



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

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

- and -

EDWARD JOHN HOLKO

ORDER

WHEREAS on April 1, 2010, the Ontario Securities Commission (the “Commission”) issued a Notice of Hearing pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the “Act”) in relation to Edward John Holko (“Holko”);

AND WHEREAS Holko entered into a settlement agreement with Staff of the Commission (“Staff”) dated April 7, 2010 (the “Settlement Agreement”), a copy of which is attached as Schedule “A” to this Order, in which he agreed to a settlement of the proceeding commenced by the Notice of Hearing dated April 1, 2010, subject to the approval of the Commission;

AND UPON reviewing the Settlement Agreement, and upon hearing submissions from counsel for Staff and Holko;

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

IT IS ORDERED THAT:

1. the Settlement Agreement is approved;
2. Holko shall be and is hereby reprimanded;

3. Holko is prohibited from becoming or acting as an officer or director of a reporting issuer, an investment fund, an investment fund manager and a registrant for a period of 3 years from the date of approval of the Settlement Agreement;
4. Holko shall disgorge to the Commission the greater of \$245,327.10 or 50% of the sale price (net of capital gains tax and real estate commissions paid) from the sale of the Condominium described in paragraph 29(a) of the Settlement Agreement, to be allocated under s. 3.4(2)(b) of the Act to or for the benefit of third parties;
5. Holko shall cooperate with the Commission and Staff in this respect of any proceeding commenced with respect to the subject-matter of the Settlement Agreement and will appear and give truthful and accurate testimony at the hearing of any such proceeding, if requested by Staff; and
6. Holko shall pay the sum of \$5,000 in respect of the costs of the investigation of this matter.

DATED at Toronto this 12th day of April, 2010.

“David L. Knight”

David L. Knight, FCA

“Carol S. Perry”

Carol S. Perry

SCHEDULE “A”

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

- and -

EDWARD JOHN HOLKO

SETTLEMENT AGREEMENT BETWEEN STAFF OF THE ONTARIO SECURITIES COMMISSION AND EDWARD JOHN HOLKO

PART I – INTRODUCTION

1. By Notice of Hearing and related Statement of Allegations dated April 1, 2010 (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 the Respondent, Edward John Holko (“Holko”), 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 Holko by the Notice of Hearing in accordance with the terms and conditions set out below. Holko 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. For the purposes of this settlement hearing only, Holko agrees with the facts set out in Part IV of the settlement agreement (the “Settlement Agreement”).

PART IV - FACTS

(a) The Fund and Fund Manager

4. Retrocom Growth Fund (“Retrocom” or the “Fund”) is a reporting issuer in Ontario and was incorporated in 1995 as a labour-sponsored investment fund. In December of 2005, Retrocom suspended redemptions because it did not have sufficient liquidity to meet outstanding redemption requests. On August 2, 2006, Retrocom issued a press release announcing that it was insolvent and had filed a Notice of Intention to make a Proposal under the *Bankruptcy and Insolvency Act* (Canada). RSM Richter Inc. (“Richter”) was named as trustee. It is not expected that any assets will be available for distribution to the Fund’s investors.

5. In its prospectus dated January 14, 2003, as amended from time to time (the “Prospectus”), Retrocom stated that it was “established to invest in small and medium-sized companies involved in high-tech communications, fibre optics, health-care development, innovative building technologies, energy and environmental conservation, construction and real estate development.” At all Material Times (defined to include all financial reporting periods between 2003 and 2005), approximately 90% of Retrocom’s holdings were comprised of direct and/or indirect investments in real property. Retrocom’s labour-sponsored status provided investors with favourable tax treatment for investments in the Fund.

6. Retrocom Investment Management Inc. (“RIMI”) was, from June 2001, Retrocom’s manager. RIMI was incorporated in Ontario in 1995. RIMI was registered with the Commission as an Investment Counsel and Portfolio Manager (“ICPM”) on April 2, 1998 and as a Limited Market Dealer (“LMD”) on September 5, 2000. On October 2, 2006, the Commission issued an Order accepting RIMI’s surrender of registration.

7. Pursuant to section 116 of the Act, RIMI, as Retrocom’s manager, was required to exercise its powers and discharge its duties honestly, in good faith and in the best

interests of the Fund and to exercise the degree of care, diligence and skill that a reasonably prudent fund manager would exercise in the circumstances.

(b) The Respondent

8. At all material times, Holko was the Vice-President of Finance and Administration at RIMI. From February 13, 2002 until June 23, 2004 Holko was registered with the Commission as a Director and Officer (non-advising) with the title of Chief Financial Officer of Bellporte Black, the Fund's manager prior to RIMI.

