

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

- and -

IN THE MATTER OF MILLER BERNSTEIN & PARTNERS LLP

SETTLEMENT AGREEMENT

I. INTRODUCTION

1. By Notice of Hearing dated April 15, 2004 in respect of Miller Bernstein & Partners LLP (“Miller Bernstein”), the Ontario Securities Commission (the “Commission”) announced that it proposed to hold a hearing to consider whether, pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the “Act”), it is in the public interest for the Commission to make orders as specified therein.

II. JOINT SETTLEMENT RECOMMENDATION

2. Staff recommend settlement of the allegations against the respondent Miller Bernstein in accordance with the terms and conditions set out below. Miller Bernstein agrees to the settlement on the basis of the facts and conclusions agreed to as provided in Part IV and consent to the making of an order against it in the form attached as Schedule "A" on the basis of the facts set out in Part IV.

3. This settlement agreement, including the attached Schedules "A" and "B" (collectively, the "Settlement Agreement") will be released to the public only if and when the Settlement Agreement is approved by the Commission.

III. ACKNOWLEDGEMENT

4. Staff and Miller Bernstein agree with the facts and conclusions set out in Part IV for the purpose of this settlement proceeding only, and further agree that this agreement of facts and conclusions is without prejudice to Miller Bernstein in any other proceedings of any kind including, but without limiting the generality of the foregoing, any proceedings brought by the Commission under the Act or any civil or other proceedings which may be brought by any other person, corporation, regulatory body or agency. For the purpose of this settlement agreement, reference to Miller Bernstein also includes the partnership's successors and assigns and includes any new partnership which is formed by or includes two or more of the Individual Partners (as defined on paragraph 7 below).

IV. AGREED FACTS

Background

5. Buckingham Securities Corporation ("Buckingham") is incorporated pursuant to the laws of Ontario. Buckingham was registered under Ontario securities law as a securities dealer during the period from March 17, 1997 to July 6, 2001 (the "Material Time"). Buckingham commenced trading for clients in or about April 1997.

6. Miller Bernstein is a partnership of chartered accountants with an office in Toronto. In December 1996, Buckingham appointed Miller Bernstein as the firm's auditor. As the auditor appointed by Buckingham, Miller Bernstein was required under section 21.10(2) of the Act to make an examination of the annual financial statements and other regulatory filings of Buckingham, in accordance with generally accepted auditing standards, and to prepare a report on the financial affairs of Buckingham in accordance with professional reporting standards.

7. During the Material Time, the Miller Bernstein partnership consisted of six partners. Following the death of one of the partners in late December 1999, the Miller Bernstein partnership has consisted of five partners (the "Individual Partner(s)"). During the Material Time, Howard Kornblum ("Kornblum") was the audit partner in respect of

the audit work carried out by Miller Bernstein. Kornblum signed the audit opinions contained in the 1999 and 2000 Form 9 Reports (described below) on behalf of Miller Bernstein.

8. Miller Bernstein has represented to Staff of the Commission that, at the Material Time, Buckingham was the only securities dealer audited by Miller Bernstein. When it was appointed to audit Buckingham, Miller Bernstein had not previously audited a securities dealer.

The 1999 and 2000 Form 9 Reports

9. Buckingham prepared Form 9 reports for the financial years ending March 31, 1999 and March 31, 2000 (hereafter, referred to as the “1999 Form 9 Report” and the “2000 Form 9 Report”). Section 142 of the Regulation to the Act requires a securities dealer, who is not a member of a self-regulatory organization to deliver to the Commission within 90 days after the end of each financial year a report prepared in accordance with Form 9. The Form 9 reports, among other things, record the capital position and requirements of the securities dealer, and confirm the segregation of clients’ fully paid and excess margin securities. Section 144 of the Regulation to the Act requires that the Form 9 Reports be audited by an auditor appointed by the securities dealer, in accordance with generally accepted auditing standards and the audit requirements published by the Commission.

10. The 1999 and 2000 Form 9 Reports were submitted by Buckingham to the Commission. The Certificate of Partners or Directors on behalf of Buckingham for the 1999 and 2000 Form 9 Reports, certified, among other things, that:

- (a) the financial statements and other information presented fairly the financial position of Buckingham; and
- (b) information stated in the Certificate of partners or directors was true and correct, including the statement that Buckingham promptly segregated all clients’ free securities.

