

**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**

**SETTLEMENT AGREEMENT BETWEEN STAFF OF THE ONTARIO  
SECURITIES COMMISSION AND JOHN R. MISZUK**

**PART I – INTRODUCTION**

1. By Notice of Hearing and related Statement of Allegations dated March 24, 2008 (the “Notice of Hearing”), the Ontario Securities Commission (the “Commission”) announced that it proposed to hold a hearing to consider whether, pursuant to s. 127 and s. 127.1(1) and (2) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the “Act”), it is in the public interest to make certain orders against Biovail Corporation (“Biovail”), Eugene N. Melnyk, Brian H. Crombie, John R. Miszuk (“Miszuk”) and Kenneth G. Howling as described in the Notice of Hearing.

**PART II – JOINT SETTLEMENT RECOMMENDATION**

2. Staff of the Commission (“Staff”) agree to recommend settlement of the proceeding initiated in respect of Miszuk by the Notice of Hearing in accordance with the terms and conditions set out below. Miszuk agrees to the settlement on the basis of the facts agreed to in Part IV and consents to the making of an Order in the form attached as Schedule “A”.

### **PART III – ACKNOWLEDGEMENT**

3. Miszuk admits the facts set out in Part IV of this Settlement Agreement solely for the purposes of this Settlement Agreement. The Settlement Agreement and the facts and admissions set out herein are without prejudice to Miszuk in any other proceeding including, without limitation, any civil, administrative, quasi-criminal or criminal actions or proceedings currently pending or which may be brought by any other person or agency. No other person or agency may raise or rely upon the terms of this Settlement Agreement or any agreement to the facts stated herein whether or not this Settlement Agreement is approved by the Commission. Without limiting the generality of the foregoing, Miszuk expressly denies that this Settlement Agreement is intended to be an admission of civil or criminal liability and expressly denies any such admission of civil or criminal liability.

### **PART IV - FACTS**

#### **Background**

4. Biovail Corporation (“Biovail”) is a reporting issuer in the province of Ontario. The common shares of Biovail are listed and posted for trading on the Toronto Stock Exchange and the New York Stock Exchange.
5. Miszuk began working at Biovail in 1990 as a Controller, reporting to Biovail’s Chief Financial Officer (“CFO”). Miszuk was the Vice-President, Controller and Assistant Secretary of Biovail until 2008. Miszuk held the positions of Vice-President and Controller from November of 1997, and the position of Assistant Secretary from June of 2000.
6. Each of the controllers of Biovail’s eight operating entities reported to Miszuk as did the Manager of Biovail’s Corporate Technical and Legal Accounting Group,

who is a chartered accountant. As Controller, Miszuk was responsible for overseeing the preparation of consolidated financial statements for Biovail.

7. Miszuk does not hold any post secondary degrees, licenses or certification and is not a chartered accountant. Miszuk studied business and accounting on a part-time basis at college and also took some courses in a registered industrial accounting program but did not receive a degree.
8. At the time of the events described herein, Biovail was experiencing significant growth as a consequence of completing numerous significant business transactions. Miszuk spent considerable time dealing with these significant transactions as well as numerous business operating issues.

#### **The Wellbutrin XL Bill and Hold Arrangement**

9. On July 29, 2003, Biovail released its financial results for the quarter ending June 30, 2003 (the “Q2 2003 Press Release”). These results were further disseminated in a conference call and webcast held on July 29, 2003 (the “Q2 2003 Analyst Call”). Biovail subsequently filed financial statements for this quarter with the Commission on August 29, 2003 (the “Q2 2003 Financial Statements”).
10. The Q2 2003 Press Release, 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 a sale of Wellbutrin XL (“WXL”) tablets to GlaxoSmithKline PLC (“GSK”) that Biovail has represented was carried out on a “bill-and-hold” basis. Inclusion of this amount in revenue for the quarter increased Biovail’s operating income by approximately U.S. \$4.4 million.

#### **(a) The Wellbutrin XL Agreement**

11. On October 26, 2001, Biovail (through its subsidiary BLI) entered into a Development, License and Co-Promotion Agreement with GSK. This agreement was modified by a Memorandum of Understanding effective January 1, 2003

(together, these two documents form the “Agreement”). Under the Agreement, Biovail agreed to manufacture and supply all of GSK’s requirements for tablets of WXL.

12. Under the Agreement, Biovail was to supply GSK with WXL tablets at two price points: “trade” prices for tablets which were to be sold to the public, and “sample” prices for tablets which were to be distributed free through physicians in order to promote the tablets in the marketplace.
13. Under the Agreement, the prices were fixed for sample tablets. Prices for trade tablets were based upon a tiered percentage of GSK’s net sales of WXL, and were higher than the sample tablet prices. The Agreement contemplated that Biovail would package the trade tablets at its own expense.
14. At the time of entering into the Agreement, WXL had not been approved by the FDA, and thus could not be sold to the public.
15. The FDA approved WXL on August 28, 2003. This included approving the form of packaging and labelling for WXL.

