

ALBERTA SECURITIES COMMISSION

Citation: Re Kirk, 2015 ABASC 900

**Date: 20151015
Docket: ENF-008154**

SETTLEMENT AGREEMENT AND UNDERTAKING

JOHN BRUCE KIRK, BENJAMIN THOMPSON KIRK, and DYLAN LESLIE BOYLE

Agreed Facts

Introduction

1. Staff of the Alberta Securities Commission (**Staff** and **Commission**, respectively) conducted an investigation into the conduct of John Bruce Kirk (**John Kirk**), Benjamin Thompson Kirk (**Ben Kirk**), and Dylan Leslie Boyle (**Boyle**) (collectively, **Respondents**) to determine if Alberta securities laws had been breached.
2. The investigation confirmed, and the Respondents admit, that they each breached those sections of the *Securities Act*, R.S.A. 2000, c. S-4, as amended (**Act**), referred to in this Settlement Agreement and Undertaking (**Agreement**), and that they each acted contrary to the public interest.
3. Solely for securities regulatory purposes in Alberta and elsewhere in Canada (but without prejudice to any other proceeding whether civil, quasi-criminal or criminal in nature), and as the basis for the settlement and undertakings referred to in paragraph 33 herein, the Respondents agree to the facts and consequences set out in this Agreement.
4. Terms used in this Agreement have the same meaning as provided in the Alberta securities laws, a defined term in the *Act*.

Parties

5. At all material times, John Kirk was a resident of British Columbia, and the sole director of Skymark Media Group Ltd. (**Skymark**). Skymark was an Alberta corporation, with its registered office and place of business in Calgary, Alberta.
6. At all material times, Ben Kirk was a resident of Calgary, Alberta, and a *de facto* director of Skymark. He also exercised day-to-day control over Skymark's operations.

7. At all material times, Boyle was a resident of Calgary, Alberta, and a *de facto* director of Skymark. He also exercised day-to-day control over Skymark's operations.

Circumstances

Respondents Acting as Advisors

8. Through Skymark, some or all of the Respondents owned and maintained three websites known as Skymark Research (www.skymarkresearch.com), Emerging Stock Report (www.emergingstockreport.com), and Liberty Analytics (www.libertyanalytics.com) (collectively, the **Skymark Websites**).
9. The Skymark Websites ostensibly provided independent market research regarding various publicly-traded issuers, including issuers trading on the U.S. OTC Bulletin Board and Pink Sheets. Users were solicited to subscribe for memberships to the Skymark Websites, which would give them access to purported research reports regarding selected issuers. Subscribers also received e-mails from the Skymark Websites promoting various securities (the **Skymark E-mails**), and were contacted by e-mail and telephone by Skymark employees, consultants, or agents (collectively, **Skymark Employees**).
10. The content of the Skymark Websites and the Skymark E-mails was either drafted by some or all of the Respondents, or drafted by Skymark Employees acting under the control and direction of some or all of the Respondents.
11. Further, some or all of the Respondents trained Skymark Employees with respect to how to communicate with subscribers. Telephone conversations were specifically guided by "scripts" some or all of the Respondents drafted and provided to Skymark Employees for use.
12. Two of the issuers promoted by the Skymark Websites, the Skymark E-mails, and Skymark Employees during the material time were Tradeshow Marketing Company Ltd. (**TSHO**) and Pacific Blue Energy Corp. (**PBEC**). TSHO was incorporated in Nevada, and had its place of business in Bellevue, Washington. PBEC was also incorporated in Nevada, but had its place of business in Flagstaff, Arizona.
13. From at least October 2009 until late August 2010, through the Skymark Websites, the Skymark E-mails, and the communications Skymark Employees had with subscribers, Skymark offered and gave advice and recommendations to invest in and purchase specific securities, including shares in TSHO and PBEC. Recipients were all given the same advice, without regard to their personal circumstances or investment objectives.
14. None of the Respondents, Skymark, or the Skymark Employees were registered in accordance with Alberta securities laws to act as advisors, as that term is defined in the *Act*. In addition, no valid exemption to that requirement applied.

