



British Columbia  
Securities Commission

REPLY TO:

**Deborah W. Flood**

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**By Regular Mail**

May 14, 2020

Dear Mr. Kirk:

**Benjamin Thompson Kirk  
Reciprocal Order Application**

I am writing this letter on behalf of the Executive Director of the British Columbia Securities Commission (the Executive Director).

This letter notifies you and the British Columbia Securities Commission (the Commission) that the Executive Director of the Commission is applying for orders against you under sections 161(6)(d) and 161(1) of the *Securities Act*, RSBC 1996, c. 418 (the Act). The Executive Director is not seeking a financial penalty.

The Executive Director is making this application based on the Settlement Agreement you entered into with the Alberta Securities Commission (ASC) where you agreed to be subject to permanent orders.

**SETTLEMENT WITH THE ALBERTA SECURITIES COMMISSION**

1. On October 9, 2015, you entered into a Settlement Agreement with the ASC, [\*Re Kirk\*](#), 2015 ABASC 900 (*Settlement Agreement*).
2. As part of the Settlement Agreement, you admitted to breaching the Alberta Securities Act. You engaged in this misconduct along with John Bruce Kirk (John Kirk), and Dylan Leslie Boyle (Boyle).

*Settlement Agreement*, paras. 1-3

3. This misconduct was conducted through Skymark Media Group Ltd. (Skymark). For the purposes of this application, you, Boyle, and John Kirk are referred to as the “Skymark Directors”.



4. The misconduct included misrepresentations and advising investors contrary to sections 75(1)(b) and 92(4.1) of the Alberta Securities Act, as well as conduct contrary to the public interest.
5. As part of the Settlement Agreement, you agreed to:
  - (a) Pay the ASC \$100,000; and
  - (b) Broad, permanent market bans with carve outs for trading.

*Settlement Agreement, para. 33*

6. In reaching the Settlement Agreement, the ASC and the Skymark Directors agreed upon the following facts:
  - (a) You are a resident of Calgary, Alberta. John Kirk was the sole registered director of Skymark, while you and Boyle were *de facto* directors of Skymark. You and Boyle exercised day-to-day control over Skymark's operations.

*Settlement Agreement, paras. 5-7*

- (b) Skymark was an Alberta corporation.

*Settlement Agreement, para. 5*

- (c) Through Skymark, some or all of the Skymark Directors owned and maintained three websites: Skymark research, Emerging Stock Report, and Liberty Analytics (the Skymark Websites).

*Settlement Agreement, para.8*

- (d) The Skymark Websites allegedly provided independent market research regarding various publicly-traded issuers. Users were solicited to subscribe for memberships to the Skymark websites. Membership gave subscribers access to purported research reports regarding selected issuers, as well as emails promoting various securities.
  - (e) The content of the Skymark Websites and emails to subscribers were either drafted by some or all of the Skymark Directors, or drafted by Skymark employees acting under the control and direction of some or all of the Skymark Directors.

*Settlement Agreement, paras. 9-10*

- (f) Two issuers, Tradeshow Marketing Company Ltd. (TSHO) and Pacific Blue Energy Corp. (PBEC), were promoted by the Skymark Websites, the Skymark emails, and Skymark employees (Skymark's Communications).



- (g) From at least October 2009 until late August 2010, through Skymark's Communications, Skymark offered and gave advice and recommendations to invest in and purchase specific securities, including shares in TSHO and PBEC, without registering to act as advisors or having a valid exemption to that requirement.
- (h) Neither you, Skymark, Boyle, John Kirk or Skymark employees were registered in accordance with Alberta Securities laws to act as advisors, and no valid exemption to that requirement applied.

*Settlement Agreement, paras. 12-15*

***Communications about TSHO***

- (i) The Skymark emails made statements about TSHO that contained misrepresentations including, but not limited to:
  - (i) TSHO shares could earn investors "massive returns", and
  - (ii) TSHO "is on the verge of a major breakout",

without a reasonable basis for making such statements and failing to disclose the risks associated with purchasing TSHO shares.

*Settlement Agreement, para. 17*

- (j) These statements were made without disclosing the facts that:
  - (i) you and your brother John Kirk, are the sons of TSHO's founder, Bruce Kirk;
  - (ii) you and John Kirk had significant ongoing involvement in TSHO's business and operations; and
  - (iii) you, Boyle, and John Kirk, at various times, held a significant number of TSHO shares, either directly, beneficially, or on behalf of third parties.

*Settlement Agreement, para. 18*

***Communications about PBEC***

- (k) The Skymark emails made statements about PBEC that contained misrepresentations, including, but not limited to:
  - (i) predicting that PBEC shares will "deliver 100-500% gains from [their] current price," and "could outperform gains of 100%-1780%," ; and
  - (ii) "there could be a massive upward movement of [PBEC's share] price and volume,"

without a reasonable basis for making such statements, and failing to disclose the risks associated with purchasing PBEC shares.