11. Buckingham, for the fiscal years ending March 31, 1999 and March 31, 2000, made statements in the 1999 and 2000 Form 9 Reports required to be filed or furnished under Ontario securities law that, in a material respect and at the time and in the light of the circumstances under which they were made, were misleading or untrue or did not state a fact that was required to be stated or that was necessary to make the statements not misleading, specifically:

- (i)
 - a. the 1999 Statement of Assets and Liabilities and Capital stated that the amount of Buckingham's total liabilities (excluding subordinated loans) was \$4,402,608 when such amount was in excess of \$12,000,000;
 - b. the 1999 Statement of Net Free Capital stated that Buckingham had excess net free capital, before taking account of capital requirements, in the amount of \$521,766, when Buckingham had a deficiency of net free capital in excess of \$8,000,000;
 - c. the 1999 Statement of Adjusted Liabilities stated that the amount of Buckingham's adjusted liabilities was \$3,527,784, when the amount was in excess of \$11,500,000;
 - d. the 1999 Statement of Minimum Free Capital stated that Buckingham had excess net free capital, after deducting capital requirements, in the amount of \$179,544, when Buckingham had a deficiency of net free capital in excess of \$9,000,000;
 - e. the 1999 Certificate of Partners or Directors stated that Buckingham properly segregated all clients' free securities, when Buckingham was not segregating clients' free securities.
- (ii)
 - a. the 2000 Statements of Assets and Liabilities and Capital stated that the amount of Buckingham's total liabilities (excluding subordinated loans) was \$11,085,049, when such amount was in excess of \$36,000,000;
 - b. the 2000 Statement of Net Free Capital stated that Buckingham had excess net free capital, before taking account of capital requirements,

in the amount of \$738,675, when Buckingham had a deficiency of net free capital in excess of \$25,500,000;

c. the 2000 Statement of Adjusted Liabilities stated that the amount of Buckingham's adjusted liabilities was \$6,914,102, when such amount was in excess of \$31,000,000;

d. the 2000 Statement of Minimum Free Capital stated that Buckingham had excess net free capital, after deducting capital requirements, in the amount of \$144,778, when Buckingham had a deficiency of net free capital in excess of \$27,500,000;

e. the 2000 Certificate of Partners or Directors stated that Buckingham had properly segregated all clients' free securities, when Buckingham was not segregating clients' free securities.

Misleading or Untrue Statements in Audit Reports

12. Miller Bernstein did not obtain sufficient audit evidence to determine the segregation of client assets and did not formulate appropriate procedures to review margin accounts held by clients of Buckingham to support the opinions expressed by it in the audit opinions contained in the 1999 and 2000 Form 9 Reports.

13. Miller Bernstein, in its audit report addressed to the Ontario Securities Commission in each of the 1999 and 2000 Form 9 Reports, stated that it had examined the financial statements and other financial information prepared by Buckingham contained within the Reports. In relation to its examination of such financial statements and information for each of the financial years ending March 31, 1999 and March 31, 2000, Miller Bernstein expressed its opinion as follows:

Our examination was made in accordance with generally accepted auditing standards and accordingly included such tests and other procedures as we considered necessary in the circumstances, including the audit procedures prescribed by the Ontario Securities Commission.

In our opinion,

- (i) the statement of assets and liabilities presents fairly the financial position of the firm as at [March 31, 1999/March 31, 2000] in the form required under the Regulation to The Securities Act, 1978 in accordance with the basis of accounting disclosed in Note 1 applied on a basis consistent with that of the preceding year; and
- (ii) the statements of net free capital, adjusted liabilities, minimum free capital and statement of segregation requirements and funds on deposit in segregation as at [March 31, 1999/March 31, 2000] are presented in accordance with applicable instructions in the Regulation under The Securities Act, 1978.

...

The additional information set out in Part II, schedules 1 to 18 and the answers contained in questions 5 and 6 on the certificate of partners or directors have been subjected to the tests and other auditing procedures applied in the examination of the financial statements A to E in Part I and schedule 19 in Part II, and in our opinion, are fairly stated in all respects material in relation to these financial statements taken as a whole.

Conduct Contrary to the Public Interest

14. Having regard to the misleading or untrue statements contained in the Form 9 Reports, described in paragraph 11 above, Miller Bernstein's conduct was contrary to the public interest in that, for the fiscal years ending March 31, 1999 and March 31, 2000, Miller Bernstein stated, in its opinions contained in Buckingham's 1999 and 2000 Form 9 Reports, that its examination of Buckingham's financial statements and other financial information was made in accordance with generally accepted auditing standards. Such statements made by Miller Bernstein were in a material respect and at the time and in the light of the circumstances under which they were made, misleading or untrue, or did not state a fact that was required to be stated or that was necessary to make the statements not misleading.