9. Holko holds the professional designation of Certified Management Accountant

10. Holko's compensation from RIMI for the years 2003, 2004 and 2005 (exclusive of the Personal Benefit defined and described herein) was approximately \$133,000, \$174,000 and \$138,000, respectively.

(c) Significant Over-Valuation of Assets During Fiscal 2000 to 2005

11. The financial year-end for the Fund was August 31. For fiscal years ending August 31, 2001 to 2004 the Fund's financial statements were audited by a professional audit firm and, in conjunction therewith, an annual valuation policy compliance review was conducted by a different professional audit firm. During this period, RIMI valued the Fund's assets and such valuations were approved by the Fund's Valuation Committee which Holko did not sit on.

12. In its audited financial statements for the period ending August 31, 2003, Retrocom recorded assets with a value of approximately \$68 million. For the year ending August 31, 2004 Retrocom's assets were valued in its audited financial statements in the approximate amount of \$52 million. Audited financial statements for the year ending August 31, 2005 were never completed.

13. In 2005, in the context of the Fund's year-end audit (which was not completed), Cole & Partners performed a valuation of the Fund's assets as at August 31, 2005. Cole & Partners reported that the Fund's NAVs were cumulatively overstated by approximately \$147 million during the period September 1, 2000 to August 31, 2005 (the

“Period”). In or about February 2006, the Special Committee retained Richter to review Retrocom’s financial affairs during the Period. Richter found that the Fund’s NAVs were overstated by \$54 million during the Period.

(d) Additional Fees and Conflict of Interest

14. Pursuant to the Prospectus, RIMI was to receive an annual management fee, calculated daily and payable monthly in arrears, to equal 3.25% per annum of the aggregate NAV of the Fund. Also, pursuant to the Prospectus, RIMI was permitted to receive fees directly from investee companies for services provided:

RIMI monitors each of the Fund’s investments on a continuous basis and may receive from investee companies certain fees for services provided thereto. RIMI may require that a representative of it be appointed as a director or observer to the board of directors of an investee company...
(page 28)

15. Article 5.1 of the management agreement between RIMI and the Fund (the “Management Agreement”) stated:

5.1 Applicable Standards. The Manager shall exercise the powers granted hereunder and discharge the duties hereunder honestly, in good faith and in the best interests of the Fund and, in connection therewith, shall exercise the degree of care, diligence and skill that a reasonable prudent person performing similar functions would exercise in the circumstances. Unless the Fund consents, the Manager shall not, and shall not permit its employees, directors or officers to enter into any arrangements with any Eligible Business in which the Fund is considering an investment or with any Investee Company or with any director, officer, shareholder or affiliate of any such Eligible Business or Investee Company or with any such Eligible Business or Investee Company, or with any person dealing at arm’s length with any of the aforesaid persons, such that the Manager or any of its employees, directors or officers receive or would receive any fee, payment or benefit as a result of dealing with such Eligible Business or Investee Company or such persons.

16. During the Material Time, RIMI received payments totalling approximately \$3.5 million from companies/projects in which the Fund had invested on RIMI’s advice (in which Holko did not have a role) in respect of the provision of the following services: monitoring, diligence, viewings, security/break-ins, liaising with City and police officials,

marketing activities, feasibility studies, financial modeling, construction consulting, debt restructuring, loan processing and due diligence, financial analysis, vacant property reports, architectural renderings, sponsorships and promotions (the “Additional Fees”).

17. A portion of the Additional Fees was paid, rather than to RIMI, by way of the transfer of a condominium unit to a numbered company controlled 50% by Holko and 50% by another RIMI employee (the “Condominium”). At the time of transfer, the Condominium was valued at \$490,654.21. A current assessment estimates the Condominium’s value to be in the range of \$550,000 to \$575,000. Accordingly, Holko obtained a personal benefit in the amount of at least \$245,327.10 as a consequence of the transfer of the Condominium (the “Personal Benefit”).

18. Holko did not personally seek the consent of the Fund prior to RIMI’s acceptance of the Additional Fees, nor did he take any steps to ensure that RIMI did so. Equally, Holko did not personally disclose to the Fund that he had received the Personal Benefit.

19. Holko states that he believed that others at RIMI who also sat on the Fund’s Board of Directors had informed the Fund of his receipt of the Personal Benefit and had obtained the Fund’s approval in respect of same. He acknowledges however, that he ought to have been more careful and sought confirmation in respect of this important assumption, particularly given that the others on which he relied also received a personal benefit.

