161(1), orders under section 161(1)(g) and administrative penalties under section 162).

Lian

A. Market prohibitions

[54] Lian was one of two central figures in a US$3.2 million dollar fraudulent scheme. In magnitude and scope, his misconduct was at the very upper end of seriousness. Only approximately US$600,000 was expended on the types of liabilities of Lexicon which investors were repeatedly told would be the use of their funds. At no relevant time did Lian have the ability to obtain the Lexicon shares and warrants which he and Keller promised to FFP participants. Lian repaid some US$180,000 to FFP participants but only after they demanded return of their invested funds. The entire balance of the funds (approximately US $2.4 million) invested by the FFP participants was dissipated by Lian on goods and services unconnected to Lexicon.

[55] Lian also created false and misleading emails about alleged progress in achieving Lexicon's rehabilitation and the urgency to invest quickly as deadlines were approaching. These emails were passed along by Keller to FFP participants and prospective participants, thereby increasing the scope and extent of the fraud.

[56] The executive director asked for permanent market prohibitions against Lian. We agree that this sanction is essential in the public interest, given the egregiousness of Lian's fraudulent conduct. This sanction is consistent with the permanent market bans invariably imposed on those who commit serious fraud against British Columbia investors. This sanction is appropriate to provide both individual deterrence on Lian and for general deterrence against others who might consider committing fraud on our markets.

B. Section 161(1)(g) Order

[57] All of the US$3.2 million that was fraudulently raised in this case was obtained by Lian and the corporate respondents. There was no distinction made by Lian in expending FFP participants' funds from his personal account or those of the corporate respondents. Lian controlled and was the directing mind of each of EagleMark and Falcon. Lian had control over the bank accounts of these entities and clearly co-mingled the funds as among them and treated the funds as his own.

[58] It is clear that the Commission may make an order under section 161(1)(g) for the full amount obtained arising from breaches of the Act. The focus is on the amount obtained through breaches of the Act and not on factors such as the personal benefit, if any, obtained by the respondent. (See *Michaels (Re)*, 2014 BCSECCOM 457 (paras. 33-46) and *Streamline Properties Inc. (Re*), 2015 BCSECCOM 66 (at paras.44-62), as examples). The section 161(1)(g) order may be for less than the full amount obtained

arising from breaches of the Act if the panel is satisfied that reducing the amount is in the public interest taking into account all of the relevant facts of the case and circumstances of the respondent.

[59] In this case, the executive director seeks section 161(1)(g) orders against Lian in the amount of US$2.3 million on a joint and several basis with EagleMark and US$133,000 on a joint and several basis with Falcon. In making these submissions, the executive director is implicitly crediting Lian and the corporate respondents with the US$600,000 expended towards the liabilities of Lexicon and the US$180,000 repaid to a few FFP participants. The executive director is also taking into account the specific amounts of FFP participants' funds paid into each of EagleMark and Falcon.

[60] In *David Charles Phillips and John Russell Wilson v. Ontario Securities Commission*, 2016 ONSC 7901, the Ontario Superior Court of Justice, Divisional Court, considered *Streamline*, as well as a series of decisions by the Ontario Securities Commission under a provision of the Ontario *Securities Act* that is substantially similar to section 161(1)(g). The Court in *Phillips* upheld the Ontario Securities Commission order that required the two respondents to jointly and severally pay the amount obtained as a result of their non-compliance with Ontario securities law. In the matter before us, we see no basis to distinguish the roles played by EagleMark and Falcon from the conduct of Lian. As such, it is appropriate we make our orders under section 161(1)(g) on a joint and several basis against all of Lian, EagleMark and Falcon..

[61] As to the quantum of our orders under section 161(1)(g), the deductions inherent in the section 161(1)(g) orders sought by the executive director are consistent with other fraud cases such as Ponzi schemes where the respondent has received credit for amounts repaid to some investors and consistent with cases where the respondent has received credit for funds actually expended in the manner promised to investors. See *Samji (Re)*, 2015 BCSECCOM 29.

