

**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
OF
KENNETH G. HOWLING**

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 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 certain orders against Biovail Corporation (“Biovail”), Eugene N. Melnyk (“Melnyk”), Brian H. Crombie (“Crombie”), John R. Miszuk and Kenneth G. Howling (“Howling”).

II. JOINT SETTLEMENT RECOMMENDATION

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

III. ACKNOWLEDGEMENT

3. Howling admits the facts set out in Part IV of this Settlement Agreement solely for the purposes of this Settlement Agreement. This Settlement Agreement and the facts and

admissions as set out herein are without prejudice to Howling in any other proceeding including, without limitation, any civil, administrative, quasi-criminal or criminal actions or proceedings currently pending or that may be brought by any person or agency, whether or not this Settlement Agreement is approved by the Commission. No other person or agency may raise or rely upon the terms of this Settlement Agreement or any agreement or the facts stated herein whether or not this Settlement Agreement is approved by the Commission. Without limiting the generality of the foregoing, Howling 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.

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. Biovail is a fully integrated pharmaceutical company.

5. During the period April 2003 to October 2004, Howling was Biovail’s head of Investor Relations with the title “Vice-President, Finance”. Howling is no longer employed by Biovail.

6. 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 Melnyk, Biovail’s Chief Executive Officer, and Crombie, its Chief Financial Officer. The information included in press releases was obtained from those persons in the company with relevant knowledge.

7. Howling had no authority to issue press releases on Biovail’s behalf. Howling had no financial reporting or accounting responsibilities nor any operational responsibilities.

Biovail's Statements in Press Releases - the Truck Accident

8. Biovail has admitted in a Settlement Agreement entered into with Staff dated January 7, 2009 (the "Biovail Settlement Agreement") that Biovail made statements in press releases issued on October 3, 8 and 30, 2003 and March 3, 2004 that, in a material respect, inaccurately disclosed the implications, for Biovail, of a truck accident that occurred on October 1, 2003.

9. The press releases concerned Biovail's disclosure that its preliminary financial results for its third quarter of 2003 would be below previously issued guidance. Full particulars are contained in the Biovail Settlement Agreement. A description of the statements is outlined below.

(a) Biovail's Revenue and Earnings Expectations

10. On February 7, 2003, Biovail publicly disclosed in a press release its revenue and earnings guidance for 2003. The revenue range projected for the third quarter of 2003 was U.S. \$260 million to U.S. \$300 million.

11. Biovail did not achieve its third quarter 2003 revenue and earnings expectations. Rather, in its October 30, 2003 press release, Biovail reported U.S. \$215.3 million in revenue for that quarter.

(b) The October 3, 2003 Press Release

12. In a press release issued on October 3, 2003 (the "October 3, 2003 Press Release"), Biovail stated that its preliminary results for its 2003 third quarter "will be below previously issued guidance...Contributing significantly to this unfavourable variance was the loss of revenue and income associated with a significant in-transit shipment loss of Wellbutrin XL as a result of a traffic accident ... Revenue associated with this shipment is in the range of [U.S.] \$10 to [U.S.] \$20 million".

13. A truck carrying WXL tablets, destined for GSK's facility in the United States, departed from Biovail's warehouse in Steinbach, Manitoba on September 30, 2003.

14. The contractual delivery term between Biovail and GSK was “F.O.B., GSK’s facilities in the U.S.A. (freight collect).”

15. The truck carrying the WXL shipment was scheduled to reach GSK’s facility after September 30, 2003.

16. On October 1, 2003, the truck carrying the WXL shipment was involved in an accident.

17. The October 3, 2003 Press Release also 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, discussed below, that the “actual revenue loss” from the shipment on the truck was U.S. \$5 million.

(c) The October 8, 2003 Press Release

18. On October 8, 2003, Biovail issued a further press release (the “October 8, 2003 Press Release”) which stated that Biovail had recovered the WXL shipment involved in the accident and that 60 percent of the shipment was saleable and might be re-shipped within 30 days. The press release went on to state “Biovail re-confirms that the sales value of these goods is within previously stated guidance”.

(d) The October 30, 2003 Press Release

19. In its earnings press release for the third quarter of 2003 issued on October 30, 2003 (the “October 30, 2003 Press Release”), Biovail stated that “[a] late third quarter 2003 shipment of Wellbutrin XL involved in an accident outside of Chicago was returned to Biovail’s facility on October 8, 2003 for inspection. No revenue was recognized from this shipment in Q3 2003.”

