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

REASONS AND DECISION

Hearing:	March 4, 5, 6, 9, 10, 11, 12, 30 and 31, 2009 April 1, 2, 3, 6, 7, 8, 9, 13, 14, 15, 22, 24, 25 and 26, 2009 June 22, 24, 25 and 26, 2009	
Decision:	September 30, 2010	
Panel:	James E. A. Turner	- Vice-Chair and Chair of the Panel
	David L. Knight, F.C.A.	- Commissioner
	Paulette L. Kennedy	- Commissioner
Counsel:	Kent E. Thomson James Doris Sean Campbell	- For Eugene N. Melnyk
	Johanna Superina Alexandra Clark Caitlin Sainsbury	- For Staff of the Ontario Securities Commission

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REASONS AND DECISION

I. INTRODUCTION

[1] On March 24, 2008, the Ontario Securities Commission (the "**Commission**") issued a Notice of Hearing in this matter pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") in connection with a Statement of Allegations issued by Staff of the Commission ("**Staff**") on that day (the "**Statement of Allegations**").

[2] On October 1, 2003, a truck carrying Wellbutrin XL ("**WXL**"), an antidepressant drug manufactured by Biovail Corporation ("**Biovail**"), was involved in a multi-vehicle accident outside Chicago, Illinois (the "**Accident**") while in transit to GlaxoSmithKline Inc. ("**GSK**"). The allegations in this proceeding relate to statements made by Biovail about the financial implications of the Accident to its financial results for its 2003 third quarter. Those statements were made in news releases issued by Biovail on October 3, October 8 and October 30, 2003 and March 3, 2004 (referred to collectively as the "**Releases**"), on an analysts conference call and webcast on October 3, 2003 (the "**Analysts Call**") and in roadshow presentations held between October 13 and 16, 2003 (the "**Roadshows**").

[3] In the Statement of Allegations, Staff alleges that Biovail made statements in the Releases, on the Analysts Call and in the Roadshows 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. Staff alleges that Biovail knew or should have known that such statements were materially misleading or untrue. Staff alleges that Biovail thereby violated Ontario securities law and engaged in conduct contrary to the public interest. Staff also alleges that Eugene N. Melnyk ("**Melnyk**"), the Chairman and Chief Executive Officer of Biovail at the time, authorized, permitted or acquiesced in all of Biovail's alleged misstatements.

[4] The Statement of Allegations relates to a significant number of matters, circumstances and conduct that were not the subject matter of this proceeding. The Commission has approved settlement agreements entered into between Staff and each of Biovail, Brian H. Crombie ("**Crombie**"), Kenneth G. Howling ("**Howling**") and John R. Miszuk ("**Miszuk**") with respect to all of the allegations made against them in the Statement of Allegations. Accordingly, this proceeding relates only to Staff's allegations against Melnyk. Staff alleges that Melnyk knew or should have known that statements made by Biovail in the Releases, on the Analysts Call and in the Roadshows were misleading or untrue in a material respect. Staff alleges that Melnyk was deemed, pursuant to section 129.2 of the Act, not to have complied with Ontario securities law and that Melnyk has acted contrary to the public interest.

II. BACKGROUND

A. The Biovail Participants in the Hearing

(i) Biovail and Biovail Laboratories Incorporated

[5] Biovail is an international full-service pharmaceutical company, engaged in the formulation, clinical testing, registration, manufacture, sale and promotion of pharmaceutical products using advanced drug delivery technologies.

[6] Biovail is a reporting issuer in the Province of Ontario. At the time of the hearing, the common shares of Biovail were listed and posted for trading on the Toronto Stock Exchange and the New York Stock Exchange.

[7] Biovail Laboratories Incorporated ("**BLI**") is a company incorporated under the laws of Barbados and is a subsidiary of Biovail. BLI is a party to the GSK Agreement referred to below.

[8] The events that are the subject matter of this proceeding relate to Biovail's 2003 financial year and focus, in particular, on the financial results for the third quarter of that year ending September 30, 2003. These events occurred primarily over the period from September 2003 to March 30, 2004 (which we will refer to in these reasons as the "**relevant time**").

(ii) Melnyk

[9] Melnyk is the founder of Biovail. He was the Chairman of the Board of Directors of Biovail (the "**Board**") until his resignation from the Board effective June 30, 2007. From December 2001 to October 2004, Melnyk was Chairman and Chief Executive Officer ("**CEO**") of Biovail. Melnyk resigned as CEO of Biovail on October 8, 2004. Melnyk became Executive Chairman of the Board in November 2004 and relinquished that title on June 27, 2006. At the relevant time, Melnyk resided in Barbados.

(iii) Other Senior Officers of Biovail

[10] Crombie was the Chief Financial Officer ("**CFO**") of Biovail from May 2000 to August 2004. He became Senior Vice-President, Strategic Development in August 2004. Crombie left Biovail in 2007.

[11] Howling was Vice-President, Finance of Biovail from May 2000 to October 2004, and Vice-President, Finance and Corporate Affairs from October 2004 to December 2006. He was Senior Vice-President and CFO of Biovail from December 2006 to December 31, 2008, when he left Biovail. At the relevant time, Howling also served as Biovail's head of investor relations.

[12] Miszuk was Vice-President, Controller and Assistant Secretary of Biovail at the time of the events described in these reasons. He held the positions of Vice-President and Controller from November 1997, and the position of Assistant Secretary from June 2000. He left Biovail in 2008.

B. Background Facts

(i) The GSK Agreement

[13] In the fall of 2001, BLI and a predecessor company of GSK negotiated and entered into a Development, License and Copromotion Agreement (the "**GSK Agreement**") that was signed on October 26, 2001. When we refer in these reasons to "GSK", we are referring to GSK and its predecessor company that was a party to the GSK Agreement.

[14] Under the GSK Agreement, BLI granted GSK the exclusive right to sell WXL in the United States. WXL is a timed release drug to be taken once a day that was developed to replace an existing Wellbutrin drug that was required to be taken twice a day. Biovail manufactured WXL at its Steinbach, Manitoba manufacturing facility and sold WXL to GSK through BLI under the terms of the GSK Agreement. For purposes of these reasons, we will treat Biovail as the party to the GSK Agreement, except where it is necessary to distinguish between Biovail and its subsidiary, BLI.

[15] An important issue in this proceeding is the interpretation of section 9.05 of the GSK Agreement, which provides in part as follows: "With respect to PRODUCT to be delivered by BIOVAIL inside of the U.S.A., BIOVAIL shall deliver all PRODUCT to GSK *F.O.B., GSK's facilities in the U.S.A. (freight collect)*" [emphasis added]. We will refer to this provision as the "**GSK delivery term**". Melnyk submits that the words "freight collect" are particularly important in interpreting the GSK delivery term.

[16] Under section 9.21 of the GSK Agreement, Biovail was to be paid for WXL sold to GSK based on a percentage of the revenue that GSK received from selling WXL in the U.S. market. Section 9.21 of the GSK Agreement provides in part as follows:

> 9.21 GSK shall pay to BIOVAIL for the supply of PRODUCT by BIOVAIL to GSK for the U.S.A. market, the following amounts:
>
> (a) twenty-two percent (22%) on NET SALES in the U.S.A. of less than or equal to Tier One during the relevant calendar year;
>
> (b) twenty-eight percent (28%) on NET SALES in the U.S.A. of greater than Tier One during the relevant calendar year up to and including Tier Two during the relevant calendar year;
>
> (c) thirty-eight percent (38%) of NET SALES in the U.S.A. greater than Tier Two during the relevant calendar year.

[17] The revenue to be received by Biovail from its WXL sales to GSK increased as GSK's sales increased: for the 2003 year, Biovail was entitled to receive 22% of GSK's "net sales" (as

defined in the GSK Agreement) less than or equal to $110 million.[1] "Net sales" for purposes of the GSK Agreement is defined as gross sales by GSK less certain deductions.

[18] Section 9.23 of the GSK Agreement provides that "[a]ll PRODUCT shipped by Biovail to GSK under this AGREEMENT shall be invoiced to GSK … at twenty-two (22%) of the estimated selling price for PRODUCT intended for sale in the U.S.A." That percentage would be adjusted for future financial quarters within a calendar year if GSK net sales increased beyond Tier One or Tier Two net sales (see paragraph 16 of these reasons).

