Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | P.O. Box 55, 19th Floor 20 Queen Street West Toronto ON M5H 3S8 | CP 55, 19e étage 20, rue queen ouest Toronto ON M5H 3S8

IN THE MATTER OF THE *SECURITIES ACT*
R.S.O. 1990, c. S.5, AS AMENDED

- and -

IN THE MATTER OF
BIOVAIL CORPORATION, EUGENE N. MELNYK, BRIAN H. CROMBIE
JOHN R. MISZUK and KENNETH G. HOWLING

HEARING HELD PURSUANT TO SECTIONS 127 and 127.1 OF THE ACT

SETTLEMENT HEARING RE: JOHN R. MISZUK and KENNETH G. HOWLING

HEARING:	January 27, 2009	
PANEL:	Suresh Thakrar	- Commissioner and Chair of the Panel
	Margot C. Howard	- Commissioner
APPEARANCES:	Kathryn Daniels	- for Staff of the Ontario Securities Commission
	Wendy Berman Melissa MacKewn	- John R. Miszuk
	Joel Wiesenfeld Natalie Biderman	- Kenneth G. Howling

ORAL RULING AND REASONS

The following text has been prepared for the purpose of publication in the Ontario Securities Commission Bulletin and is based on excerpts of the transcript of the hearing. The excerpts have been edited and supplemented and the text has been approved by the Chair of the Panel for the purpose of providing a public record of the decision.

Chair:

[1] This was a hearing under sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended, (the "Act") for the Ontario Securities Commission (the "Commission") to consider whether it is in the public interest to approve two proposed Settlement Agreements between:

1. Staff of the Commission ("Staff") and the respondent John R. Miszuk ("Miszuk"); and

2. Staff and the respondent Kenneth G. Howling ("Howling").

[2] We, as a Panel, have decided to approve both Settlement Agreements as being in the public interest. At the request of the parties, and for convenience, we agreed to hear the submissions concurrently and are issuing a single set of oral reasons. However, our reasons address two separate distinct Settlement Agreements and we will be signing two separate orders. These are our oral reasons in these matters which will be published in the Bulletin.

[3] The facts and circumstances agreed to by both respondents are set out in the respective Settlement Agreements. These facts are not findings of fact by this Panel, rather, they are facts agreed to by Staff and the respondents for purposes of the agreements. In approving both Settlement Agreements, we relied solely on the facts set out in them and the facts represented to us at today's hearing (see: *Re Rankin* (2008), 31 O.S.C.B. 3303 at para. 5).

[4] The conduct at issue in both Settlement Agreements relates to Biovail Corporation ("Biovail"), which is a reporting issuer in the province of Ontario.

[5] We will discuss the conduct at issue as it relates to each settlement below.

Miszuk's Settlement Agreement

[6] During the relevant period Mizsuk was Biovail's Vice-President, Controller and Assistant Secretary.

[7] The specific matters that are the subject of the Settlement Agreement between Miszuk and Staff fall into two categories.

[8] The first category relates to Miszuk's role in considering Biovail's recognition in its interim financial statements for Q2 of 2003 of revenue relating to the sale of Wellbutrin XL ("WXL") tablets as discussed in the Settlement Agreement in paragraphs nine through 28. The following is a brief review of the agreed facts as they relate to Miszuk's role:

> The Q2 2003 Press Release, the Q2 2003 Analyst Call and the Q2 2003 Financial Statements, included in Biovail's revenue for the quarter approximately U.S. $8 million relating to the sale of WXL tablets to GlaxoSmithKline PLC ("GSK") that Biovail has represented was carried out on a "bill-and-hold" basis. Inclusion of this amount in the revenue for the quarter increased Biovail's operating income by approximately U.S. $4.4 million, which was a material amount.