[62] Accordingly, we find it in the public interest to order that Lian pay to the Commission on a joint and several basis with each of EagleMark and Falcon US$2.4 million under section 161(1)(g).

Administrative penalty

[63] The executive director has asked for an administrative penalty of at least US$2.4 million against Lian. The executive director submits that a significant administrative penalty is necessary in light of the fraudulent misconduct of Lian and the importance of both specific deterrence of further misconduct by Lian and to send a strong general deterrence message to potential securities fraudsters that such conduct will result in significant monetary penalties being imposed.

[64] In his analysis of previous decisions of this Commission, the executive director points out that, when considering the appropriate administrative penalty for those found liable for fraud under the Act, the administrative penalty is often roughly equal to the amount of the

fraud after taking into account the same deductions as were considered appropriate in reaching the amount of the section 161(1)(g) order.

[65] Lian's misconduct requires a significant administrative penalty, which will serve as a deterrent for both him and others who might engage in significant, widespread and persistent fraudulent misconduct as well as serious breaches of orders of this Commission. Accordingly, we find an amount approximate to US$2.4 million to be appropriate to order as against Lian under section 162 in all of the circumstances relevant to him. For the purposes of the order, we have converted US$2.4 million into Canadian $2,420,000. In doing the conversion, we used the average Bank of Canada noon exchange rate for the period between January 1, 2010 and December 30, 2011. We have summarized our calculations in Schedule A to this decision.

Keller

A. Market prohibitions

[66] Keller was the other of the two central figures in a US$3.2 million dollar fraudulent scheme. Similar to Lian, Keller's misconduct was at the very upper end of seriousness as it resulted in millions of dollars being dissipated by Lian rather than on the promised efforts to rehabilitate Lexicon. Only approximately US$600,000 was expended on the types of liabilities of Lexicon which investors were repeatedly told would be the use of their funds. At no relevant time did Lian have the ability to obtain the Lexicon shares and warrants which he and Keller promised to FFP participants. Lian repaid some US$180,000 to FFP participants but only after they demanded return of their invested funds. The entire balance of the funds (approximately US $2.4 million) invested by the FFP participants was dissipated by Lian on goods and services unconnected to Lexicon.

[67] Keller distributed to FFP participants and prospective FFP participants, often verbatim, emails created by Lian containing false and misleading information about alleged progress in achieving Lexicon's rehabilitation and the urgency to invest quickly as deadlines were approaching. Keller also communicated on a continuing basis with FFP participants and prospective FFP participants in person, by telephone and through emails with information about how to wire funds to Lian or his corporations, confirmations of entitlements to Lexicon shares and warrants, warnings that there were deadlines approaching and encouraging investing or further investing before it was too late. Often, when FFP participants expressed concern about lack of progress in receiving their promised Lexicon shares and warrants, Keller tried to alleviate their concerns with false platitudes about how well Lian was doing and the progress being made.

[68] The executive director asked for permanent market prohibitions against Keller. We agree that this sanction is essential in the public interest, given the egregiousness of Keller's fraudulent conduct. This sanction is consistent with the permanent market bans invariably imposed on those who commit serious fraud against British Columbia investors. Keller also breached the CTO and TO and failed to be registered to trade in securities. Permanent market prohibitions are appropriate to provide both individual deterrence to Keller and for general deterrence against others who might consider

committing fraud on our markets, breach Commission orders or fail to comply with fundamental obligations such obtaining registration to trade in securities. Although Lian rather than Keller reaped almost all of the benefits of the fraud, Keller's misconduct was essential to the ongoing and continuing fraud. She recruited, serviced and placated FFP participants enabling Lian to dissipate investor funds rather than apply them to the promised purpose, as outlined above.

B. Section 161(1)(g) Order

[69] The Commission may make an order under section 161(1)(g) for the full amount obtained arising from breaches of the Act. The focus is on the amount obtained through breaches of the Act and not on factors such as the personal benefit, if any, obtained by the respondent. (See *Michaels*, *supra* (paras. 33-46) and *Streamline, supra* (at paras.44-62), as examples). The section 161(1)(g) order may be for less than the full amount obtained if the panel is satisfied that reducing the amount is in the public interest taking into account all of the relevant facts of the case and circumstances of the respondent.