[19] Melnyk did not play a direct role in negotiating the detailed terms of the GSK Agreement. While he had read earlier drafts of the agreement and he executed it by signing separate signature pages, he testified that he did not read or review the final version of the GSK Agreement and, in particular, that he was not aware of the accurate GSK delivery term at the time the GSK Agreement was signed or thereafter until the afternoon of October 3, 2003.

(ii) Biovail Earnings Guidance

[20] On February 7, 2003, Biovail issued a news release which contained revenue and earnings guidance for its 2003 financial year (the "**February 03 Release**"). In that release, Biovail provided, among other things, full year revenue guidance for various products including WXL. The news release forecast total revenue for 2003 of between $950 and $1,050 million and total third quarter revenue of between $260 and $300 million. The February 03 Release also forecast total WXL revenue for 2003 of between $75 and $150 million.

(iii) FDA Approval of WXL

[21] In early 2003, Biovail anticipated that it would obtain U.S. Food and Drug Administration ("**FDA**") approval for the manufacture and sale of WXL in the United States by as early as June 2003. However, Biovail did not in fact receive that approval until late August 2003. On August 29, 2003, Biovail publicly announced that it had obtained FDA approval for WXL. As a result, the commercial launch of WXL occurred in early September 2003.

[22] As September 2003 progressed, Melnyk and the other senior officers of Biovail were aware that there was an increasing risk that Biovail would not meet its revenue and earnings guidance in the February 03 Release.

(iv) The Accident

[23] Late on September 30, 2003, three trucks left Biovail's manufacturing facility in Steinbach, Manitoba carrying a substantial amount of WXL for delivery to GSK's facility in North Carolina. Because those shipments were in transit on October 1, 2003, it was clear that actual delivery of the shipments to GSK at its U.S. facility could not occur until after the end of Biovail's third quarter, which ended on September 30.

[1] Note: All dollar amounts in these reasons are in U.S. dollars.

[24] On October 1, 2003, one of the trucks was involved in a multi-vehicle accident outside Chicago, Illinois. A portion of the WXL shipment being carried by that truck was damaged and all of the WXL in that shipment had to be returned to Biovail for inspection before it could be re-shipped to GSK. The other two trucks continued on to GSK's facility in North Carolina.

(v) The October 3 Release

[25] Following the Accident, on October 2, 2003, Melnyk, Crombie and Howling concluded for a number of reasons that Biovail would not meet its revenue and earnings guidance for the 2003 third quarter and that Biovail should issue an earnings warning news release and hold an analysts' conference call and webcast following issue of that news release.

[26] Accordingly, Biovail issued a two-page news release at approximately 10:15 a.m. on October 3, 2003 (the "**October 3 Release**") that provided, in part, as follows:

> …
>
> Biovail Provides Guidance on 2003 Third Quarter Results
>
> TORONTO, Ontario – Biovail Corporation (NYSE: BVF) (TSX: BVF) announced today that while it has not completed a final compilation and analysis of its 2003 third quarter, preliminary results indicate that revenues will be below previously issued guidance and will be in the range of $215 million to $235 million and earnings per share of $0.35 to $0.45 for the three months ended September 30, 2003. *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.*
>
> After leaving Biovail's Steinbach, Manitoba manufacturing facility on September 30, 2003, a truck carrying a material shipment of Wellbutrin XL was involved in a multi-vehicle traffic accident at approximately 4 p.m. eastern standard time October 1, 2003 near Chicago, Illinois. While this product may still be salable in the future, it must first be returned for inspection to Biovail's manufacturing facility in Manitoba to ensure it is still within acceptable specifications. *Revenue associated with this shipment is in the range of $10 to $20 million.* The manufacturing cost value of this shipment was fully insured.
>
> …
>
> [emphasis added]

The October 3 Release went on to say that Biovail anticipated a third quarter shortfall related to sales of two other Biovail products: generic omeprazole (a negative effect of up to $15 million in net income) and Cardizem CD (a significant shortfall related to the failure of the supplier to fill back orders).

[27] We will refer to the event described in the first sentence of the October 3 Release as the "**Earnings Miss**". In doing so, we recognise that the Earnings Miss relates to a variance in both revenues and earnings per share for the third quarter.

[28] The two statements in the October 3 Release that Staff alleges were misleading or untrue in a material respect are that the Accident contributed "significantly to this unfavourable variance" in revenue and earnings for the third quarter and that the "[r]evenue associated with this shipment is in the range of $10 to $20 million." We will refer to these two statements together as the "**Truck Accident Statement**". Where it is relevant to the analysis, we will distinguish between the two different elements of the Truck Accident Statement. We will refer to the statement that the Accident contributed to this "unfavourable variance" in revenue and earnings as the "**Accident Contribution Statement**"; except as otherwise noted, we will treat the Accident Contribution Statement as not including the statement that the Accident contributed "significantly" to the unfavourable variance. We will refer to the statement that the revenue associated with the WXL product involved in the Accident was "in the range of $10 to $20 million" as the "**Revenue Loss Statement**".

[29] Staff alleges that the Accident did not contribute to or affect, at all, Biovail's 2003 third quarter financial results and that the revenue range of $10 to $20 million stated to be associated with the WXL product involved in the Accident was grossly inflated. Accordingly, Staff submits that each of those statements was misleading or untrue in a material respect at the various times those statements were made by Biovail.

(vi) The Analysts Call

[30] Immediately following the issue of the October 3 Release, Biovail held the Analysts Call to explain the reasons for the Earnings Miss and to give analysts an opportunity to ask questions.

[31] It is clear from the transcript of the Analysts Call (the "**Call Transcript**") that both Melnyk and Crombie stated that the Accident had had a negative financial impact on Biovail's third quarter revenues. They thereby repeated the Accident Contribution Statement. Crombie also stated that "… the impact of Wellbutrin loss due to the accident is in the range of $15 to $20 million". Crombie thereby repeated the Truck Accident Statement but increased the lower end of the revenue range reflected in the Revenue Loss Statement from $10 to $15 million. When we refer in these reasons to the Truck Accident Statement or the Revenue Loss Statement being made during the Analysts Call, we are referring to those statements with a revenue range of $15 to $20 million as stated by Crombie on the Analysts Call.

[32] Melnyk testified that the first time he heard the $15 to $20 million revenue range was on the Analysts Call. He stated on the Analysts Call, however, in response to a question about WXL financial guidance for the year that "[t]he only thing we are going to be changing is that for this quarter [third quarter 2003], the $15 million of lost product – not for next quarter". The $15 to $20 million revenue range stated by Crombie on the Analysts Call was inconsistent with the revenue range disclosed in the October 3 Release and the October 8 Release and it does not appear that it was ever repeated or expressly corrected in any subsequent Biovail news release or public statement.

[33] Melnyk also commented in the course of the Analysts Call, in response to a question about Biovail's new guidance:

> Well, yes, they are one-time events. What we are hoping for is to be in a position to provide by the next conference call guidance for next year. I mean we're just – you know, Wellbutrin is such a huge impact to next year, I think that anything we would give you right now would be premature.

In the first sentence of that comment, Melnyk is referring to the three factors contributing to the Earnings Miss described in the October 3 Release, one of which was the Accident.

[34] Crombie also explained in response to a question on the Analysts Call how one would calculate fourth quarter guidance as a result of the financial impact of the Accident. He stated that:

> … if I could just review the numbers, our original guidance for Wellbutrin XL for this year was $75 million to $150 million. If you take out our comment today of $15 million to $20 million impact because of the traffic accident, that would result in annual revenue guidance of between $60 million and $130 million. Subtract out from that the $18 million or so in Q2 and Q3 production, that would result in $42 million to $102 million worth of guidance for Q4.

[35] Biovail also disclosed on the Analysts Call that it estimated that its revenues from WXL for the third quarter would be below $10 million. Neither that information nor the analysis referred to in paragraph 34 of these reasons was disclosed in the October 3 Release.

[36] Crombie also stated in the course of the Analysts Call that "[o]ur contract with GSK has title change in Manitoba when it leaves our shipping dock". That statement is inconsistent with the GSK delivery term and the draft news release that Crombie initially prepared on October 2, 2003 in connection with the announcement of the Earnings Miss (see paragraph 137 of these reasons). As discussed more fully below, Staff and Melnyk disagree as to what the GSK delivery term means in terms of the transfer of title to the WXL product shipped. That question has a direct effect on whether revenue associated with the WXL product involved in the Accident could have been recognised in Biovail's 2003 third quarter.