> Canadian Generally Accepted Accounting Principles ("Canadian GAAP") provides that in most cases, revenue is not recognized until the passing of possession of goods. In other words, in most cases, revenue should not be recognized until delivery has occurred. Delivery is generally not considered to have occurred unless the product has been delivered to the customer's place of business or to an alternative site specified by the customer.
>
> "Bill and hold" transactions, in which delivery of the goods does not immediately take place, provide an exception to general revenue recognition principles. Such transactions, however, must meet very specific accounting requirements.
>
> Miszuk states that he did not participate in the discussions between GSK and Biovail regarding the pre-launch manufacturing of WXL. He was made aware of the terms of the arrangement by members of Biovail's senior management and, at all times, relied on the information provided by senior management. Miszuk states that at all times he acted in good faith in considering the terms of the transaction and the recognition of revenue.
>
> Miszuk further acknowledges that he ought to have been more careful in considering the recognition of revenue for the sale of the specified tablets. Specifically, he ought to have made further inquiries or sought further guidance from a qualified accounting professional concerning this arrangement. His failure to do so constituted conduct contrary to the public interest.

[9] The second category relates to Miszuk's role in Biovail's incorrect accounting in its 2003 quarterly statements in relation to unrealized foreign exchange gains or losses for an outstanding debt obligation. This is discussed in the Settlement Agreement in paragraphs 29 through 35. The following is a brief review of the facts as they relate to Miszuk's role:

> Biovail failed to properly account for an obligation denominated in Canadian dollars in its Q1 2003 Financial Statements, its Q2 2003 Financial Statements and its Q3 2003 Financial Statements.
>
> As background, in December 2002, Biovail assumed an obligation denominated in Canadian dollars. Since Biovail reported its results in U.S. dollars, it was required to account for this obligation in its financial statements in U.S. dollars.
>
> Canadian GAAP requires that any outstanding balance of a foreign currency denominated obligation that is a monetary item be revalued using the FX Rate current at each balance sheet date. At March 31, 2003, however, Biovail, continued to use the FX Rate from December 2002 and did the same thing for the June 30, 2003 and September 30, 2003 statements. The interim financial statements for Q1, Q2, and Q3 of 2003 therefore did not accurately reflect any unrealized exchange losses or gains on the outstanding balance of the obligation.
>
> In early July 2003, the issue of whether the remaining loan balance required an adjustment to the FX Rate being applied was raised with Biovail by its subsidiary BLI. Miszuk states that he directed that steps be taken to analyze the issue and

> confirm whether the appropriate accounting treatment was being used. The interim financial statements issued for Q2 2003 and Q3 2003 continued to record the debt obligation based on the FX Rate as of December 2002, until corrected and restated in 2004.
>
> As a result of this restatement, for the financial statements filed on May 14, 2004, Biovail's net income decreased by U.S. $5.4 million and U.S. $3.9 million for the Q1 and Q2 2003, respectively, and increased by U.S. $3.1 million for the Q3 2003 Financial Statements.
>
> Miszuk states that he at all times acted in good faith. However, Miszuk acknowledges that he ought to have been more careful in determining whether the foreign exchange losses and gains issue was analysed and correctly accounted for prior to the completion of Biovail's Q1, Q2 and Q3 quarterly financial statements. Specifically, when the issue was first identified in July 2003, he ought to have followed up to ensure that an analysis of the issue was prepared and considered. His failure to do so constituted conduct contrary to the public interest.

[10] By entering into the Settlement Agreement, Miszuk acknowledges that his failure to take appropriate care and to seek further guidance from a qualified accounting professional constitutes conduct contrary to the public interest.

Howling's Settlement Agreement

[11] During the relevant period Howling was Biovail's head of Investor Relations with the title "Vice-President, Finance". Howling is a former Certified Public Accountant and was the former Chief Financial Officer of Biovail.

[12] The specific matters that are the subject of the Settlement Agreement between Howling and Staff relate to Howling's role in Biovail's dissemination of incorrect statements in certain press releases in October 2003, March 2004 and in certain analyst calls and investor meetings, as discussed in the Settlement Agreement in paragraphs five through 27. The following is a brief review of the facts as they relate to Howling.