*Settlement Agreement, para. 22*

- (l) In addition, Skymark made the statements without disclosing the facts that:
- (i) you, Boyle, and John Kirk, either directly or through nominee corporations, were involved, along with other third parties, in purchasing the shell corporation that became PBEC;
  - (ii) you and John Kirk, had significant ongoing involvement in PBEC's business and operations; and
  - (iii) you, and the other Skymark Directors, at various times, held a significant number of PBEC shares, either directly, beneficially, or on behalf of third parties.

*Settlement Agreement, para. 23*

***Communications about Skymark's independence***

- (m) Starting in at least March 2010, Skymark sent emails that included the following disclaimer (Disclaimer):
- (i) "Skymark Research [or Emerging Stock Report, or Liberty Analytics] is an independent organization that produces and publishes unbiased research."
  - (ii) "Skymark Research [or Emerging Stock Report, or Liberty Analytics], along with its employees and associates, do not hold any positions, shares, or beneficial interest in the company mentioned above."

*Settlement Agreement, para. 24*

- (n) As a result of your family connection, significant involvement, and shareholdings of PBEC and TSHO, the Disclaimer was misleading or untrue.

*Settlement Agreement, paras. 25-26*

- (o) You, along with John Kirk and Boyle, failed to exercise due diligence, and knew, or reasonably ought to have known that the Disclaimer was misleading or untrue, or failed to state a fact required to be stated or that was necessary to make it not misleading.

*Settlement Agreement, para. 26*

- (p) Particulars of the misrepresentations in the Skymark Emails about PBEC and TSHO would reasonably be expected to have a significant effect on the market price or value of PBEC's and TSHO's securities.



*Settlement Agreement*, paras. 17, 22

7. You admitted to breaches of sections 75(1)(b) and 92(4.1) of the Alberta Securities Act and that your breaches of the Alberta Securities Act as outlined in paragraph 6 constituted conduct contrary to the public interest.

*Settlement Agreement*, paras. 27 and 28

#### **THIS APPLICATION**

8. With this letter, the Executive Director is applying to the Commission for orders against you under section 161 of the Act. I enclose a copy of section 161 of the Act for your reference.
9. In making orders under section 161 of the Act, the Commission must consider what is in the public interest in the context of its mandate to regulate trading in securities.
10. Orders under section 161(1) of the Act are protective, preventative and intended to be exercised to prevent further harm.

*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*,  
[2001] 2 SCR 132, 2001 SCC 37 (CanLII), paras. 36, 39,  
and 56

11. In *Re Eron Mortgage Corporation*, [2000] 7 BCSC Weekly Summary 22, and in subsequent decisions, the Commission identified factors to consider when determining orders under section 161(1).
12. The following factors from *Re Eron* are relevant in this proceeding:
  - (a) the seriousness of the respondent's conduct;
  - (b) the harm suffered by investors as a result of the respondent's conduct;
  - (c) the extent to which the respondent was enriched;
  - (d) factors that mitigate the respondent's conduct;
  - (e) the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia;
  - (f) the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers;
  - (g) the need to deter those who participate in the capital markets from engaging in inappropriate conduct; and
  - (h) orders made by the Commission in similar circumstances in the past.

*Re Eron Mortgage Corporation*, [2000] 7 BCSC Weekly  
Summary 22



### **Application of the Factors**

#### ***Seriousness of the conduct***

13. The misrepresentations about Skymark's independence were grossly misleading, considering you had family connections to TSHO, significant ongoing involvement in both TSHO's and PBEC's businesses and operation, and held a significant number of TSHO and PBEC shares at various times.
14. Those who operate and profit in the capital markets by misstating material facts (through commission or omission), undermine the confidence of the public in one of the cornerstones of capital markets regulation, the provision of accurate and complete information for investors to make informed investment decisions.

*Michaels (Re)*, 2014 BCSECCOM 457, para. 8

15. Your failure to comply with advising registration requirements is inherently serious as this section is among the Act's foundational requirements for protecting investors and preserving the integrity of the capital markets. Registration is designed to protect investors and to ensure those who trade in securities are registered and purchasers of securities are offered only securities that are suitable.<sup>1</sup>
16. Your admitted misconduct falls well below the standard of conduct that commissions expect of market participants.

#### ***Harm suffered by investors***

17. Accurate representations are fundamental to the operation and integrity of the capital markets. False or misleading facts misleads investors regarding the facts relevant to their investment decisions, distorts the trading price of an issuer's securities, and undermines investor confidence and the integrity of the capital markets.
18. It is reasonable to infer that material false or misleading disclosure regarding securities causes harm to investors. Although there is no specific evidence of the amount of the loss to investors, given the fundamental nature of the misleading statements, it is reasonably likely that such losses were significant.
19. Further, as a result of your failure to comply with the registration requirements of the Alberta Securities Act, investors were denied the benefits of fundamental protections to which they were entitled to under Alberta Securities laws.