(vii) The October 8 Release

[37] On October 8, 2003, David W. Maris, an analyst with Bank of America, issued a research report (the "**Maris Report**") that raised questions with respect to Biovail's statement of the revenue associated with the WXL product involved in the Accident (see paragraphs 184 to 187 of these reasons for a fuller description of the comments made in the Maris Report). Melnyk says that Biovail's share price immediately fell by approximately $4.00 per share as a result of the issue of the Maris Report. Following the Maris Report, Biovail began to receive inquiries from analysts and investors questioning whether the truck involved in the Accident contained any WXL product at all. As a result of the inquiries and rumours in the market, Biovail concluded that it should issue a clarifying news release.

[38] At approximately 2:00 p.m. on October 8, 2003, Biovail issued a one-page news release (the "**October 8 Release**"), the substance of which was as follows:

> …
>
> Biovail Confirms Wellbutrin XL Shipment Recovery
>
> TORONTO, Ontario – Biovail Corporation (NYSE: BVF) (TSX: BVF) today confirmed that it has recovered the Wellbutrin XL shipment, which included bulk tablets, involved in a traffic accident on October 1, 2003. Although further testing is required at Biovail's Steinbach, Manitoba manufacturing facility, Biovail confirmed that approximately 60% of the shipment is salable and may be re-shipped within the next 30 days.
>
> *Furthermore, Biovail re-confirms that the sales value of these goods is within previously stated guidance*.
>
> [emphasis added]

[39] We have concluded that the reference to "the sales value of these goods" in the October 8 Release refers to the $10 to $20 million revenue range reflected in the Revenue Loss Statement. Accordingly, in our view, the October 8 Release repeated the Revenue Loss Statement. The October 8 Release did not expressly refer to the Accident Contribution Statement but, in our view, a reasonable investor would understand in the context of the October 8 Release that the Accident Contribution Statement was being repeated by necessary implication. Accordingly, in our view, the Truck Accident Statement was repeated by Biovail in the October 8 Release.

(viii) The Roadshows

[40] Between October 13 and 16, 2003, Melnyk, Crombie and Howling participated in a series of meetings with institutional investors in New York, Boston, Toronto and Montreal (referred to in these reasons as the Roadshows). There were between 30 to 35 meetings in those cities over that period. Melnyk attended some or all of those meetings. Staff alleges that Biovail through Melnyk and Crombie repeated the Truck Accident Statement in those meetings.

(ix) The October 30 Release

[41] On October 30, 2003, Biovail issued a 14-page news release that reported its third quarter and nine-month financial results for the period ended September 30, 2003 (the "**October 30 Release**"). Biovail reported revenues from the sale of WXL in the third quarter of $8.2 million and total revenues for the third quarter of $215.3 million.

[42] Biovail stated in the October 30 Release that the WXL product involved in the Accident had been returned to Biovail and that all but a small portion was recovered and re-shipped to GSK.

[43] The relevant portions of the October 30 Release provided as follows:

> BIOVAIL REPORTS THIRD QUARTER 2003 FINANCIAL RESULTS
> …
>
> TORONTO, Canada, October 30, 2003 – Biovail Corporation (NYSE/TSX: BVF) announced today its financial results for the three month and nine month periods ending September 30, 2003. Total revenues for the three months ended September 30, 2003 increased 3% to $215.3 million versus the prior year comparable period. Total revenues for the nine months ended September 30, 2003 were $624.0 million reflecting an increase of 14% versus the prior year comparable period.
>
> …
>
> 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 recognised from this shipment in Q3 2003. The shipment included both bulk and fully packaged material. All bulk tablets, which are packaged in plastic drums, were salvaged and have already been shipped to GSK. A small portion of the packaged goods (less than 1,000 bottles) was effected [*sic*] in the accident and could not be re-shipped.
>
> …
>
> Wellbutrin XL product sales revenue was $8.2 million for third quarter 2003 and $16.3 million for the nine months ended September 30, 2003. Biovail receives a percentage of Glaxo's net sales as revenue for supplying trade supplies of Wellbutrin XL. Biovail also is paid for bulk sample product that is [*sic*] produces and supplies to Glaxo. Samples are sold at a contractually agreed price at approximately Biovail's manufacturing cost.
>
> …

The second and third paragraphs referred to above appear on different pages of the release and were not the principal focus of it.

(x) The March 2004 Release

[44] On March 3, 2004, Biovail issued a 15-page news release (the "**March 04 Release**") announcing its fourth quarter and full year 2003 financial results. In the March 04 Release, Biovail provided updated information regarding the WXL revenue loss associated with the Accident.

[45] The relevant portions of the March 04 Release provided as follows:

> BIOVAIL REPORTS 2003 FOURTH QUARTER AND FULL YEAR FINANCIAL RESULTS

…

TORONTO, Canada, March 3, 2004 – Biovail Corporation (NYSE/TSX: BVF) announced today its financial results for the three and twelve month periods ending December 31, 2003. Total revenues for the three months ended December 31, 2003 were $199.7 million versus $238.7 million for the three months ended December 31, 2002. Total revenues for the twelve months ended December 31, 2003 were $823.7 million representing an increase of 5% versus $788.0 million for the prior year.

…

Wellbutrin XL product sales revenue was $48.6 million for fourth quarter 2003 and $64.9 million for the year 2003. Fourth quarter 2003 Wellbutrin XL sales included the recovery of over 90% of Wellbutrin XL product that was involved in a traffic accident on October 1, 2003.

As part of a comprehensive earnings guidance press release on October 3, 2003, Biovail announced that its estimated revenue from Wellbutrin XL for third quarter 2003 would be less than $10.0 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 $10.0 million to $20.0 million. Numerous variables that were not known and were unavailable on October 3, 2003 are now determinable given better information and the reconciliation provided by GSK to Biovail.

Variables that determine Biovail's revenue that were not then known include levels of discounts, free goods or rebates that would have been deducted from GSK's gross sales and the percentage of GSK's net sales Biovail is to receive. In calculating the high end of the estimate range, Biovail also took into consideration the variables that analysts were generally using in their models to estimate the Wellbutrin XL revenues, which included typically higher pricing, higher percentage supply prices and did not reflect the typical gross to net deductions. This analysis with analyst estimates was completed to better explain why revenue in third quarter 2003 would be less than previously expected by analysts.

After a subsequent review of all of the facts, the actual revenue loss from the accident was determined to be $5.0 million. Calculated with analysts' assumptions for these variables, the revenue loss estimate would range from $7.5 million to $8.0 million.

…

[emphasis added]

The second and subsequent paragraphs of the release referred to above appear on page 4 of the release.

[46] Among other things, Biovail stated in the March 04 Release that the actual revenue loss from the Accident for the 2003 third quarter was $5.0 million. The March 04 Release thereby repeated the Accident Contribution Statement and corrected the Revenue Loss Statement. The March 04 Release also stated that the revenue loss from the Accident calculated *with analysts' assumptions* was in the range of $7.5 to $8.0 million.

C. Positions of the Parties

(i) Staff

[47] Staff alleges that Biovail made statements in the October 3 Release, on the Analysts Call, and in the October 8 Release, the Roadshows, the October 30 Release and the March 04 Release 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.

[48] In summary, Staff alleges that, in the October 3 Release, Biovail made the materially misleading or untrue statement that the Accident was one of the reasons for Biovail's failure to meet previously issued revenue and earnings guidance for the third quarter of 2003 (referred to in these reasons as the Accident Contribution Statement). In addition, Staff alleges that Biovail disseminated the materially misleading or untrue information that the revenue associated with the WXL product involved in the Accident was in the range of $10 to $20 million (referred to in these reasons as the Revenue Loss Statement). Staff alleges that Biovail repeated or implicitly reinforced these materially misleading or untrue statements during the Analysts Call (as modified by Crombie's statement that the revenue range was $15 to $20 million), in the October 8 Release and in the Roadshows. Staff also alleges that Biovail made a materially misleading or untrue statement in the October 30 Release and the March 04 Release by continuing to disseminate the previous statements and by failing to correct them. According to Staff, Biovail thereby violated Ontario securities law and engaged in conduct contrary to the public interest.

[49] Staff alleges that Biovail knew or should have known that the statements referred to above were misleading or untrue in a material respect.