[13] As head of Investor Relations, Howling, assisted by several Biovail employees, managed Biovail's corporate communications, including liaising with senior management of Biovail regarding the company's press releases and other public disclosures. Typically, Howling and his staff would prepare financial press releases for review and approval by senior management, including Biovail's Chief Executive Officer and its Chief Financial Officer. The information included in the press releases was obtained from those persons in the company with relevant knowledge.

[14] Howling had no authority to issue press releases on Biovail's behalf. Howling had no financial reporting or accounting responsibilities nor any operational responsibilities.

[15] Biovail made statements in press releases issued on October 3, 8 and 30, 2003 and March 3, 2004 that, in material respects, inaccurately disclosed the implications to Biovail, of a truck accident that occurred on October 1, 2003.

[16] The Press releases concerned Biovail's disclosure that preliminary financial results for its third quarter of 2003 would be below previously issued guidance.

[17] For example, the October 3, 2003 Press Release, amongst other things, stated that "[r]evenue associated with the WXL shipment was in the range of [U.S.] $10 million to [U.S.] $20 million". Biovail later stated, in a March 3, 2004 press release, that "actual revenue loss" from the shipment on the truck was U.S. $5 million.

[18] Howling's role as head of Investor Relations at Biovail was to receive information from both internal and external sources, participate in the drafting of press releases and company communications, inform the senior executives of issues brought to his attention that required clarification, finalize the press releases and other company communications in consultation with the senior executives, obtain authorization for the release, and then liaise with investors and analysts.

[19] Howling is a former Certified Public Accountant and was the former Chief Financial Officer of Biovail. As such, and in his role as the head of Investor Relations, he had an understanding of the information needs of the investing public. He should have taken greater care to ensure that accurate information was disseminated to the investing public. His failure to take greater care constitutes conduct contrary to the public interest.

[20] Now that we have reviewed the facts in each Settlement Agreement, we would like to briefly refer to the law as it applies to the consideration of sanctions and Settlement Agreements before the Commission.

Approval of the two Settlement Agreements

[21] The Commission's mandate in upholding the purposes of the Act, as set of in section 1.1 of the Act, is:

> (a) to provide protection to investors from unfair, improper or fraudulent practices; and
>
> (b) to foster fair and efficient capital markets and confidence in the capital markets.

[22] The promotion of fair and efficient capital markets requires timely, accurate and efficient disclosure. Such disclosure is a cornerstone principle of securities regulation. Everyone investing in securities should have equal access to information that may affect their investment decisions. The Act requires that reporting issuers provide full, fair and complete disclosure of their financial results by filing with the Commission interim and annual financial statements prepared in accordance with Canadian GAAP. Sections 77 and 78 of the Act reflect this. The Act's focus on public disclosure of information is meaningless without a requirement that such disclosure be accurate, complete and accessible to investors.

[23] With respect to sanctions, we are guided by the sanctioning factors listed in *Re M.C.J.C. Holdings and Michael Cowpland* (2002), 25 O.S.C.B. 1133 and *Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743, which were referred to us by Staff in their submissions. In doing this, the Commission takes into account circumstances that are appropriate to the particular respondents. This requires us to be satisfied that the proposed sanctions are proportionately appropriate with

respect to the circumstances facing the particular respondent (*Re M.C.J.C. Holdings and Michael Cowpland* (2002), 25 O.S.C.B. 1133 at 1134).

[24] With respect to reviewing the two Settlement Agreements, as established in *Re Sohan Singh Koonar et al*. (2002), 25 O.S.C.B. 2691, the role of the Commission Panel in reviewing a settlement agreement is not to substitute its own sanctions for what is proposed in the settlement agreement. The Commission should ensure that the agreed sanctions in the settlement agreement are within acceptable parameters.