**(b) GSK’s Purchase Orders**

16. The Agreement did not impose an obligation on Biovail to manufacture WXL prior to FDA approval. The Agreement did not make specific provision, whether through milestone payments or otherwise, for the expenses of pre-launch manufacture of WXL. It also did not specifically contemplate a price at which pills manufactured prior to launch would be sold.
17. During 2002, Biovail and GSK representatives met to discuss the pre-launch manufacture of WXL.

18. In April 2003, GSK sent out an initial order for 30,400,000 WXL tablets, for which it proposed to pay the sample prices provided in the Agreement (the “April Purchase Order”). These tablets were requested for June delivery.
19. Throughout April, May and June 2003, GSK and Biovail representatives continued to discuss the pre-launch manufacture of WXL. The parties agreed that in addition to the April Purchase Order, GSK would place an order for WXL for which it would pay a fixed price.
20. On June 20, 2003, GSK sent Biovail a purchase order requesting 27,090,000 WXL tablets at a fixed price per tablet and a \$1.00 per bottle packaging fee (the “June Purchase Order”). The June Purchase Order replaced the April Purchase Order and therefore also contained an order for 30,400,000 WXL tablets at sample prices.

**(c) The Recognition of Revenue**

21. On June 30, 2003, Biovail invoiced GSK for a total of 18,020,244 WXL tablets at fixed trade prices for a total amount of \$8,073,051.24 (the “June Invoice”). Biovail recorded this latter figure as revenue for its fiscal quarter ending June 30, 2003. The inclusion of this revenue increased Biovail’s operating income for the quarter by approximately \$4.4 million, which was a material amount.

**(d) The Bill-And-Hold Arrangement**

22. The June Invoices identified by lot number the specific WXL tablets that it encompassed (the “Specified Tablets”). Miszuk states that he understood that, subsequent to June 30, 2003, Biovail maintained the Specified Tablets in a segregated area of its warehouse in Steinbach, Manitoba and in a designated “site” in its inventory system. Biovail did not, however, supply all of the Specified Tablets to GSK in accordance with the terms reflected on the June Purchase Order and the June Invoice.

23. On August 1, 2003 and August 22, 2003, Biovail shipped some of the Specified Tablets to GSK as sample product. By August 31, 2003 Biovail had replaced most, if not all, of those Specified Tablets with new WXL tablets (the “Pill Switch”).
24. Biovail ultimately issued credit memos for the June Invoice and re-issued a different invoice, with different lot numbers, reflecting the sale of the new WXL tablets at the fixed prices agreed in the June Purchase Order.
25. 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 generally is not considered to have occurred unless the product has been delivered to the customer’s place of business or to another site specified by the customer.
26. “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.
27. Miszuk states that he did not participate in the discussions between GSK and Biovail regarding the pre-launch manufacture 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.
28. Miszuk 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.

## **The Foreign Exchange Error**

29. On April 29, 2003 Biovail released its financial results for the quarter ending March 31, 2003 (the “Q1 2003 Press Release”). As set out above, Biovail released its financial results for Q2 2003 on July 29, 2003. On October 30, 2003 Biovail released its financial results for the quarter ending September 30, 2003 (the “Q3 2003 Press Release”). Biovail subsequently filed financial statements for the first quarter on May 30, 2003 (the “Q1 2003 Financial Statements” ), for the second quarter on August 29, 2003 (as defined above, the “Q2 2003 Financial Statements”) and for the third quarter on November 28, 2003 (the “Q3 2003 Financial Statements”).
30. Biovail failed to account properly for an obligation denominated in Canadian dollars in its Q1 2003 Financial Statements, its Q2 2003 Financial Statements and its Q3 2003 Financial Statements. Although questions regarding the proper recording of the Canadian dollar obligation had been raised by Biovail accounting personnel in early July 2003, prior to the release of its Q2 2003 financial results and the filing of the Q2 2003 Financial Statements, Biovail did not disclose the error until it issued on March 3, 2004 its earnings release for the fourth quarter 2003 and the full fiscal year ended December 31, 2003 (the “March 3, 2004 Press Release”).
31. In December of 2002, Biovail, through its subsidiary BLI, acquired the rights to certain drugs. In so doing, 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. Biovail properly accounted for this obligation in December 2002 when it converted the obligation from Canadian dollars to U.S. dollars using the then current U.S.\$/CAN\$ exchange rate (“FX Rate”).
32. 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 (the “Error”). Biovail also continued to use the FX Rate from December 2002 on June 30, 2003 and September 30, 2003. The interim financial statements for Q1, Q2 and Q3 of 2003 therefore did not accurately reflect any unrealized exchange losses or gains and the outstanding balance of the obligation.
33. 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 BLI. Miszuk states that he directed that steps be taken to analyse 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.
34. In 2004, in consultation with its auditors, Biovail took steps to file restated interim financial statements for Q1, Q2 and Q3 2003. Biovail disclosed the Error in a Press Release on March 3, 2004 and filed its restated interim financial statements on May 14, 2004. As a result of the restatement, Biovail’s net income decreased by U.S. \$5.4 million and \$3.9 million for the Q1 and Q2 2003 Financial Statements respectively, and increased by \$3.1 million for the Q3 2003 Financial Statements.
35. 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 unrealized 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.