20. None of the Additional Fees were deducted from the management fees paid by Retrocom to RIMI, although RIMI’s duties, as set out in the Management Agreement, included, among other things, “ongoing monitoring of investments.”

21. Holko acknowledges that a conflict of interest was created by the Additional Fees, because RIMI had an incentive to recommend that the Fund make investments in projects that would generate fees in the nature of the Additional Fees, regardless of whether such investments were in the best interests of the Fund.

22. Accordingly, Holko acknowledges RIMI’s failure to disclose to the Fund its intended receipt of the Additional Fees, prior to accepting such payments, was in breach

of its obligations pursuant to section 116 of the Act to exercise its powers and discharge its duties fairly, honestly, in good faith and in the best interests of the Fund and to exercise the degree of care, diligence and skill expected of a reasonably prudent fund manager in the circumstances. Equally, Holko acknowledges that RIMI's failure to disclose to the Fund its receipt of the Additional Fees, including the Personal Benefit, was in breach of section 116 of the Act.

23. Holko further acknowledges that he ought to have been more careful in ensuring that the Additional Fees and Personal Benefit received by RIMI were properly disclosed to the Fund. He therefore acknowledges that he acquiesced and participated in these non-compliances with Ontario securities law by RIMI and accordingly, that he failed to comply with Ontario securities law contrary to section 129.2 of the Act and the public interest.

PART V - RESPONDENT'S POSITION

24. Holko did not sit on any of the Fund's committees, including those committees that were charged with responsibilities and that had decision-making powers in connection with the valuation of the Fund's assets, the audit of the Fund's financial affairs or the investment of the Fund's assets.

25. Holko has cooperated with Staff fully in the investigation and resolution of this matter.

PART VI – TERMS OF SETTLEMENT

26. Holko agrees to the terms of settlement listed below.

27. The Commission will make an order pursuant to section 127(1) and section 127.1 of the Act that:

- (a) the Settlement Agreement is approved;
- (b) Holko shall be reprimanded;

- (c) Holko is prohibited from becoming or acting as an officer or director of a reporting issuer, an investment fund, an investment fund manager and a registrant for a period of 3 years from the date of approval of the Settlement Agreement;
- (d) Holko will disgorge to the Commission the greater of \$245,327.10 or 50% of the sale price (net of capital gains tax and real estate commissions paid) from the sale of the Condominium described in paragraph 29(a) below, to be allocated under s. 3.4(2)(b) of the Act to or for the benefit of third parties;
- (e) Holko will cooperate with the Commission and Staff in this respect of any proceeding commenced with respect to the subject-matter of this Settlement Agreement and will appear and give truthful and accurate testimony at the hearing of any such proceeding, if requested by Staff; and
- (f) Holko will pay the sum of \$5,000 in respect of the costs of the investigation of this matter.

28. Holko agrees to personally make the costs payment ordered in paragraph 27 (f) above by certified cheque when the Commission approves this Settlement Agreement. Holko will not be reimbursed for, or receive a contribution toward, this or any other payment made pursuant to this Settlement Agreement from any other person or company subject to paragraph 31 below.

29. Holko agrees to provide, when the Commission approves this Settlement Agreement:

- (a) a written undertaking to the Commission executed by himself and the legal owner of the Condominium to list the Condominium for sale within 5 days of the approval of the Settlement Agreement;

- (b) a consent executed by himself and the legal owner of the Condominium to a certificate of direction pursuant to s. 126(1) and (4) of the Act to be registered on title to the Condominium; and
- (c) a direction by the legal owner of the Condominium directing any purchaser of the Condominium to direct payment of all sale proceeds, after payout only of (i) the outstanding first mortgage (instrument No. AT1671009), (ii) applicable capital gains taxes, and (iii) applicable real estate commissions, to the Commission on closing of the sale of the Condominium.

30. Upon receipt of the funds from the sale of the Condominium, the Commission will revoke its certificate and direction against title to the Condominium. In the event the Condominium is not sold within 120 days of the date when the Commission approves this Settlement Agreement and the amount set out in paragraph 27 (d) is not otherwise paid, the Commission will seek to enforce its Order approving this Settlement Agreement as an order of the Ontario Superior Court of Justice pursuant to section 151 of the Act.

31. Holko hereby agrees and acknowledges that, in the event that he should receive any further or additional funds in connection with the transactions giving rise to the Personal Benefit: (i) if the amounts owing pursuant to this Settlement Agreement are not paid in full, he will direct those funds to the Commission; (ii) if the amounts owing pursuant to this Settlement Agreement are paid in full, he will direct those funds to Richter in its capacity as trustee for Retrocom; and (iii) should Richter no longer be acting as trustee, he will return to the Commission for direction in respect of those funds.