[70] In this case, the executive director does not seek any section 161(1)(g) order against Keller. He submits that Keller only received less than US$50,000 from the FFP participants' funds and he suggests that this amount may have been on account of reimbursement of her expenses. He says that Keller also "devoted [a] considerable amount of her time and resources in trying to resolve Lexicon's many issues". Keller's testimony that she expended significant amounts of her own funds to assist in the efforts to rehabilitate Lexicon was not challenged. We also note that Keller had no access to the FFP participants' funds once they had been received by Lian and his corporations. It is not clear from the evidence how much Keller knew in any detail about how Lian was disbursing the funds of FFP participants.

[71] Given the executive director's submissions and the factors referred to in the preceding paragraph, we do not consider it in the public interest to make an order under section 161(1)(g) against Keller.

Administrative penalty

[72] The executive director has asked for an administrative penalty of $250,000 against Keller. The executive director submits that although an administrative penalty is necessary in light of her fraudulent misconduct, Keller had no control over the funds of FFP participants once they were received by Lian and his corporations. As noted above, Keller received less than US$50,000 of those funds and those payments may have been for reimbursement of her expenses. The executive director says that Keller's circumstances were not typical of other perpetrators of securities fraud. He says that "Keller's conduct was serious but the fraud case against her is not as serious as the fraud case against Lian." The executive director seeks an administrative penalty against Keller substantially lower than the penalty sought for Lian.

[73] We do not agree with the submissions by the executive director regarding the appropriate administrative penalty for Keller. As we have noted, Keller's fraudulent misconduct was

essential to the success of the FFP scheme. Without her efforts, Lian would likely have been unable to recruit Lexicon shareholders and other investors to send their funds to Lian and his corporations. Keller's continuous misleading communications with FFP participants and prospective FFP participants was essential to continuing and expanding the scope of the fraud.

[74] For the purpose of both specific deterrence of further misconduct by Keller and to send a strong general deterrence message to those who may consider facilitating and enabling securities fraud, such conduct must result in a significant administrative penalty being imposed.

[75] In his analysis of previous decisions of this Commission, the executive director points out that the administrative penalty for those found liable for fraudulent conduct is often roughly equal to the amount of the fraud after taking into account the same deductions as were considered appropriate in reaching the amount of the section 161(1)(g) order.

[76] We have considered the misconduct of Keller as a whole and note again her breaches of the CTO and TO as well as her breach of section 34(1) were also serious and contributed to the losses incurred by the FFP participants. Even though Keller did not benefit from the fraud to the same extent as Lian, her misconduct was essential to the success of the fraudulent scheme. We find that the administrative penalty for Keller should be no less than that for Lian. Accordingly, we find the amount of $2.42 million to be appropriate to order against Keller under section 162 taking into account all of the circumstances relevant to her.

EagleMark and Falcon

A. Market prohibitions

[77] EagleMark and Falcon were alter egos of Lian and totally under his direction and control. They played a significant role in the fraud as the recipients of FFP participants' funds and obscured the fraudulent nature of the FFP scheme and Lian's dissipation of most of those funds on personal expenditures unrelated to Lexicon. EagleMark and Falcon's participation in our capital markets would pose a significant risk to investors and would compromise investor confidence in the integrity of our capital markets. We order permanent market bans under section 161(1)(b), (c) and (d) against EagleMark and Falcon as set out below.

B. Section 161(1)(g) Orders

[78] All of the US$3.2 million that was fraudulently raised in this case was obtained by Lian and the corporate respondents. There was no distinction made by Lian in expending FFP participants' funds from his personal account or those of the corporate respondents. Lian controlled and was the directing mind of each of EagleMark and Falcon. Lian had control over the bank accounts of these entities and clearly co-mingled the funds as among them and treated them as his own.