#### ***Enrichment***

20. Although there is no quantification of the financial benefits obtained by you, you reaped a significant benefit from your misconduct. In the Settlement Agreement,

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<sup>1</sup> *Re Solara*, 2010 BCSECCOM 357, paras. 10-11; *Re Liu*, 2019 BCSECCOM 236, para. 13.



you admitted that you realized a substantial personal profit from selling shares in TSHO and PBEC.

*Settlement Agreement*, para. 29

21. Because your conduct involved the securities of US issuers trading in the U.S. capital markets, you and the other Skymark Directors, were named as defendants in a civil complaint filed by the U.S. Securities and Exchange Commission.

*Settlement Agreement*, para. 30

22. On April 3, 2016, you entered into a consent order consenting to the entry of a final judgment that ordered you to pay disgorgement in the amount of \$5,499,021, plus prejudgment interest in the amount of \$731,495.63.

*Consent of Benjamin T. Kirk*, para. 2

*Complaint*

*Final Judgment as to Defendant Benjamin T. Kirk*

***Fitness to be a registrant, director, officer or adviser to issuers***

23. Core requirements of fitness to be a director or officer are honesty, integrity, and compliance with securities law.
24. You admitted you were a *de facto* director of Skymark and exercised day-to-day control over Skymark's operation. In that capacity, you failed to ensure compliance with registration requirements and failed to ensure the accuracy of Skymark's representations.
25. Your misconduct clearly illustrates that you are unfit to act as a registrant, director or officer.

***Risk to investors and the capital markets***

26. It is a privilege, not a right, to participate in the capital markets.<sup>2</sup>
27. Participants who engage in the securities industry do so voluntarily and for their own profit. In exchange for the privilege of participating, individuals and companies must comply with securities laws. Compliance is paramount, ensuring the protection of the public and the integrity of the capital markets.
28. You authorized, permitted, or acquiesced in Skymark's failure to comply with a number of fundamental requirements. These transgressions were not isolated. Your conduct was contrary to the public interest and harmful to the integrity of the capital markets.

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<sup>2</sup> [\*Re Sungro\*](#), 2015 BCSECCOM 281, para. 66; [\*Re Hable\*](#), 2017 BCSECCOM 340, para. 19.



29. Your disregard of compliance with securities regulations shows that your participation in the capital market poses a risk.

***Deterrence***

30. The market as a whole must understand that misconduct like yours will result in a significant penalty. Your misconduct calls for orders that are protective of the capital markets and preventative of likely future harm.
31. Through the orders the Executive Director is seeking, the Executive Director intends to demonstrate the consequences of your conduct, to deter you from future misconduct, and to create an appropriate deterrent to others (a general deterrent). Permanent bans are proportionate to your misconduct and are necessary to ensure that you and others will be deterred from engaging in similar misconduct in the future.

***Mitigating Factors***

32. You entered into an agreed statement of facts and admitted breaches. The Settlement Agreement saved the ASC the time and expense associated with a contested proceeding under the Act.

*Settlement Agreement*, para. 32

**The Davis Consideration**

33. In the Court of Appeal decision in [\*Davis v. British Columbia \(Securities Commission\)\*](#), 2018 BCCA 149, the Court identified that it is incumbent upon a tribunal to consider a respondent's individual circumstances when determining whether measures short of a permanent ban would protect the investing public where a person's livelihood is at stake.
34. The Executive Director is unaware of any individual circumstances that would support orders short of a lengthy or permanent market ban.

**PREVIOUS DECISIONS**

35. We refer to a number of decisions for guidance on the appropriate sanction. The decisions involve the same contravention (misrepresentation).
36. In [\*McCabe \(Re\)\*](#), 2014 BCSECOM 269, the panel found that McCabe made misrepresentations when he published grossly promotional and misleading reports about three companies. McCabe's misrepresentations included misstating the date that one of the companies acquired a property, and stating that the property had recoverable resources in excess of 1 million ounces of gold. McCabe also materially understated the amounts he was paid for the promotional reports.<sup>3</sup> McCabe was also found to have engaged in conduct contrary to the public

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<sup>3</sup> [\*McCabe \(Re\)\*](#), 2014 BCSECOM 269, paras. 3, 179





interest. The panel issued permanent market bans with carve outs against McCabe.

37. In [\*Michaels \(Re\)\*](#), 2014 BCSECCOM 457, the panel found that Michaels acted as an advisor without being registered, made misrepresentations, and perpetrated a fraud. Michael's misrepresentations including telling investors that the value of the security would double within a few months, the issuer had never suffered a loss, and that returns were guaranteed.<sup>4</sup> The panel issued broad, permanent market bans against Michaels.