[50] Staff alleges that Melnyk authorized, permitted or acquiesced in Biovail's misconduct in that:

(a) he knew or should have known at all material times that the GSK delivery term precluded Biovail from recognizing any revenue associated with the WXL shipment involved in the Accident in its financial statements for the third quarter of 2003;

(b) he knew or should have known at all material times that the value of the WXL tablets that were involved in the Accident was substantially below the $10 to $20 million that was initially disclosed;

(c) by October 2, 2003, before the October 3 Release was issued, Melnyk should have known or taken steps to verify the GSK delivery term; in particular, on October 2,

2003, Melnyk was sent a draft of the October 3 Release by Crombie which contained the accurate GSK delivery term;

(d) on October 8, 2003, Howling received a copy of the Maris Report questioning the GSK delivery term and the valuation of the WXL damaged in the Accident, and circulated the Maris Report to Melnyk;

(e) Howling also received information from GSK on October 8, 2003 highlighting the correct GSK delivery term, and forwarded that information to Melnyk;

(f) Melnyk participated in drafting the October 3 Release, the October 8 Release, the October 30 Release and the March 04 Release; and

(g) Melnyk participated in the Analysts Call and the Roadshows.

(ii) Melnyk

[51] Melnyk submits that the difference between the Truck Accident Statement and an accurate statement was not material to investors at the various times and in the circumstances under which the Truck Accident Statement was made. Accordingly, he says the Truck Accident Statement was not misleading or untrue in a material respect. Melnyk submits that the Earnings Miss was the only material information contained in the October 3 Release and that Biovail acted appropriately by disclosing that information to the public as promptly as practicable, even though it had no legal obligation to do so.

[52] Melnyk also says that he was not aware of the accurate GSK delivery term until the afternoon of October 3, 2003 following the issue of the October 3 Release. In any event, he submits that New York law applied to the interpretation of the GSK delivery term and there was legal uncertainty as to the appropriate interpretation of that term. Melnyk submits that the GSK delivery term did not clearly distinguish between the risk of loss of WXL product and the transfer of title to that product and, as a result, it was ambiguous and unclear. Melnyk submits that ambiguity was, in part, a result of the use of the words "freight collect" in the GSK delivery term. Melnyk submits that the uncertainty with respect to the interpretation of the GSK delivery term was not resolved until that term was renegotiated by the parties to the GSK Agreement in November 2003. Accordingly, Melnyk submits that he did not know and could not have known that the Accident Contribution Statement was misleading or untrue at the various times that statement was made.

[53] Melnyk notes that he does not hold a university degree, is neither a lawyer nor an accountant and is not familiar with technical accounting rules. He submits that he properly relied on Crombie and other members of Biovail senior management for determining financial numbers, including those reflected in the Revenue Loss Statement. Melnyk says his principal role at Biovail was to act as a visionary and to provide strategic guidance. He says that he did not focus on specific or detailed product revenue numbers or estimates such as those related to the revenues associated with the WXL product involved in the Accident.

[54] In any event, Melnyk says it was not possible to determine the revenue to Biovail associated with the WXL product involved in the Accident until GSK provided a reconciliation of its "net sales" of WXL after the completion of the third quarter, as contemplated by the GSK Agreement. That is because revenue to Biovail was determined as a percentage of net sales made by GSK and that percentage increased as net sales reached higher tiers (see paragraphs 16 and 17 of these reasons). In addition, GSK was entitled to make various deductions in determining net sales, including deductions for discounts, allowances and rebates granted by it to its customers. Melnyk notes that the commercial launch by Biovail of WXL occurred in early September 2003 and, as a result, Biovail had never received a reconciliation statement from GSK.

[55] For all of these reasons, Melnyk submits that he did not know and could not have reasonably known that the Truck Accident Statement was misleading or untrue at the various times that statement was made. In any event, Melnyk submits that he exercised due care and diligence in authorizing and approving the Releases and in acquiescing to the statements made by Biovail with respect to the Accident on the Analysts Call and in the Roadshows. Melnyk also notes that he lives in Barbados and was not physically present in Biovail's offices over the period of October 1 to 8, 2003.

[56] Melnyk submits that Biovail did not contravene the Act in making the Truck Accident Statement and that, in all the circumstances, neither Biovail's conduct nor his own was contrary to the public interest.

III. THE ISSUES

[57] The questions we must address in this proceeding are the following:

1. What is the standard of proof to be applied?

2. What is the standard of materiality to be applied to the statements made by Biovail?

3. Did Biovail make a statement in the October 3 Release, on the Analysts Call or in the October 8 Release, the Roadshows, the October 30 Release or the March 04 Release that was, in a material respect and at the time and in the light of the circumstances under which it was made, misleading or untrue or did not state a fact that was required to be stated or that was necessary to make that statement not misleading?

4. If so, did Melnyk know or should he have known that such statements were misleading or untrue?

5. Were the Releases "required to be filed" within the meaning of subsection 122(1)(b) of the Act or, if not, were they "submitted to" the Commission within the meaning of subsection 122(1)(a) of the Act?

6. Did Melnyk authorize, permit or acquiesce in the statements made by Biovail?

7. Is Melnyk entitled to advance a due diligence defence to the allegation that he acted contrary to the public interest and, if so, did he exercise due care and diligence in the circumstances?

8. Was Melnyk's conduct in the circumstances contrary to the public interest?

IV. ANALYSIS

A. The Standard of Proof

[58] The civil standard of proof and the nature of the evidence that is required to meet that standard are integral to the duty of an administrative tribunal to provide a fair hearing. It is well established that the standard of proof that must be met in an administrative proceeding such as this is the civil standard of the balance of probabilities.

[59] The Supreme Court of Canada recently considered the civil standard of proof. The Court confirmed that there is only one civil standard of proof, which is proof on a balance of probabilities:

> [l]ike the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof.
>
> (*F. H. v. McDougall*, [2008] 3 S.C.R. 41, at para. 40 ("***McDougall***"))

[60] The balance of probabilities standard requires the trier of fact to decide "whether it is more likely than not that the event occurred" (*McDougall*, *supra,* at para. 44).

[61] The Court noted in *McDougall* that "the evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test". However, this requirement of clear, convincing and cogent evidence does not elevate the civil standard of proof above a balance of probabilities (*McDougall*, *supra,* at para. 46).

[62] We will apply this standard of proof in addressing the matters before us.

B. Materiality of Statements

(i) Materiality Generally

[63] One of the key questions we must decide is whether the statements made by Biovail that are the subject matter of this proceeding were, in a material respect, misleading or untrue, as alleged by Staff. The words "in a material respect" impose a standard of materiality against which an impugned statement is to be judged.

[64] The Act does not define the words "in a material respect". (The Statement of Allegations uses the words contained in subsections 122(1)(a) and (b) of the Act but does not refer specifically to those sections of the Act.) See the discussion of the meaning of the words "in a material respect" commencing at paragraph 75 of these reasons.

[65] In general, the concept of "materiality" in the Act is a broad one that varies with the characteristics of the reporting issuer and the particular circumstances involved. In National Policy 51-201 of the Canadian Securities Administrators, it is stated that:

> In making materiality judgements, it is necessary to take into account a number of factors that cannot be captured in a simple bright-line standard or test. These include the nature of the information itself, the volatility of the company's securities and prevailing market conditions. The materiality of a particular event or piece of information may vary between companies according to their size, the nature of their operations and many other factors.
>
> (*National Policy 51-201 Disclosure Standards* (2002), 25 O.S.C.B. 4492 ("**NP 51-201**"))

NP 51-201 addresses materiality in the context of the definitions in the Act of "material change" and "material fact" (see paragraphs 70, 348 and 349 of these reasons). In our view, however, the comments set out above have wider application to the determination of materiality.

