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: BRIAN H. CROMBIE

HEARING:	Thursday, February 12, 2009	
PANEL:	Wendell S. Wigle, Q.C.	- Commissioner and Chair of the Panel
	Suresh Thakrar	- Commissioner
	Carol S. Perry	- Commissioner
APPEARANCES:	Johanna Superina Alexandra Clark	- for Staff of the Ontario Securities Commission
	Paul LeVay	- for Brian H. Crombie

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 a proposed Settlement Agreement between Staff of the Commission ("Staff") and the respondent Brian H. Crombie ("Crombie").

[2] We have decided to approve the Settlement Agreement as being in the public interest. These are our oral reasons in this matter which will be published in the Bulletin.

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

[4] Crombie's conduct in this matter is in relation to Biovail Corporation ("Biovail"), which is a reporting issuer in the province of Ontario and is Canada's largest publicly traded pharmaceutical company. The common shares of Biovail are listed and posted for trading on the Toronto Stock Exchange and the New York Stock Exchange.

[5] During the period May 2000 to August 2004, Crombie was Biovail's Chief Financial Officer and as Chief Financial Officer, Crombie had overall responsibility for Biovail's finance and accounting function. From August 2004 to May 2007, Crombie was Vice-President, Strategic Development. Crombie is no longer employed by Biovail.

[6] Crombie's conduct relates to improper accounting practices in the area of revenue recognition and Crombie's role in the dissemination of incorrect statements in certain press releases and in certain analyst calls and investor meetings and providing misleading information to Staff during a continuous disclosure review.

[7] The specific matters that are the subject of the Settlement Agreement fall into three categories:

(1) Crombie's role in Biovail's recognition in its interim financial statements for Q2 of 2003 of revenue relating to a sale of Wellbutrin XL tablets;

(2) Crombie's role in Biovail's dissemination of materially inaccurate information concerning the consequences of a truck accident in the press releases of October 3, 8 and 30, 2003 and in March 3, 2004, in the analyst call held on October 3, 2003, and in investor meetings held in October 2003; and

(3) Crombie's role in Biovail's provision of misleading information to Staff during a continuous disclosure review of Biovail in 2003 and 2004.

[8] With respect to the sale of Wellbutrin XL tablets in June 2003:

(1) As the senior financial officer of Biovail, Crombie had principal responsibility for ensuring that the Q2 2003 financial statements complied with Canadian Generally Accepted Accounting Principles ("GAAP"). He certified the public

disclosure of these financial statements on behalf of Biovail and thereby acquiesced in their release to the public;

(2) Crombie acknowledges that he ought to have been more careful in considering the recognition of revenue for this transaction;

(3) Crombie specifically admits that he ought to have made further inquiries or ensured that Biovail sought further guidance from a qualified accounting professional; and

(4) Crombie, now acknowledges that he acquiesced in conduct by Biovail that was a violation of Ontario securities law and, by his conduct, acted contrary to the public interest.

[9] With respect to Biovail's dissemination of materially inaccurate information in connection with the truck accident:

(1) As chief financial officer of Biovail, Crombie played a leading role in the preparation and drafting of the press releases in issue, including being the person to provide the estimate as to the range of revenue loss in the October 3, 2003 press release. Crombie was also a participant in the October 3, 2003 analyst call and provided the estimate as to the range of revenue loss in the call. He also attended the October 2003 investor meetings as a member of Biovail's senior management;

(2) Crombie should have taken greater care to ensure that the correct information was disseminated to the investing public and that this was done in a timely fashion; and

(3) Crombie now acknowledges that he acquiesced in conduct by Biovail that was a violation of Ontario securities law and, by his conduct, acted contrary to the public interest.

[10] With respect to Biovail's provision of misleading information to Staff:

(1) During the continuous disclosure review of Biovail conducted by Commission Staff in 2003 and 2004, Staff requested information from Biovail in relation to several issues, including arrangements between Biovail and Pharmaceutical Technologies Corporation ("PTC");

(2) In response to Staff's disclosure review, Crombie participated in drafting the January 28, 2003 letter to Staff from Biovail, which Biovail has admitted contained a materially inaccurate statement. Crombie signed this letter on behalf of Biovail;

(3) Crombie should have taken greater care to ensure that the letter did not contain an inaccurate statement; and

(4) Crombie now acknowledges that, by his conduct, he acted contrary to the public interest.

[11] By entering into the Settlement Agreement, Crombie has recognized that his conduct was contrary to the public interest, and we find that it is appropriate to impose sanctions including a reprimand, an eight year officer and director ban, an administrative penalty of $250,000 and costs of $50,000.