Prohibited Representations Regarding TSHO

15. Commencing in at least October 2009, the Skymark Websites, the Skymark E-mails, and the Skymark Employees began promoting the purchase of securities of TSHO.
16. The Skymark E-mails concerning TSHO made statements to subscribers in respect of which the Respondents failed to exercise due diligence and therefore that the Respondents knew, or reasonably ought to have known, were misleading or untrue, or which failed to state a fact required to be stated or that was necessary to make the statement not misleading.
17. Particulars of the misrepresentations in these Skymark E-mails, all of which would reasonably be expected to have a significant effect on the market price or value of TSHO's securities, include the following:
 - 17.1 predicting the future price of TSHO shares, where there was no reasonable basis for the prediction;
 - 17.2 predicting the future price of TSHO shares without fully or properly setting out the assumptions upon which the predicted price was based and without fairly setting out the risks associated with purchasing TSHO shares;
 - 17.3 stating that TSHO shares could earn investors "massive returns", with no reasonable basis for making such a statement and while failing to disclose the risks associated with purchasing TSHO shares; and
 - 17.4 stating that TSHO "is on the verge of a major breakout", with no reasonable basis for making such a statement and while failing to disclose the risks associated with purchasing TSHO shares.
18. In addition, the foregoing statements were made without disclosing the following facts:
 - 18.1 John Kirk and Ben Kirk are the sons of the founder of TSHO, Bruce Kirk, and had significant ongoing involvement in TSHO's business and operations; and
 - 18.2 at various times, each of the Respondents held a significant number of TSHO shares, either directly, beneficially, or on behalf of third parties.
19. Further, at the end of some of the Skymark E-mails, a disclaimer in fine print stated that Skymark had been paid \$5000 by a third party to research and promote TSHO. In order to prevent these Skymark E-mails as a whole from being misleading, Skymark was required to draw the readers' attention to this passage properly, to disclose the identity of the third party and its shareholdings in TSHO, and to include this information in all Skymark E-mails concerning TSHO.

Prohibited Representations Regarding PBEC

20. Commencing in at least March 2010, the Skymark Websites, the Skymark E-mails, and the Skymark Employees began promoting the purchase of securities of PBEC.
21. The Skymark E-mails concerning PBEC made statements to subscribers in respect of which the Respondents failed to exercise due diligence and therefore that the Respondents knew, or reasonably ought to have known, were misleading or untrue, or which failed to state a fact required to be stated or that was necessary to make the statement not misleading.
22. Particulars of the misrepresentations in these Skymark E-mails, all of which would reasonably be expected to have a significant effect on the market price or value of PBEC's securities, include the following:
 - 22.1 predicting the future price of PBEC shares, where there was no reasonable basis for the prediction;
 - 22.2 predicting the future price of PBEC shares without fully or properly setting out the assumptions upon which the predicted price was based and without fairly setting out the risks associated with purchasing PBEC shares;
 - 22.3 predicting that PBEC shares will "deliver 100-500% gains from [their] current price" and "could outperform gains of 100%-1780%", with no reasonable basis for making such statements and while failing to disclose the risks associated with purchasing PBEC shares; and
 - 22.4 stating that "there could be a massive upward movement of [PBEC's share] price and volume", with no reasonable basis for making such a statement and while failing to disclose the risks associated with purchasing PBEC shares.
23. In addition, the foregoing statements were made without disclosing the following facts:
 - 23.1 the Respondents, either directly or through nominee corporations, were involved along with other third parties in purchasing the shell corporation that became PBEC;
 - 23.2 John Kirk and Ben Kirk had significant ongoing involvement in PBEC's business and operations; and
 - 23.3 at various times, each of the Respondents held a significant number of PBEC shares, either directly, beneficially, or on behalf of third parties.

Prohibited Representations Regarding Skymark and the Skymark Websites

24. Commencing in at least March 2010, the Skymark E-mails began to include the following in a disclaimer appearing at the end of each Skymark E-mail:

24.1 “Skymark Research [or Emerging Stock Report, or Liberty Analytics] is an independent organization that produces and publishes unbiased research.”

24.2 “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.”

25. Contrary to these claims, John Kirk and Ben Kirk had family connections to TSHO, John Kirk and Ben Kirk had significant ongoing involvement in TSHO’s and PBEC’s business and operations, and all of the Respondents were involved along with other third parties in purchasing the shell corporation that became PBEC. Moreover, at various times, each of the Respondents held a significant number of TSHO and PBEC shares, either directly, beneficially, or on behalf of third parties. None of these facts were disclosed by the Skymark Websites, the Skymark E-mails, or the Skymark Employees.
26. The Respondents failed to exercise due diligence with respect to the foregoing, and therefore knew, or reasonably ought to have known, that the claims in paragraph 24 hereof were misleading or untrue, or failed to state a fact required to be stated or that was necessary to make the statement not misleading.