[66] In considering the term "material fact" in *Re Donnini*, the Commission stated that:

> … materiality is a fact-specific relative concept that varies from issuer to issuer according to size of profits, assets and capitalization, the nature of its operations, and many other factors.
>
> Counsel for staff referred us to the materiality standard used in the United States and quoted by the United States Supreme Court in *TSC Industries, Inc.* [citation deleted]:
>
> > An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote…. It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder.
>
> (*Re Donnini* (2002), 25 O.S.C.B. 6225 ("***Re Donnini***"), at paras. 135 and 136)

[67] In *Re YBM Magnex International Inc.*, the Commission referred to the reasonable investor test adopted in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 at 449 (1976) ("***TSC Industries"***) and stated that:

> Disclosure is contextual. In the U.S. this has been identified as the total mix of information test; *TSC Industries* at 449. It seems sensible that the respondents must take into account the import of all extant disclosures, positive or negative, in order to assess whether a fact is material.
>
> (*Re YBM Magnex International Inc.* (2003), 26 O.S.C.B. 5285 ("***Re YBM***") at para. 93)

[68] The Commission concluded in *Re YBM* that:

> Materiality is a question of mixed law and fact, i.e. do the facts satisfy the legal test? Some facts are material on their own. When one or more facts do not appear to be material on their own, materiality must also be considered in light of all the facts available to the persons responsible for the assessment.
>
> (*Re YBM, supra*, at para. 94)

[69] Accordingly, the assessment of the materiality of a statement is a question of mixed fact and law that requires a contextual determination that takes into account all of the circumstances including the size and nature of the issuer and its business, the nature of the statement and the specific circumstances in which the statement was made. The reasonable investor standard for determining materiality articulated in *TSC Industries* has been accepted and applied by the Commission in a number of decisions (see *Re Standard Broadcasting* (1985), 8 O.S.C.B. 3671 ("***Standard Broadcasting***") at 3677; *Re Rolland Inc.* (1987), 10 O.S.C.B. 1629 at 1635-1636; *Re Canfor Corp.* (1995), 18 O.S.C.B. 475 at paras. 21-22; *Re MacDonald Oil Exploration Ltd.* (1999), 22 O.S.C.B. 6453 at paras. 39-42; *Re Chapters Inc.* (2001), 24 O.S.C.B. 1064 at paras. 14-17; *Re Sears Canada Inc.,* (2006), 22 B.L.R. (4th) 267 (OSC) at para. 187; and *Re Sterling Centrecorp Inc.* (2007), 30 O.S.C.B. 6683 at para. 211).

(ii) "Material Change" and "Material Fact"

[70] The terms "material change" and "material fact" are defined in subsection 1(1) of the Act and require a determination whether a change or fact "would reasonably be expected to have a significant effect on the market price or value" of a security (see paragraphs 348 and 349 of these reasons for the definitions of "material change" and "material fact"). Those terms are not, however, used in subsection 122(1) of the Act. It has been held that the threshold of materiality imposed by section 122 is lower than for a material change or a material fact because **s**ection 122 does not require proof that a statement would have "a significant effect on the market price or value of securities" (see *R. v. Maxwell*, [1996] O.J. No. 4832 (Prov. Ct.) at paras. 119-120 ("***Maxwell***"); and *R. v. Felderhof* (2007), 24 C.C.C. (3d) 97 (Ont. C. J.) ("***Felderhof***") at p. 215).

[71] In *Maxwell*, the Court contrasted the definitions of "material change" and "material fact" with the language of subsection 122(1)(b) of the Act and adopted the following passage from V. Alboini, *Securities Law and Practice* (2nd Edition), at pp. 18-14:

> The effect of focussing on price or value of the securities as the appropriate test may be to exclude, as material changes, matters that may influence, and may therefore be material to, an investor in making decisions but do not have the

probable effect of significantly altering market price or value of any securities of the issuer.

(*Maxwell*, *supra*, at para. 54)

[72] Because the Act does not define "in a material respect", the Court in *Maxwell* concluded that the legislature intended those words to have their ordinary dictionary meaning and noted that the Oxford Dictionary defines "material" as "important, essential" (*Maxwell*, *supra*, at paras. 63-64). However, the Court found that the version of subsection 122(1)(b) under which the charges were brought in that matter (which is the current provision in the Act, introduced in 1994) is substantively different from its predecessor. The previous version of subsection 122(1)(b) made it an offence to make a statement that "at the time and in the light of the circumstances under which it is made, is a misrepresentation". "Misrepresentation" was defined as "an untrue statement of material fact" or "an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made". The Court found that this amendment "indicates a clear legislative intent to reduce the Crown's burden by not requiring the Crown to show 'a significant effect on the market price or value of such securities'" (*Maxwell*, *supra*, at para. 97 and 104-106; see also *Felderhof, supra,* at pp. 176-187). We agree with that conclusion.

[73] It is perhaps worth noting in this context that if a statement would reasonably be expected to have a significant effect on the market price or value of a security, then that statement would clearly be important to an investor in making an investment decision. However, it does not necessarily follow that a statement that is important to an investor in making an investment decision would reasonably be expected to have a significant effect on the market price or value of a security.

(iii) The Reasonable Investor Standard

[74] For purposes of these reasons, we will treat a statement as material if there is a substantial likelihood that a reasonable investor would consider the statement to be important in making an investment decision. By an investment decision, we mean a decision to buy, sell or hold shares. That will require us to determine whether the statement or omission would have assumed actual significance to a reasonable investor. We will refer to this test for materiality as the "**reasonable investor standard**".

(iv) The Meaning of "In a Material Respect"

[75] We note that the words "in a material respect" in subsection 122(1) of the Act apply to statements made in a number of different kinds of documents and circumstances. For instance, subsection 122(1)(b) applies to any application, report, return or other document required to be filed or furnished under Ontario securities law. Subsection 122(1)(a) applies to statements made in any material, evidence or information submitted to the Commission, which would include, for instance, statements made to a Staff investigator carrying out an investigation under the Act. In our view, the meaning of the words "in a material respect" is contextual and will vary depending on the nature of the document in which the statement is made, the nature of the statement itself

and the circumstances in which the statement is made. One would not necessarily apply the reasonable investor standard in assessing the materiality of a statement made (i) in a document that is not a disclosure document intended to be relied upon by investors in making investment decisions, (ii) in financial statements, or (iii) to an investigator carrying out a Commission investigation.

(v) Conclusion as to the Appropriate Materiality Standard

[76] In this proceeding, we are addressing the materiality of statements made primarily in the Releases. Both Staff and Melnyk made submissions to us as to the materiality of the alleged misstatements made by Biovail.

[77] Given the nature of a news release as a disclosure document that is relied upon by investors in making investment decisions, we believe that it is appropriate to apply the reasonable investor standard in assessing whether the statements made by Biovail in the Releases were misleading or untrue in a material respect, as alleged by Staff. Adopting that standard of materiality in this matter should not be interpreted as suggesting that the reasonable investor standard is the only appropriate or correct standard of materiality for purposes of subsection 122(1) of the Act. The circumstances in which the words "in a material respect" apply will vary and those circumstances may suggest or require a different standard of materiality.

[78] We must determine whether the statements made by Biovail were misleading or untrue in a material respect, as alleged by Staff. To paraphrase the reasonable investor standard, we must determine whether the statements made by Biovail were misleading or untrue in a respect that a reasonable investor would consider important in making an investment decision with respect to Biovail's shares. Counsel for Melnyk has submitted that to be misleading or untrue in a material respect, the difference between the alleged misstatement and an accurate statement must be important or essential to investors. By addressing the difference between two such statements, the test suggested by counsel for Melnyk seems to us to be a slightly different test or standard but one that, in this case, we have concluded does not lead to a different result.

[79] However, we do not agree with the submission of counsel for Melnyk that, to be material, a statement must be "essential" to a reasonable investor in making an investment decision. That was suggested by the dictionary definition of the word "material" referred to by the Court in *Maxwell*. Requiring that a statement be "essential" to a reasonable investor in making an investment decision seems to us to impose a higher standard that is inconsistent with the accepted articulation of the reasonable investor standard.

[80] The reasonable investor standard is an objective test and applying it is ultimately a matter of judgement to be exercised in light of all of the relevant circumstances. The assessment of the materiality of a statement is a question of mixed fact and law that falls squarely within the Commission's specialized expertise and does not require the opinion or evidence of expert witnesses or of investors (*Re Donnini, supra,* at para. 123). Such opinion or evidence may be relevant or useful but is not necessary.

[81] We will judge the materiality of each of the Biovail statements alleged to be misleading or untrue in a material respect at the time and in the light of the specific circumstances under which those statements were made. We recognise that in making determinations as to materiality, common sense judgement must be applied. The Commission noted in *Re YBM, supra,* at para. 90, that "[a]ssessments of materiality are not to be judged against the standard of perfection or with the benefit of hindsight. It is not a science and involves the exercise of judgement and common sense [citation omitted]". Accordingly, Biovail should not be held to a perfect standard of disclosure and its statements must not be judged with the benefit of hindsight.