[12] In coming to our conclusion to approve the Settlement Agreement, we considered the following principles relating to the approval of settlement agreements and sanctioning factors.

[13] First, the Commission's mandate in upholding the purposes of the Act, as set out 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.

[14] In pursuing the purposes of the Act, section 2.1 provides that the Commission shall have regard to certain fundamental principles. Relevant to this case, paragraph 2 states that the primary means for achieving the purposes of the Act are: requirements for timely, accurate and efficient disclosure of information, and requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.

[15] These requirements articulated in section 2.1 dealing with the timely, accurate and efficient disclosure of information form the cornerstone principle of securities regulation. As stated in *Re Phillip Services Corp*. (2006), 29 O.S.C.B. 3971 at para. 7:

> Disclosure is the cornerstone principle of securities regulation. All persons investing in securities should have equal access to information that may affect their investment decisions. The Act's focus on public disclosure of material facts in order to achieve market integrity would be meaningless without a requirement that such disclosure be accurate and complete and accessible to investors.

[16] By entering into the Settlement Agreement, Crombie has recognized the seriousness of his misconduct relating to Biovail's disclosure practices. It is a recognition that this is a serious violation of securities law that undermines the primary goals of the Commission to achieve investor protection and to foster fair and efficient capital markets. Disseminating incorrect statements to the marketplace sends the wrong signal to investors and misleads the market as a whole and this endangers the efficiency of the capital markets and damages investor confidence. In our view, misleading Staff is also very serious misconduct that is contrary to the public interest.

[17] 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 written 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*, *supra* at 1134).

[18] Further, as set out in *Re Mithras Management Ltd.*, (1990), 13 O.S.C.B. 1600 at 1610-1611, it is not the role of the Panel to punish the respondent, but rather to make an order that will protect investors and prevent their exposure to similar conduct in the future.

[19] With respect to reviewing the Settlement Agreement, 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. Specifically, the Commission's role is to decide whether to approve the Settlement Agreement, as a whole, on the terms presented to us (see: *Re Melnyk* (2007), 30 O.S.C.B. 5232 at para. 15).

[20] We also took into account the following mitigating factors:

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

(2) Crombie 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.

[21] In addition, consideration should be given to the agreement reached between adversarial parties, as a balancing of factors and interests, has taken place between Staff and Crombie in reaching this Settlement Agreement.

[22] Although the regulatory sanctions agreed to in the Settlement Agreement 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.

[23] Considering the respondent's position as stated in the Settlement Agreement, we are of the view that the sanctions set out in the Settlement Agreement are within the acceptable parameters and are aligned with previous settlement agreements reached with members of senior financial management, including Chief Financial Officers, involved in accounting irregularities (see: *Re Philip Services Corp*. (2006), 29 O.S.C.B. 2064, 2073 and 3941). The sanctions are also proportionate for Crombie's conduct in this matter in comparison with the conduct of the other respondents that have settled in this same proceeding.

[24] We therefore find it appropriate to order that:

(1) The Settlement Agreement is approved;

(2) Crombie is reprimanded;

(3) Crombie is prohibited from becoming or acting as a director or officer of a reporting issuer for a period of eight (8) years from the date of this Order;

(4) Crombie 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;

(5) Crombie shall pay an administrative penalty of CAN $250,000, to be paid to or for the benefit of third parties designated by the Commission, pursuant to section 3.4(2) of the Act; and

(6) Crombie shall pay CAN $50,000 in respect of a portion of the costs of the investigation and hearing in relation to this matter.

[25] In conclusion, we find that together, all the sanctions imposed in this matter provide adequate specific and general deterrence, which the Supreme Court of Canada has established is an important regulatory objective for securities commissions (*Re Cartaway Resources Corp*., [2004] 1 S.C.R. 672).

[26] The public reprimand provides strong censure of Crombie's past conduct.

[27] In our view, the imposition of an administrative penalty in the amount of CAN $250,000 is appropriate. In this matter there are multiple breaches of the Act.

[28] The amount of CAN $50,000 ordered in costs will also enable the Commission to recover a part of its costs of conducting the investigation and the hearing in this matter.

[29] Therefore, we approve the Settlement Agreement as being in the public interest.

[30] Now, Mr. Crombie, will you please stand. Mr. Crombie, as the Chief Financial Officer of Biovail during the period in question, you had overall responsibility for the company's finance and accounting function. By your own admission, you acquiesced in conduct by Biovail that was a violation of Ontario securities law, and by your own conduct, acted contrary to the public interest. You are hereby reprimanded by the Commission for your conduct. You may please now be seated.

Approved by the Chair of the Panel on February 25, 2009.

"*Wendell S. Wigle*"

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Wendell S. Wigle, Q.C.