### **ORDERS SOUGHT**

38. You agreed to permanent bans on advising, as well as restrictions on trading, and restrictions on acting as a director, officer, registrant, or investment fund manager.

*Settlement Agreement*, para. 33

39. Although there is no limitation on the Commission from imposing a capital market sanction that is similar or different than the undertakings you agreed to in the Settlement Agreement, the Commission needs to consider what is reasonable based on the evidence known to it, as well as what is in the public interest.
40. In seeking orders under 161(1) of the Act, the Executive Director has taken the following factors into consideration:
- (a) the circumstances of your misconduct including the Settlement Agreement;
  - (b) the factors from *Eron* and *Davis*;
  - (c) the sanctions ordered in previous cases cited above; and
  - (d) the public interest.
41. Based on the misconduct described in paragraph 6 and the Settlement Agreement, the executive director is seeking the same sanctions against you that you agreed to in the Settlement Agreement, except it is not seeking any monetary sanctions. The sanctions sought will contain orders pursuant to section 161(1) of the Act that:
- (a) under section 161(1)(d)(i), you resign any position you hold as a director or officer of any issuer or registrant, except that you may continue to act as a director or officer of an issuer whose securities are solely owned by you;
  - (b) you are permanently prohibited:

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<sup>4</sup> [\*Michaels \(Re\)\*](#), 2014 BCSECCOM 327, paras. 102- 112



- (i) under section 161(1)(b)(ii), from trading in or purchasing any securities or exchange contracts, except where all of the following conditions are met:
  - trades in your own: RRSP account, TFSA account and/or RRIF account;
  - trades through a registrant who has first been given a copy of the Settlement Agreement and any order made by the Commission, and
  - trades in mutual funds, exchange-traded funds, government bonds, guaranteed investment certificates, or securities listed and posted for trading on the TSX, TSX Venture Exchange, the NYSE, or the NASDAQ.
- (ii) under section 161(1)(c), from relying on any exemptions set out in this Act, the regulations or a decision;
- (iii) under section 161(1)(d)(ii), from becoming or acting as a director or officer of any issuer or registrant, except that you may act as a director or officer of any issuer whose securities are solely owned by you or your immediate family members (being your spouse, parent, child, sibling, mother or father-in-law, son or daughter-in-law or brother or sister-in-law); and
- (iv) under section 161(1)(d)(iv), from advising or otherwise acting in in a management or consultative capacity in connection with activities in the securities or derivatives market.

## SUPPORTING MATERIALS

42. In making this application, the Executive Director relies on the following:
- (a) [\*Re Kirk\*](#), 2015 ABASC 900 (*Settlement Agreement*)
  - (b) [\*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario \(Securities Commission\)\*](#), [2001] 2 SCR 132, 2001 SCC 37 (CanLII)
  - (c) [\*Re Eron Mortgage Corporation\*](#), [2000] 7 BCSC Weekly Summary 22
  - (d) [\*Michaels \(Re\)\*](#), 2014 BCSECCOM 457
  - (e) [\*Re Solara\*](#), 2010 BCSECCOM 357
  - (f) [\*Re Liu\*](#), 2019 BCSECCOM 236
  - (g) Consent of Benjamin T. Kirk
  - (h) Complaint
  - (i) Final Judgment as to Defendant Benjamin T. Kirk
  - (j) [\*Re Sungro\*](#), 2015 BCSECCOM 281
  - (k) [\*Re Hable\*](#), 2017 BCSECCOM 340
  - (l) [\*Davis v. British Columbia \(Securities Commission\)\*](#), 2018 BCCA 149
  - (m) [\*McCabe \(Re\)\*](#), 2014 BCSECOM 269



**YOUR RESPONSE**

43. You are entitled to respond to this application. To do so, you must deliver any response in writing, together with any supporting materials, to the Commission Hearing Officer by **Monday, June 29, 2020**.
44. The contact information for the Commission Hearing Officer is:
- Hearing Officer  
British Columbia Securities Commission  
12<sup>th</sup> Floor, 701 West Georgia Street  
Vancouver, BC V7Y 1L2  
E-mail: [commsec@bcsc.bc.ca](mailto:commsec@bcsc.bc.ca)  
Telephone: 604-899-6500
45. If you do not respond within the time set out above, the Commission will decide this application and may make orders against you without further notice.
46. The Commission will send you a copy of its decision.
47. If you have any questions regarding this application, please contact Ms. Deborah Flood, at 604-899-6623, or [dflood@bcsc.bc.ca](mailto:dflood@bcsc.bc.ca)

Yours truly,

Douglas B. Muir  
Director, Enforcement

DWF/crc  
Enclosures

cc: Hearing Office (by email to [commsec@bcsc.bc.ca](mailto:commsec@bcsc.bc.ca))