C. The Evidence

(i) General Comments on the Evidence

[82] We heard testimony in this matter from a number of witnesses, including Melnyk, Crombie, Miszuk and Howling. We also heard testimony from Douglas Deeth ("**Deeth**"), Biovail's legal counsel in negotiating the GSK Agreement, Robert Scullion ("**Scullion**") and Martin Lundie ("**Lundie**"), accountants with Ernst & Young, Biovail's auditor at the relevant time, and three witnesses from GSK who were involved in negotiating the GSK Agreement and in discussing with Biovail after the Accident issues related to the interpretation of the GSK delivery term. We also heard testimony from three expert witnesses as to the materiality of the Truck Accident Statement. Four Biovail employees, Neil Smith, Manager of Financial Analysis and a certified general accountant ("**Smith**"), Le'raine Dunn, Plant Controller (Steinbach), Larry Thiessen, Plant Manager (Steinbach) and Naomi Nemeth, Manager of Corporate Communications, Finance Department, testified as to their knowledge of the circumstances surrounding the Accident and the issue of the Releases. We also received and reviewed a large number of documents, memoranda, e-mails, the Call Transcript, a draft slide deck used at one of the Roadshows and the reports of the three experts.

[83] In coming to our conclusions in this matter, we have considered, in particular, the credibility of the testimony given by Melnyk, Crombie, Howling and Miszuk. Some of Melnyk's testimony was not credible. For instance, we do not accept his testimony that he was not a hands-on CEO directly involved in the management decisions related to this matter and that he did not review or look at specific revenue numbers and estimates for WXL sales. We also believe that Melnyk knew very well the revenue value of the WXL shipped by Biovail to GSK late on September 30, 2003 (see paragraph 311 of these reasons). The testimony of witnesses such as Melnyk, Crombie and Howling, who are at least in some respects aligned in interest, presents challenges. Where the testimony of Melnyk, Crombie or Howling conflicted with the testimony of Miszuk, we preferred the testimony of Miszuk. In addition, where the testimony of Melnyk, Crombie and Howling conflicted with the various contemporaneous documents and e-mails that were tendered in evidence, we relied on that documentary evidence. We have based our findings on the preponderance of evidence before us and have concluded that, overall, the evidence is clear and cogent.

[84] In considering the evidence, we believe that it is appropriate to attribute to Biovail the knowledge of, and information known by, Melnyk, Crombie, Howling or Miszuk. We do so on the basis that each of those individuals was a senior officer of Biovail at the relevant time.

[85] In considering the allegations against Melnyk, we recognise that we must reach conclusions based on the evidence about what Melnyk knew or should have known at a particular time. We will not assume simply because one of the other senior officers or employees of Biovail was aware of particular information that Melnyk was necessarily also aware of that information. However, we are skeptical of some of Melnyk's testimony as to what he knew or did not know at various times. Further, we are entitled to make reasonable inferences from the evidence and to reach conclusions based on the balance of probabilities as to what Melnyk knew or should have known at a particular time.

(ii) Melnyk's Testimony

[86] We have summarized Melnyk's position on the key issues where we discuss the issues in these reasons. Melnyk's testimony was consistent with those positions. Where we considered it relevant, we have referred in these reasons to specific aspects of Melnyk's testimony. We have taken the same approach with respect to the testimony of Crombie, Howling and Miszuk.

(iii) Evidence of the GSK Witnesses

[87] We received videotaped evidence from three employees of GSK who testified from the offices of GSK's North Carolina counsel.

[88] Stanley Hull ("**Hull**") was Senior Vice-President of Pharmaceuticals of GSK at the time he testified, and was, at the relevant time, Senior Vice-President of GSK's RTP (Research Triangle Park) Business Unit. In that role, he was primarily responsible for managing sales and marketing at the North Carolina location; he reported to the President of U.S. Pharmaceuticals.

[89] Richard Dyer ("**Dyer**") was Director of Contract Manufacturing and Supply at GSK at the time he testified, and was, at the relevant time, Sourcing Group Manager for North American Contract Manufacturing. He is a Certified Public Accountant in the State of North Carolina. In his role as Sourcing Group Manager, Dyer was responsible for contractual issues with suppliers such as Biovail.

[90] Jack Davis ("**Davis**") was Vice-President, Finance for U.S. Commercial Operations at GSK at the time he testified and at the relevant time.

(a) Negotiation of the GSK Agreement

[91] Hull testified that Wellbutrin was developed by one of GSK's predecessor companies as a tablet to be taken three times a day, and later, as a twice-a-day tablet, under the name Wellbutrin SR. When Biovail developed WXL, the once-a-day tablet, GSK negotiated with Biovail the right to sell WXL in the United States. Hull was involved in negotiating some of the commercial aspects of the GSK Agreement.

(b) GSK's Pre-Launch Discussions with Biovail

[92] Hull testified that in the months prior to Biovail receiving final FDA approval for WXL at the end of August 2003, he was in contact with Biovail – primarily Crombie, Howling and

Carol Chapuis, Vice-President, Strategic Alliances at Biovail ("**Chapuis**") – to ensure that everything was ready for the commercial launch of WXL. He testified that there were a number of questions around supply of WXL. GSK wanted to ensure Biovail would be able to supply sufficient WXL product and Biovail wanted firm orders for purchases by GSK. Hull testified there was "some back and forth" on these issues.

[93] Dyer testified that he dealt primarily with Chapuis, who was responsible for Biovail's relationship with GSK. Dyer testified that he discussed with Chapuis issues of supply and forecasts in the fall of 2003. GSK initially wanted to order only WXL sample tablets, but Biovail wanted GSK to order WXL trade product because of the higher revenue value to Biovail of that product (see paragraph 172 of these reasons).

(c) GSK's Response to the Truck Accident Statement

[94] Davis testified that his immediate reaction to the October 3 Release was that the amount quoted as revenue associated by Biovail with the WXL product involved in the Accident seemed to be high, because, at the 22% royalty rate, "that would be the equivalent of about $100 million of our sales, and that was – we barely sold over $100 million in the entire third and fourth quarters. And to have that much product on one truck seemed to me to be significantly high."

[95] Dyer testified that when the October 3 Release came to his attention shortly after it was issued, his reaction was that the revenue value was "a little bit high" because most of the shipment consisted of samples. Melnyk submits that Dyer did not know at the time that all of the WXL involved in the Accident consisted of trade tablets, most of which were shipped in bulk in drums.

[96] Dyer sent an e-mail to Howling and Chapuis on the morning of October 8 indicating that the statement by Crombie on the Analysts Call that title to WXL product changed hands when the shipment left Biovail's manufacturing facility was "incorrect" because the GSK Agreement provided that title did not pass until the shipment was delivered to GSK's facility. In the e-mail, Dyer asked Biovail to refrain from "making further inaccurate statements with respect to the transfer of title and the associated risk of loss and, if questioned, clarify the record." Dyer also requested Biovail to consult with GSK prior to issuing any further news releases related to their business relationship, as required under the GSK Agreement. Howling forwarded that e-mail to Crombie and Melnyk that morning, and Crombie called Dyer soon after. Crombie advised Dyer in that call that Biovail intended to issue another news release that day and he agreed to provide GSK with a copy for GSK's comments. Dyer testified that Biovail did provide GSK with an advance copy of the October 8 Release, but issued the release only 30 minutes later and before GSK was able to provide any comments.

[97] Hull had little recollection of his involvement in discussions with Biovail after the Accident. He testified, however, that he sent a letter that had been prepared by GSK's legal counsel to Melnyk on October 9, 2003 (the "**Hull Letter**"). The Hull Letter made three points. First, it stated that Biovail's statement on the Analysts Call that title to the WXL product involved in the Accident changed as soon as it left Biovail's manufacturing facility was "technically incorrect" as the GSK Agreement, "*as interpreted under the laws of the State of*

New York, provides that title to and risk of loss with respect to the product would not have passed to GSK until the product was delivered to GSK's facility in the U.S.A." [emphasis added]. Hull continued in the letter, "I would ask that Biovail refrain from making any further statements inconsistent with [the GSK Agreement] with respect to the transfer of title and the associated risk of loss and, if questioned, please clarify the record." The Hull Letter also stated that GSK could not agree that the WXL product involved in the Accident was saleable without that product going through GSK's quality assurance process and inspection, and, accordingly, GSK reserved all rights to reject as non-conforming the WXL product involved in the Accident. Finally, the Hull Letter stated that GSK was not consulted in advance as to the content of the October 3 Release and the statements made on the Analysts Call, and that GSK had been given the opportunity to review, but had no opportunity to comment on, the October 8 Release, contrary to the prior consultation provisions of the GSK Agreement.