32. Holko is not aware of any fees in the nature of the Additional Fees owing to him or RIMI at this time, other than fees in connection with the transactions giving rise to the Personal Benefit. If he becomes aware of any such fees he will provide notice and details to Staff forthwith.

PART VII – STAFF COMMITMENT

33. If the Commission approves this Settlement Agreement, Staff will not commence any proceedings against Holko under Ontario securities law in relation to the facts alleged in the Notice of Hearing, subject to paragraph 34 below.

34. If the Commission approves this Settlement Agreement and Holko fails to comply with any of the terms of the Settlement Agreement, Staff may bring proceedings under Ontario securities law against Holko. 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 VIII – PROCEDURE FOR APPROVAL OF SETTLEMENT

35. 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. At the request of the parties, approval of this Settlement Agreement will be considered at a joint hearing at which settlement agreements for other respondents will also be considered.

36. Staff and Holko agree that this Settlement Agreement will form all of the agreed facts that will be submitted in respect of this settlement at the settlement hearing, unless the parties agree that additional facts should be submitted at the settlement hearing.

37. If the Commission approves this Settlement Agreement, Holko agrees to waive all rights to a full hearing, judicial review or appeal of this matter under the Act.

38. If the Commission approves this Settlement Agreement, Holko will not make any public statement that is inconsistent with this Settlement Agreement or with any additional agreed facts submitted at the settlement hearing.

39. Whether or not the Commission approves this Settlement Agreement, Holko 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 IX – DISCLOSURE OF SETTLEMENT AGREEMENT

40. 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 Holko before the settlement hearing takes place will be without prejudice to Staff and Holko; and
- ii. Staff and Holko 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.

41. Both parties will keep the terms of the Settlement Agreement confidential until the Commission approves the Settlement Agreement, except that the Settlement Agreement may be disclosed to the other respondents who are in attendance at the settlement hearing, as provided in paragraph 35 above. Upon approval of the Settlement Agreement by the Commission, the parties will no longer have to maintain confidentiality. If the Commission does not approve the Settlement Agreement, both parties and every other respondent in attendance at the settlement hearing must continue to keep the terms of the Settlement Agreement confidential, unless they agree in writing not to do so or if otherwise required by law.

PART X – EXECUTION OF SETTLEMENT AGREEMENT

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

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

Dated at Toronto this 8th day of April, 2010

Witness: “Michael Magonet”

Name: “Ed Holko”
Edward John Holko

Dated at Toronto this 7th day of April, 2010

Staff of the Ontario Securities Commission

“Tom Atkinson”

Tom Atkinson
Director of Enforcement

SCHEDULE "A"



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- and -

EDWARD JOHN HOLKO

ORDER

WHEREAS on April 1, 2010, the Ontario Securities Commission (the "Commission") issued a Notice of Hearing pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act") in relation to Edward John Holko ("Holko");

AND WHEREAS Holko entered into a settlement agreement with Staff of the Commission ("Staff") dated April 1, 2010 (the "Settlement Agreement"), a copy of which is attached as Schedule "A" to this Order, in which he agreed to a settlement of the proceeding commenced by the Notice of Hearing dated April 1, 2010, subject to the approval of the Commission;

AND UPON reviewing the Settlement Agreement, and upon hearing submissions from counsel for Staff and Holko;

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

IT IS ORDERED THAT:

1. the Settlement Agreement is approved;
2. Holko shall be and is hereby reprimanded;
3. Holko is prohibited from becoming or acting as an officer or director of a reporting issuer, an investment fund, an investment fund manager and a registrant for a period of 3 years from the date of approval of the Settlement Agreement;
4. Holko shall disgorge to the Commission the greater of \$245,327.10 or 50% of the sale price (net of capital gains tax and real estate commissions paid) from the sale of the Condominium described in paragraph 29(a) of the Settlement Agreement, to be allocated under s. 3.4(2)(b) of the Act to or for the benefit of third parties;
5. Holko shall cooperate with the Commission and Staff in this respect of any proceeding commenced with respect to the subject-matter of the Settlement Agreement and will appear and give truthful and accurate testimony at the hearing of any such proceeding, if requested by Staff; and
6. Holko shall pay the sum of \$5,000 in respect of the costs of the investigation of this matter.

DATED at Toronto this day of April, 2010.