[25] In addition, significant weight should be given to the agreement reached between adversarial parties, as a balancing of factors and interests will have already taken place in reaching the agreement. The Commission, in its reasons for approving the settlement agreement in *Re Melnyk* (2007), 30 O.S.C.B. 5253 commented on its role as follows:

> [w]e note that our role is not to renegotiate the terms of the Settlement Agreement or to suggest changes to the facts, statements or sanctions set forth in the Settlement Agreement. Our role is to decide whether to approve the Settlement Agreement, as a whole, on the terms presented to us. (*Re Melnyk, supra,* at para. 15)

[26] This is what we as a Panel have done in approving both Settlement Agreements. We are of the view that the sanctions set out in both Settlement Agreements are within the acceptable parameters.

[27] In Staff's written submissions they pointed out the following mitigating factors with respect to each respondent:

1. The avoidance of substantial costs and expenses associated with proceeding with a contested hearing; and

2. The cooperation of each respondent with respect to the ongoing proceeding and their agreement to testify.

[28] We also took into account the mitigating factors that Howling has stated in the Settlement Agreement. Specifically:

1. Howling states that he relied, at all times, on information he received from his superiors and others when drafting disclosures and responding to investor inquiries regarding the truck accident's impact on Biovail's earnings;

2. He also states that he relied on the fact that senior management directly reviewed and authorized the subject disclosures; and

3. Further, Howling states that he acted at all times in good faith.

[29] Both Miszuk and Howling have each entered into a separate Settlement Agreement, and in doing so, both have recognized that their conduct was contrary to the public interest.

[30] Therefore with respect to Miszuk we find it appropriate to order that:

1. The Settlement Agreement is approved;

2. Miszuk is reprimanded;

3. Miszuk is prohibited from becoming or acting as a director or officer of a reporting issuer for a period of three years from the date of this Order;

4. Miszuk shall successfully complete the Financial Literacy Program of the Institute of Corporate Directors before becoming or acting as a financial officer of a reporting issuer;

5. Miszuk shall cooperate with the Commission and Staff in this matter and shall appear and give truthful and accurate testimony at the hearing in this matter if requested by Staff; and

6. Miszuk shall pay $30,000.00 in respect of a portion of the costs of the investigation and hearing in relation to this matter.

[31] And with respect to Howling we find it appropriate to order that:

1. The Settlement Agreement is approved;

2. Howling is reprimanded;

3. Howling is prohibited from becoming or acting as a director or officer of a reporting issuer for a period of two years from the date of this Order;

4. Howling shall cooperate with the Commission and Staff in this matter and shall appear and testify at the hearing in this matter if requested by Staff; and

5. Howling shall pay $20,000.00 in respect of a portion of the costs of the investigation and hearing in relation to this matter.

[32] In conclusion, we find that, in each case, the sanctions imposed in these matters provide adequate specific and general deterrence, which the Supreme Court has established is an important regulatory objective for securities commissions (*Re Cartaway Resources Corp*., [2004] 1 S.C.R. 672). We agree with Staff's submissions that the sanctions imposed will have an impact on Miszuk's and Howling's ability to make a living. This is achieved through the imposition of a prohibition to act as an officer and director. In addition, counsel for Miszuk pointed out the reputational harm that would be experienced by Miszuk as a result of this Order and that this should not be underestimated.

[33] Although the regulatory sanctions agreed to in the two Settlement Agreements may be below what we might have imposed after a hearing on the merits, we note that this was not a hearing on the merits, and there is no certainty as to what the outcome of any such hearing would have been.

[34] It was submitted during the hearing that there were no cases having similar circumstances to these described in the Settlement Agreements. After considering the importance of disclosure, the submissions by counsel, the facts agreed to in each Settlement Agreement, the mitigating factors and giving due consideration that a balancing of factors would have taken place in reaching each agreement, we find that the agreed sanctions in these matters are acceptable.

[35] The public reprimand also provides strong censure of both Miszuk's and Howling's past conduct.

[36] Therefore, we approve the two Settlement Agreements as being in the public interest.

Approved by the Chair of the Panel on February 10, 2009.

"*Suresh Thakrar*"

Suresh Thakrar