V. TERMS OF SETTLEMENT

15. Miller Bernstein agrees to the following terms of settlement:

A. At the time of approval of this settlement, Miller Bernstein will make a settlement payment in the amount of \$75,000 by certified cheque

or bank draft to the Commission for allocation to or for the benefit of third parties under section 3.4(2) of the Act;

B. Miller Bernstein undertakes to the Commission that it will not provide auditing or other services to reporting issuers or to registrants under Ontario securities law in their capacity as reporting issuers and registrants, respectively. Miller Bernstein agrees to execute an undertaking to the Commission in the form attached as Schedule "B" to this Settlement Agreement. Staff and Miller Bernstein agree that this undertaking applies to the Miller Bernstein partnership and is not intended to apply to any individual partner or employee of Miller Bernstein to the extent that he or she leaves Miller Bernstein to join another accounting firm or other entity. Miller Bernstein agrees that it will forthwith notify the Institute of Chartered Accountants of Ontario (the "ICAO") and the Canadian Public Accountability Board (the "CPAB") in the event that any Individual Partner (as defined in paragraph 7 above) of Miller Bernstein leaves the partnership, and further, Miller Bernstein will identify the accounting firm or other entity that the departing Individual Partner intends to join;

C. No earlier than one year after the date of approval of this settlement, Miller Bernstein will be at liberty to apply to the Commission for an Order pursuant to section 144 of the Act for relief from the undertaking not to provide auditing or other services to reporting issuers or to registrants described above in paragraph 15(B). In respect of such application made by Miller Bernstein, Miller Bernstein agrees to the following:

- i. Miller Bernstein will not make such application under section 144 of the Act until it has complied with the following:

- a) Miller Bernstein at its own expense shall prepare a quality control report (“Quality Control Report”) that complies with the guidelines or requirements of the Canadian Public Accountability Board (the “CPAB”) for participating audit firms (as such term is defined in National Instrument 52-108 – “Auditor Oversight”, and hereafter referred to as a “Participating Audit Firm”). Miller Bernstein will provide the Quality Control Report to the CPAB, and to Staff and the Commission concurrently. The Quality Control Report shall be filed with the Secretary to the Commission and be made publicly available;
- b) the CPAB, or alternatively, a public accounting firm acceptable to Staff and Miller Bernstein, has performed an inspection (the “Inspection”) of Miller Bernstein, including the partnership’s practices and procedures, and in particular, the design and implementation of the quality controls in place at Miller Bernstein as set out in the Quality Control Report. Such Inspection is to be carried out at the expense of Miller Bernstein. The report setting out the results of such Inspection shall be submitted to Staff and the Commission and Miller Bernstein concurrently;
- c) Miller Bernstein will implement such changes as may be recommended by the CPAB (or alternatively, the public accounting firm) in relation to the Inspection, within reasonable time frames set out by the CPAB (or alternatively, the public accounting firm) in consultation with Miller Bernstein and Staff. Miller

Bernstein will provide a report or reports concerning the implementation of the recommendations concurrently to Staff and the Commission, and to the CPAB (or alternatively, the public accounting firm) within the aforementioned time frames. The report(s) prepared by Miller Bernstein shall be filed with the Secretary to the Commission and be made publicly available.

- d) Miller Bernstein is a Participating Audit Firm (as defined in National Instrument 52-108 – “Auditor Oversight”); and
 - e) Miller Bernstein is in compliance with any restrictions or sanctions imposed by the CPAB;
- ii. Miller Bernstein further undertakes to the Commission that if it seeks to become registered with the CPAB as a Participating Audit Firm, it will give Staff reasonable prior notice of its application to the CPAB for registration; and
- iii. Staff of the Commission will be at liberty to oppose any application made by Miller Bernstein pursuant to section 144 of the Act or to seek the imposition by the Commission of sanctions on any order made by the Commission granting relief from the undertaking.