[79] We see no basis to distinguish the roles played by EagleMark and Falcon from the conduct of Lian. As discussed above, it is appropriate we make our orders under section 161(1)(g) on a joint and several basis against all of Lian, EagleMark and Falcon.

C. Administrative Penalties

[80] The executive director submits that making orders for administrative penalties under section 162 against EagleMark and Falcon is not required to serve the public interest as these corporations are no more than alter egos of Lian.

[81] We note that the Commission panel in the recent case of *Williams (Re),* 2016 BCSECCOM 283 was faced with the same issue whether to make orders under section 162 against corporations utilized by a fraudster to obfuscate his fraud and to lend an air of legitimacy to his scheme. The panel in that case said:

> …it would normally be consistent with our sanctions' principles of specific and general deterrence to make an order under section 162 against the [corporations]. However, in this case, as we are of the view that the [corporations] were really just the alter ego of Williams and did not act independently of Williams, we do not think it necessary to make orders under section 162 against any of the [corporations].

[82] Although this panel shares the concerns of the *Williams* panel, we see no reason to reach a different conclusion and we accept the submissions of the executive director and make no orders under section 162 against EagleMark or Falcon.

VI. Appropriate Orders

[83] Considering it to be in the public interest, and pursuant to sections 161(1) and 162, we order:

Lian

a) under sections 161(1)(b), (c) and (d)(i) through (v), that Lian resign any position he holds as a director or officer of any issuer or registrant and that permanently:

   (i) Lian cease trading in, and be prohibited from purchasing, any securities and exchange contracts;
   (ii) Lian be prohibited from becoming or acting as a director or officer of any issuer or registrant;
   (iii) all exemptions under the Act, the regulations or a decision do not apply to Lian;
   (iv) Lian be prohibited from becoming or acting as a registrant or promoter;
   (v) Lian be prohibited from acting in a management or consultative capacity in connection with activities in the securities market; and
   (vi) Lian be prohibited from engaging in investor relations activities,

b) under section 161(1)(g) of the Act, that Lian pay to the Commission US$2.4 million, and

c) under section 162 of the Act, that Lian pay to the Commission an administrative penalty of $2.42 million.

Keller

d) under sections 161(1)(b), (c) and (d)(i) through (v), that Keller resign any position she holds as a director or officer of any issuer or registrant and that permanently:

(i) Keller cease trading in, and be prohibited from purchasing, any securities and exchange contracts;
(ii) Keller be prohibited from becoming or acting as a director or officer of any issuer or registrant;
(iii) all exemptions under the Act, the regulations or a decision do not apply to Keller;
(iv) Keller be prohibited from becoming or acting as a registrant or promoter;
(v) Keller be prohibited from acting in a management or consultative capacity in connection with activities in the securities market; and
(vi) Keller be prohibited from engaging in investor relations activities, and

e) under section 162 of the Act, that Keller pay to the Commission an administrative penalty of $2.42 million.

EagleMark and Falcon

f) under sections 161(1)(b), (c) and (d)(iii) and (v):

(i) a permanent market prohibition against any person purchasing or trading in securities of EagleMark or Falcon;
(ii) a permanent market prohibition against EagleMark and Falcon on purchasing securities or exchange contracts;
(iii) permanently that exemptions under the Act, the regulations or a decision do not apply to EagleMark or Falcon;
(iv) that EagleMark and Falcon be permanently prohibited from being a registrant, investment manager or promoter; and
(v) that EagleMark and Falcon be permanently prohibited from engaging in investor relations; and

g) under section 161(1)(g), that EagleMark and Falcon pay to the Commission US$2.4 million

Joint and Several Liability

h) Lian, EagleMark and Falcon are jointly and severally liable to pay the amounts in subparagraphs (b) and (g) of this paragraph 83.

February 14, 2017

For the Commission

George C. Glover, Jr.
Commissioner

Gordon Holloway
Commissioner

Don Rowlatt
Commissioner

Schedule A

Date	Net Deposit (US$)	Bank of Canada (noon) Exchange Rate – Average	Net Deposit (CAN$)
January 1, 2010 – December 30, 2011	$2,400,000	1.00953	$2,422,872