(e) The March 3, 2004 Press Release

20. The March 3, 2004 Press Release stated that “Biovail announced [on October 3, 2003] that its estimated revenue from Wellbutrin XL for third quarter 2003 would be less than [U.S.] \$10 million partially as a result of the truck accident and that the loss in revenue due to the accident would be in the range of [U.S.] \$10.0 million to [U.S.] \$20.0

million". The March 3, 2004 Press Release further stated that "the actual revenue loss from the accident was determined to be [U.S.] \$5.0 million".

(f) October 3, 2003 Analyst Call

21. Biovail held a conference call with analysts and a webcast on October 3, 2003 following the release of the October 3, 2003 Press Release (the "October 3, 2003 Analyst Call"). During the October 3, 2003 Analyst Call, Biovail stated that the accident would have a material negative financial impact on its third quarter revenues. Biovail further stated that the negative impact of the truck accident on revenue would be in the range of U.S. \$15 million to U.S. \$20 million.

22. During the October 3, 2003 Analyst Call, an analyst questioned whether the accident would have fourth quarter rather than third quarter implications. Biovail responded that it was purely a third quarter issue.

(g) October 2003 Investor Meetings

23. In October 2003, Biovail held a series of meetings with investors to, among other things, deal with questions surrounding the truck accident and the related announcements that followed (the "Investor Meetings"). The Investor Meetings took place in various cities on October 10, 13, 14 and 15 of 2003.

24. Specifically, the presentation materials included a slide with the heading "Revised third quarter guidance" which stated "Revenue and EPS effected (sic) by three items[:] 1. Wellbutrin XL shipment / traffic accident ...". Another slide entitled "Wellbutrin XL – timing issue" stated "Impact to Q3 ... Revenue [U.S.] \$10 to [U.S.] \$20 million".

25. In its Settlement Agreement with Staff dated January 7, 2009, Biovail admitted that it had disseminated incorrect statements in the Press Releases of October 3, 8 and 30, 2003 and March 3, 2004, in the Analyst Call held on October 3, 2003, and in Investor Meetings held in October 2003 relating to the truck accident. Biovail further admitted that it should have taken greater care, from the outset, to accurately assess the revenue associated with

the product on the truck, and to accurately assess whether, but for the accident, it would have been able to recognize revenue from the sale of the product on the truck in Q3 2003.

Howling's Role in Relation to Press Releases and Statements in Issue

26. 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 their release, and liaise with investors and analysts.

27. 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 informational needs of the investing public. He should have taken greater care to ensure that correct information was disseminated to the investing public. His failure to take greater care constitutes conduct contrary to the public interest.

Mitigating Factors

28. 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. Howling communicated to the senior executives of Biovail information he received and issues brought to his attention regarding the terms of the GSK contract and questions regarding the value of the goods on the truck.

29. Further, Howling states that he relied on the fact that senior management directly reviewed and authorized the subject disclosures.

30. Howling states that he acted at all times in good faith.

V. TERMS OF SETTLEMENT

31. Howling agrees to the terms of settlement listed below. 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) Howling be reprimanded;
- (c) Howling be prohibited from becoming or acting as an officer or director of a reporting issuer for a period of two years from the date of approval of the Settlement Agreement;
- (d) Howling 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
- (e) Howling will pay the sum of \$20,000.00 in respect of the costs of the investigation and hearing in this matter.

PART VI – STAFF COMMITMENT

32. If the Commission approves this Settlement Agreement, Staff will not commence any proceedings against Howling under Ontario securities law in relation to the facts alleged in the Notice of Hearing.

33. If the Commission approves this Settlement Agreement and Howling fails to comply with any of the terms of the Settlement Agreement, Staff may bring proceedings under Ontario securities law against Howling. 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

34. 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.

35. Staff and Howling 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.

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

37. If the Commission approves this Settlement Agreement, Howling 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 Howling 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.

38. Whether or not the Commission approves this Settlement Agreement, Howling 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

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

40. 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

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

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

Dated this 26th day of January, 2009

“Joel Wiesenfeld”

Witness

“Kenneth G. Howling”

Kenneth G. Howling

Dated this 26th day of January, 2009

“Peggy Dowdall-Logie”

Staff of the Ontario Securities Commission
Per: Peggy Dowdall-Logie
Executive Director

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 and Kenneth G. Howling (“Howling”);

AND WHEREAS Howling has entered into a settlement agreement with Staff of the Commission dated January 26, 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 Howling 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. 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.

Dated at Toronto this day of January, 2009.