Admitted Breaches of Alberta Securities Laws

27. Based on the foregoing Agreed Facts, the Respondents each admit they breached:
 - 27.1 section 75(1)(b) of the *Act* by acting, or by authorizing, permitting, or acquiescing in Skymark and the Skymark Employees acting, as advisors, without being registered to do so under Alberta securities laws, and without an applicable exemption from that requirement; and
 - 27.2 section 92(4.1) of the *Act* by making, or by authorizing, permitting, or acquiescing in the making of, prohibited representations regarding TSHO, PBEC, Skymark, and the Skymark Websites.
28. The Respondents further admit that their breaches of the Act as outlined in paragraph 27 constituted conduct contrary to the public interest.

Circumstances Relevant to Settlement

29. By selling the TSHO and PBEC shares they owned either directly, beneficially, or on behalf of third parties while at the same time promoting the purchase of TSHO and PBEC shares by others, the Respondents realized substantial personal profits.
30. Because the Respondents’ conduct as described herein involved the securities of U.S. issuers trading in the U.S. capital markets, they are named as defendants in a civil complaint filed by the U.S. Securities and Exchange Commission in the U.S. District Court, Southern District of New York. They have been or are expected to be subject to orders in that forum directing them to disgorge the profits obtained as a result of their

conduct and enjoining them from participating in penny stock offerings and serving as officers or directors of any public companies.

31. The Respondents have not been previously sanctioned by the Commission.
32. This Agreement has saved the Commission the time and expense associated with a contested proceeding under the *Act*.

Settlement and Undertakings

33. Based on the Agreed Facts and Admitted Breaches, the Respondents agree and undertake to the Executive Director of the Commission to:

33.1 pay to the Commission the amount of \$100,000 each in settlement of the allegations;

33.2 cease trading in and purchasing securities or derivatives, permanently, except where all of the following conditions are met:

33.2.1 trades are made through a registrant who has first been given a copy of this Agreement,

33.2.2 trades are made in a registered retirement savings plan (RRSP), a registered retirement income fund (RRIF), or a tax-free savings account (TFSA) (as defined in the *Income Tax Act*, R.S.C. 1985, c. 1, as amended) of which that individual has sole beneficial ownership, and

33.2.3 trades are made in mutual funds, exchange-traded funds, government bonds, guaranteed investment certificates, or securities listed and posted for trading on the Toronto Stock Exchange, the TSX Venture Exchange, the New York Stock Exchange, or the NASDAQ;

33.3 refrain from using any of the exemptions contained in Alberta securities laws, permanently;

33.4 refrain from advising in securities or derivatives, permanently; and

33.5 resign from any positions that each holds as a director or officer of any issuer, registrant, or investment fund manager in Alberta and elsewhere in Canada, and refrain from becoming or acting as a director or officer (or both) of any issuer, registrant, or investment fund manager in Alberta and elsewhere in Canada, permanently, except that each may become or act as a director or officer (or both) of any issuer that is wholly owned by that individual or his family members and does not issue or propose to issue securities to the public.

Administration

34. The Respondents each acknowledge that they received independent legal advice and have voluntarily made the admissions and undertakings in this Agreement.
35. The Respondents acknowledge and agree that the Commission may enforce this Agreement in the Court of Queen's Bench or in any other court of competent jurisdiction.
36. Execution and fulfillment of the terms of this Agreement by the Respondents resolves all issues involving the Respondents relating to the conduct described above, and Staff will take no further steps against them arising from these facts.
37. This Agreement may be executed via electronic means and in counterpart.

Signed by JOHN BRUCE KIRK at)
 Surrey, British Columbia this)
 9th day of October 2015,)
 in the presence of:)

 WITNESS NAME)

 WITNESS NAME)

"Original Signed By")

 JOHN BRUCE KIRK)

 SIGNATURE)

Signed by BENJAMIN THOMPSON)
 KIRK at Toronto,)
 Canada this 9th day of)
 October 2015, in the presence of:)

 WITNESS NAME)

 WITNESS NAME)

"Original Signed By")

 BENJAMIN THOMPSON KIRK)

 SIGNATURE)

Signed by DYLAN LESLIE BOYLE at)
 Manila, Philippines this)
 13 day of October 2015,)
 in the presence of:)

 WITNESS NAME)
 WITNESS NAME)

 "Original Signed By")
 SIGNATURE) DYLAN LESLIE BOYLE)

) ALBERTA SECURITIES COMMISSION)
)
 Calgary, Alberta, 15 October 2015)

) "Original Signed By"
) David C. Linder, Q.C.
) Executive Director