[98] On October 29, 2003, Davis sent Crombie, by e-mail, GSK's draft WXL inventory and sales reconciliation to September 30, 2003. Davis testified that he assumed this was the first reconciliation GSK had sent to Biovail, since GSK had no WXL sales prior to the 2003 third quarter. A further updated reconciliation was provided by GSK to Biovail on November 14, 2003 and a final year-to-date (to December 31, 2003) reconciliation was provided on January 20, 2004. Melynk submits that the changes in the rates used for discounts, allowances and rebates in those reconciliations illustrate the challenges Biovail faced in determining the WXL revenue associated with the Accident, leading up to the issue of the October 3 Release and thereafter.

[99] Davis testified that the GSK Agreement provided that Biovail would invoice GSK for WXL product at the time of delivery at a pre-determined price that, at the relevant time, was based on the rate of 22% of GSK net sales. Reconciliation to actual GSK net sales was to be done on a quarterly (later a monthly) basis based on the information provided by GSK.

(d) Amendment of the GSK Delivery Term

[100] Melnyk and Hull discussed the GSK shipping term in several telephone conversations in late October 2003 and appear to have agreed to amend that term. Dyer led the discussions on behalf of GSK. He testified that Crombie called him after the Accident and said that Biovail had understood that GSK bore the risk of loss of WXL shipped, but on reviewing the matter after the Accident, "realized that GSK didn't have risk of loss, Biovail did, and then this whole series of negotiations around shipping terms followed that." In December 2003, Biovail and GSK agreed to amend the GSK delivery term on an interim basis so that it was clear that title to WXL product would transfer to GSK immediately after the shipment crossed the Canada-U.S. border, and in late 2004, after further negotiations, the GSK Agreement was amended accordingly. The new shipping term clearly distinguished between when title to the WXL product passed and who bore the risk of loss of a shipment.

[101] Although Melnyk made much of the fact that the amended shipping term addressed title to the WXL product and risk of loss separately, we do not accept that the subsequent amendment of the GSK delivery term has any bearing on what Biovail and Melnyk knew or should have known about the GSK shipping term as it read at the relevant time. We also heard testimony that Biovail made a proposal to GSK after the Accident to amend the GSK delivery term retroactive

to the date of the Accident, but withdrew that proposal because of concerns about the implications for insurance coverage. It does not seem to us that a retroactive amendment of the GSK delivery term would, in any event, have changed the interpretation and application of that term at the various times the Truck Accident Statement was made prior to that amendment.

[102] In any event, it is not surprising that commercial parties to an agreement, following an event that gives rise to some uncertainty about the meaning of a particular contractual term, agree to amend the agreement to provide clarity and avoid future disagreement.

(iv) Evidence of the Ernst & Young Witnesses

[103] We also heard evidence from Scullion and Lundie, accountants with Ernst & Young. Scullion was the partner who led Ernst & Young's Biovail engagement team at the relevant time and Lundie reported to him. Lundie was not a partner of Ernst & Young at the time.

(a) Reaction to the October 3 Release

[104] Scullion and Lundie testified that they were surprised that no one at Biovail consulted them prior to issuing the October 3 Release. Upon seeing that news release, they immediately questioned the accuracy of the Accident Contribution Statement but later also questioned the Revenue Loss Statement.

[105] Lundie testified that he first saw the October 3 Release at 11:27 a.m. that morning. Lundie e-mailed his reaction to Scullion, stating: "Interesting – seems they got a lot of cut-off matters wrong by a few days!!" Lundie testified that he believed at the time that the GSK delivery term was F.O.B. Biovail, in which case "this would be Biovail's revenue and they would have recognised it [in the third quarter]." However, he also noted that the October 3 Release implied that Biovail was responsible for the WXL product and would take it back for inspection, which he thought was inconsistent with an F.O.B. Biovail delivery term.

[106] Scullion had a similar reaction. In his testimony, Scullion stated that in order for revenue to be recognised from the September 30 shipments, the risks and rewards of ownership of the WXL product had to be transferred to GSK on or prior to September 30. An accident occurring on October 1 should not have affected revenue recognition. As a result, Scullion testified that he was confused as to why an accident in October would affect revenue recognition in respect of a September shipment. In his e-mail response to Lundie, Scullion stated that "[t]hey have discussed none of this with me. We need to discussed [*sic*] F.O.B. destination vs. shipping point as well as everything else included here."

[107] Lundie testified that his e-mail was based only on his reading of the October 3 Release, on his understanding that Biovail's contracts generally provided for delivery of product F.O.B. Biovail, and on Biovail's historic revenue recognition policies.

[108] Scullion testified that he called Miszuk after the issue of the October 3 Release and they had several conversations about revenue recognition practices around cut-off dates (a cut-off date establishes the point in time after which shipments to a customer cannot be included in revenues for a particular financial period and must be recognised in the succeeding period). He also

communicated to Crombie and Miszuk his surprise that Ernst & Young was not consulted prior to the issue of the October 3 Release.

[109] At the request of Ernst & Young, a meeting was held at Biovail on October 6 or 7, 2003 that Scullion, Lundie, Miszuk and Peter McLean (another Biovail employee) attended. Melnyk did not attend. At the meeting, Ernst & Young asked Biovail management to review the application of their revenue recognition criteria to all their contracts going back to the beginning of 2002 with respect to cut-off date policies. Later in October, Biovail management gave a presentation to Ernst & Young of their analysis in response to that request. Scullion and Lundie concluded that the GSK delivery term meant that revenue related to the WXL product involved in the Accident could not have been recognised in the third quarter unless it had arrived at GSK's facility by September 30, 2003. Scullion testified that he did not recall if the phrase "freight collect" was discussed at the time, but he testified that he understood that term to mean only that the recipient of a shipment pays transportation costs and that it does not speak to transfer of risks and rewards or title. He testified that he understood that title transfers based on the F.O.B. designation.

[110] Staff entered into evidence a copy of the Call Transcript of the Analysts Call, to which a typed note had been added at the top of the first page. Lundie testified that the typed note was his and that he had prepared it after the October 6 or 7 meeting at Biovail. Lundie's typed note was as follows:

> **Thoughts**
>
> **MISLEADING CONFERENCE CALL**
>
> - "While press releases are not regulated documents in themselves, a misleading press release could be actionable under s 127 of the Act (Ontario) [*sic*] on a public interest basis."
>
> - Both Eugene and Brian part of the misleading info.
>
> - Speaks to character
>
> **Actions**
>
> - Warning to change their ways otherwise we resign [or maybe we should just resign – can we re 2003?] actions required:
>
> - Full disclosure to auditors on a timely basis
>
> - Change CFO – one with CA or CPA
>
> - No more use of PWC to undertake valuations
>
> - In Camra sessins [*sic*] with audit committee

[111] Lundie's handwritten notation to the right of the note states "[t]his was me at 2 AM." Lundie testified that the handwritten notation was intended to let Scullion know that these were his initial thoughts after working 18 hours and being "pretty tired and maybe not . . . thinking totally rationally".

[112] Lundie testified that he spoke to Scullion about his comments the next morning and that they concluded that Melynk and Crombie were probably not aware of the accounting inconsistencies raised by the October 3 Release. They also concluded that Lundie's comments "were rather hasty and rash" and that Scullion would discuss them with more senior people at Ernst & Young.

[113] Scullion testified that Biovail was "a high risk audit" and that Lundie's comments (referred to in paragraph 110 of these reasons) were discussed at Ernst & Young to determine whether Ernst & Young should resign as Biovail's auditor. By that time, Biovail had retained external securities counsel to advise Biovail on disclosure matters and Crombie had provided information explaining his perspective on the disclosure made in the October 3 Release. Scullion testified that he did not understand Crombie's explanation for how he determined the revenue range reflected in the Revenue Loss Statement, but Ernst & Young ultimately concluded that it would not resign as auditor.

[114] Scullion and Lundie both testified that the low end of the revenue range reflected in the Revenue Loss Statement (i.e., $10 million) was material, from an accounting perspective, with respect to Biovail's 2003 third quarter financial statements.

(b) The October 8 Release, October 30 Release and March 04 Release

[115] Scullion and Lundie testified that they were not involved in preparing the October 8 Release and were not consulted about it. Neither Scullion nor Lundie had a particular reaction to the disclosure in the October 8 Release. Scullion stated that "it was the same information I had seen before."