D. Miller Bernstein will provide forthwith a copy of the Order of the Commission and this Settlement Agreement to the ICAO and to the CPAB;

E. pursuant to clause 6 of subsection 127(1) of the Act, Miller Bernstein will be reprimanded by the Commission;

F. pursuant to subsection 127.1(1)(b) of the Act, Miller Bernstein will make payment to the Commission in the amount of \$115,000 by certified cheque or bank draft in respect of a portion of the costs of the Commission's investigation in relation to Miller Bernstein, such payment to be made at the time of approval of this settlement; and

G. Howard Kornblum, in his capacity as a representative partner of Miller Bernstein, will attend the hearing before the Commission on a date to be determined by the Secretary to the Commission to consider the Settlement Agreement, or such other date as may be agreed to by the parties for the scheduling of the hearing to consider the Settlement Agreement.

VI. STAFF COMMITMENT

16. If this settlement is approved by the Commission, Staff will not initiate any other proceeding under the Act against Miller Bernstein in relation to the facts set out in Part IV of this Settlement Agreement, subject to the provisions contained in paragraphs 17 and 21 below.

17. If this Settlement Agreement is approved by the Commission, and at any subsequent time Miller Bernstein fails to honour the terms and undertakings contained in Part V herein, Staff reserve the right to bring proceedings under Ontario securities law against Miller Bernstein based on the facts set out in Part IV of the Settlement Agreement, as well as the breach of the terms and undertakings.

VII. PROCEDURE FOR APPROVAL OF SETTLEMENT

18. Approval of the settlement set out in the Settlement Agreement shall be sought at a public hearing of the Commission scheduled for such date as is agreed to by Staff and Miller Bernstein.

19. Counsel for Staff or Miller Bernstein may refer to any part, or all, of the Settlement Agreement at the Settlement Hearing. Staff and Miller Bernstein agree that the Settlement Agreement will constitute the entirety of the evidence to be submitted at

the Settlement Hearing, unless the parties later agree that further evidence should be submitted at the Settlement Hearing.

20. If the Settlement Agreement is approved by the Commission, Miller Bernstein agrees to waive its right to a full hearing, judicial review or appeal of the matter under the Act.

21. Staff and Miller Bernstein agree that if the Settlement Agreement is approved by the Commission, they will not make any statement inconsistent with the Settlement Agreement. Notwithstanding this paragraph, nothing in this Settlement Agreement shall prevent Miller Bernstein from raising any defence that may be available to Miller Bernstein in any civil or administrative proceeding commenced against Miller Bernstein or its predecessors.

22. Whether or not the Settlement Agreement is approved by the Commission, Miller Bernstein agrees that it will not, in any proceeding, refer to or rely upon the Settlement Agreement or the settlement negotiations as the basis of any attack on the Commission's jurisdiction, alleged bias or appearance of bias, alleged unfairness or any other remedies or challenges that may otherwise be available.

23. If, for any reason whatsoever, the Settlement Agreement is not approved by the Commission, or an order in the form attached as Schedule "A" is not made by the Commission;

- a. the Settlement Agreement and its terms, including all settlement negotiations between Staff and Miller Bernstein leading up to its presentation at the Settlement Hearing, shall be without prejudice to Staff and Miller Bernstein;
- b. Staff and Miller Bernstein shall be entitled to all available proceedings, remedies and challenges, including proceeding to a hearing on the merits of the allegations in the Notice of Hearing and Statement of Allegations of Staff, unaffected by the Settlement Agreement or the settlement negotiations; and

- c. the terms of the Settlement Agreement will not be referred to in any subsequent proceeding, or disclosed to any person except with the written consent of Staff and Miller Bernstein or as may be required by law.

VIII. DISCLOSURE OF SETTLEMENT AGREEMENT

24. The Settlement Agreement and its terms will be treated as confidential by Staff and Miller Bernstein, until approved by the Commission, and forever if, for any reason whatsoever, the Settlement Agreement is not approved by the Commission, except with the written consent of Staff and Miller Bernstein or as may be required by law.

25. Any obligations of confidentiality shall terminate upon approval of the Settlement Agreement by the Commission.

IX. EXECUTION OF SETTLEMENT AGREEMENT

26. The Settlement Agreement may be signed in one or more counterparts which together shall constitute a binding agreement.

27. A facsimile copy of any signature shall be as effective as an original signature.

DATED this 17th day of May, 2005

Signed in the presence of:

“Ron Kobric”
Ron Kobric

Miller Bernstein & Partners LLP
by [entity]
Per:

“Howard Kornblum”
Authorized Signing Officer

“Michael Watson”
Michael Watson
Director, Enforcement Branch