**PART V – TERMS OF SETTLEMENT**

36. Miszuk agrees to the terms of settlement listed below.
37. The Commission will make an order pursuant to section 127(1) and section 127.1 of the Act that:
- (a) the Settlement Agreement be approved;
  - (b) Miszuk be reprimanded;
  - (c) Miszuk be prohibited from becoming or acting as an officer or director of a reporting issuer for a period of three years from the date of approval of the Settlement Agreement; and
  - (d) Miszuk be required to successfully complete the Financial Literacy Program of the Institute of Corporate Directors before becoming or acting as a financial officer of a reporting issuer;
  - (e) Miszuk will cooperate with the Commission and Staff in this matter and will appear and testify at the hearing in this matter if requested by Staff ; and
  - (f) Miszuk will pay the sum of \$30,000.00 in respect of the costs of the investigation and hearing in this matter.

**PART VI – STAFF COMMITMENT**

38. If the Commission approves this Settlement Agreement, Staff will not commence any proceedings against Miszuk under Ontario securities law in relation to the facts alleged in the Notice of Hearing.
39. If the Commission approves this Settlement Agreement and Miszuk fails to comply with any of the terms of the Settlement Agreement, Staff may bring

proceedings under Ontario securities law against Miszuk. These proceedings may be based on, but are not limited to, the facts alleged in the Notice of Hearing as well as the breach of the Settlement Agreement.

#### **PART VII – PROCEDURE FOR APPROVAL OF SETTLEMENT**

40. The parties will seek approval of this Settlement Agreement at a public hearing before the Commission according to the procedures set out in this Settlement Agreement and the Commission's Rules of Practice.
41. Staff and Miszuk agree that this Settlement Agreement will form all of the agreed facts that will be submitted at the settlement hearing, unless the parties agree that additional facts should be submitted at the settlement hearing.
42. If the Commission approves this Settlement Agreement, Miszuk agrees to waive all rights to a full hearing, judicial review or appeal of this matter under the Act.
43. If the Commission approves this Settlement Agreement, Miszuk will not make any public statement that is inconsistent with this Settlement Agreement or with any additional agreed facts submitted at the settlement hearing provided, however, that Miszuk shall not be prohibited from making any statement or argument in the proceeding issued by the United States Securities and Exchange Commission involving similar issues to those raised in this proceeding.
44. Whether or not the Commission approves this Settlement Agreement, Miszuk will not use, in any proceeding, this Settlement Agreement or the negotiation or process of approval of this agreement as the basis for any attack on the Commission's jurisdiction, alleged bias, alleged unfairness, or any other remedies or challenges that may otherwise be available.

**PART VIII – DISCLOSURE OF SETTLEMENT AGREEMENT**

45. If the Commission does not approve this Settlement Agreement or does not make the order attached as Schedule “A” to this Settlement Agreement:
- i. this Settlement Agreement and all discussions and negotiations between Staff and Miszuk before the settlement hearing takes place will be without prejudice to Staff and Miszuk; and
  - ii. Staff and Miszuk will each be entitled to all available proceedings, remedies and challenges, including proceeding to a hearing of the allegations contained in the Statement of Allegations. Any proceedings, remedies and challenges will not be affected by this Settlement Agreement, or by any discussions or negotiations relating to this agreement.
46. Both parties will keep the terms of the Settlement Agreement confidential until the Commission approves the Settlement Agreement. At that time, the parties will no longer have to maintain confidentiality. If the Commission does not approve the Settlement Agreement, both parties must continue to keep the terms of the Settlement Agreement confidential, unless they agree in writing not to do so or if required by law.

**PART IX – EXECUTION OF SETTLEMENT AGREEMENT**

47. The parties may sign separate copies of this agreement. Together, these signed copies will form a binding agreement.

48. A fax copy of any signature will be treated as an original signature.

Dated this            day of January, 2009

*“John Miszuk”*

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John Miszuk

*“Wendy Berman”*

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Witness

Dated this 26<sup>th</sup> day of January, 2009

*“Peggy Dowdall-Logie”*

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Peggy Dowdall-Logie  
Executive Director  
Ontario Securities Commission

**SCHEDULE – “A” – DRAFT ORDER**

**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**

**ORDER  
(Sections 127 and 127.1)**

**WHEREAS** on March 24, 2008 the Ontario Securities Commission (the “Commission”) issued a Notice of Hearing and related Statement of Allegations (the “Notice of Hearing”) against Biovail Corporation, Eugene N. Melnyk , Brian H. Crombie, John R. Miszuk (“Miszuk”) and Kenneth G. Howling;

**AND WHEREAS** Miszuk has entered into a settlement agreement with Staff of the Commission dated January , 2009 (the “Settlement Agreement”) in relation to the matters set out in the Notice of Hearing;

**UPON** reviewing the Notice of Hearing and Settlement Agreement, and upon hearing submissions from counsel for Miszuk and for Staff of the Commission;

**AND WHEREAS** the Commission is of the opinion that it is in the public interest to make this Order;

**IT IS HEREBY ORDERED** 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.

Dated at Toronto this            day of January, 2009.

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