[116] Scullion and Lundie testified that they were not involved in preparing the October 30 Release, but reviewed it before it was issued. Scullion testified that his review was intended to ensure that the dollar numbers in the release were consistent with the financial statements they had reviewed and that the language was factually correct and consistent with the financial statements. Scullion also expressed his view that the October 30 Release, as it related to the Accident, "was factually correct". He acknowledged that the release did not explicitly state that the revenue associated with the WXL product involved in the Accident could never have been recognised in Biovail's 2003 third quarter, but he did not recall raising that issue with Biovail.

[117] Scullion acknowledged that the March 04 Release, though it corrected the Revenue Loss Statement, did not state that the Accident could not have affected Biovail's third quarter financial results. Scullion testified that he did not raise that issue with Biovail at the time of the March 04 Release.

(c) Conclusions as to the Evidence of the Ernst & Young Witnesses

[118] The evidence of Scullion and Lundie has somewhat limited value because they both testified that they did not discuss their concerns as to the disclosure in the October 3 Release with Melnyk or the Biovail audit committee. Nor did they suggest to Biovail that any of the statements in the October 3 Release should be corrected.

[119] Moreover, Scullion and Lundie acknowledged in cross-examination that they did not review the GSK Agreement before coming to their views with respect to the October 3 Release. They acknowledged that they (i) were not aware at the time of the accurate GSK delivery term, (ii) were not lawyers or experts in interpreting shipping terms, and (iii) did not consult with legal counsel on the meaning of the GSK delivery term. At the time, they did not fully consider the implications of the words "freight collect" in the GSK delivery term or the fact that damaged product had to be returned to Biovail for inspection before it was re-shipped to GSK.

[120] It is clear, however, that Scullion and Lundie expressed concern about the Accident Contribution Statement at or before the October 6 or 7 meeting with Biovail, and, as a result, requested Biovail to review its revenue recognition practices with respect to cut-off dates. Thus, their concerns were known to Biovail, but not necessarily to Melnyk, before the October 8 Release was issued.

[121] Further, the evidence of Scullion and Lundie shows that they had a common understanding of the accounting implications of a delivery term that provided F.O.B. shipping point rather than F.O.B. destination. Scullion and Lundie both understood that the Accident Contribution Statement was inconsistent with an F.O.B. GSK shipping term because, in that case, the revenue associated with the WXL product involved in the Accident would not have been recognised in the third quarter even if the Accident had not happened. Lundie testified that this accounting treatment was consistent with Biovail's revenue recognition policies at the time.

[122] Further, it was immediately apparent to Scullion and Lundie how important the GSK delivery term was to the accuracy of the statements made by Biovail in the October 3 Release. In addition, both Scullion and Lundie were of the view that the low end of the revenue range reflected in the Revenue Loss Statement was material, as an accounting matter, for purposes of Biovail's 2003 third quarter financial statements.

D. Was the Accident Contribution Statement Misleading or Untrue?

[123] The first question we will address is whether the Accident Contribution Statement was misleading or untrue at the time it was made in the October 3 Release and thereafter, as alleged by Staff. If we conclude that it was, we will then determine whether it was misleading or untrue in a material respect.

(i) Positions of the Parties

Staff's Position

[124] Staff's allegation that the Accident Contribution Statement was misleading or untrue in a material respect rests on the meaning and effect of the GSK delivery term. We heard a significant amount of evidence and lengthy submissions on that issue.

[125] Staff alleges that the Accident did not contribute at all to the Earnings Miss because the WXL product on the truck involved in the Accident could not, in any event, have been delivered to GSK on or before September 30, 2003, the end of Biovail's third quarter. There is no dispute that the shipment could not have been delivered to GSK on or before that date. Staff says that the GSK delivery term provided for delivery to "GSK F.O.B., GSK's facilities in the U.S.A. (freight collect)". Staff says that means that title to WXL product did not pass to GSK until it was delivered to GSK at its U.S. facility. Staff submits that, as a result, no revenue from the WXL product involved in the Accident, or from the WXL product on the other two trucks that were not involved in the Accident, could have been recognised or reflected in Biovail's 2003 third quarter financial results.

[126] Accordingly, Staff submits that the Accident had no effect whatsoever on Biovail's 2003 third quarter financial results. The WXL product shipped on the three trucks on September 30, 2003 was shipped too late to be included in Biovail's third quarter financial results. That means that the Accident Contribution Statement was misleading or untrue.

Melnyk's Position

[127] Melnyk does not make any submission on exactly how the GSK delivery term should be interpreted. He submits, however, that the interpretation of the GSK delivery term is a complex matter and that Staff's interpretation ignores the words "freight collect". He says that the GSK delivery term does not clearly distinguish between transfer of title to the product shipped and transfer of the risk of loss of that product. Melnyk says that it does not make business sense for Biovail to have given control over the shipping of WXL product to GSK but for Biovail to retain the risk of loss (because title to a shipment would not pass until delivery to GSK in the U.S.). He submits that the term "freight collect" suggests that GSK bore the risk of loss of the shipment and that, as a result, title may have passed upon shipment from Steinbach.

[128] Further, Melnyk submits that the interpretation of the GSK delivery term is a matter of New York law and we have no evidence before us as to the application of that law. Accordingly, he says that, having failed to establish the appropriate meaning of the GSK delivery term, Staff's allegation with respect to the Accident Contribution Statement cannot be sustained. Melnyk submits that failure is fatal to Staff's position that the Accident Contribution Statement was misleading or untrue.

[129] Melnyk also submits that the important point made in the October 3 Release as it related to the Accident was that the revenue associated with the WXL product involved in the Accident could not be recognised in Biovail's third quarter financial results and that contributed

significantly to the Earnings Miss. Melnyk says that it is not important to investors whether the WXL revenue associated with the Accident could not be recognised in the third quarter because of the Accident or because of the meaning or interpretation of the GSK delivery term. Melnyk's counsel characterized that question as simply a debate over a "sub-reason for a reason" for the Earnings Miss.

[130] In any event, Melnyk submits that Biovail acted appropriately and with due care in making prompt disclosure of the Earnings Miss, despite the difficulty in determining the impact of the Accident on 2003 third quarter financial results given the limited information available at the time of the October 3 Release.

[131] Melnyk also testified that he received "repeated assurances" from senior officers of Biovail that the information reflected in the Truck Accident Statement was "both accurate and reliable". Crombie confirmed that in his testimony. Melnyk says that he had a strategic rather than operational role at Biovail and that he "trusted others to carry out their responsibilities on a timely basis and to make the right decisions". Further, he submits that there were no "red flags" that should have alerted him that further inquiry was necessary.

(ii) Analysis

(a) Biovail's Usual Delivery Term

[132] We did not receive any expert evidence with respect to the meaning or interpretation of the GSK delivery term under New York law. Having said that, we believe that some conclusions can be made.

[133] First, Melnyk testified that Biovail's usual practice was to include in its licensing agreements a delivery term that specified delivery F.O.B. Biovail's manufacturing facility (and not F.O.B. the licensee). Melnyk testified that he assumed, until the afternoon of October 3, 2003 when he first became aware of the accurate GSK delivery term, that this usual formulation was the delivery term in the GSK Agreement. Further, Melnyk knew that the usual delivery term meant that Biovail recognised the revenue from a shipment as of the date the shipment left Biovail's manufacturing facility. That appears to be what Biovail does under its other licensing arrangements and that was why Melnyk was tracking shipments of WXL from Steinbach on an hourly basis on September 30. Melnyk testified that he assumed that if WXL was shipped from Steinbach before midnight on September 30, that shipment would be reflected in Biovail's third quarter revenues. He testified that had he known there was any uncertainty with respect to the meaning of the GSK delivery term, he would have arranged for Biovail to deliver the last three WXL September 30 shipments by air rather than by truck, ensuring delivery by the end of the day on September 30.

[134] It appears that the delivery term in the GSK Agreement was changed, in the last or close to last draft of the GSK Agreement before it was signed, from Biovail's usual delivery term used in licensing agreements. Melnyk testified that the last-minute change to the delivery term was made without his knowledge (he signed separate signature pages in executing the GSK Agreement and testified that he did not read the executed agreement). He may also have been

misled by an incorrect summary of the GSK Agreement prepared and used by Biovail for internal purposes that referred to delivery to GSK F.O.B. Biovail and not the delivery term that was actually in the GSK Agreement. We accept this evidence, which was consistent with the documentary evidence and was not contradicted.

[135] Melnyk's position on this question is consistent with an e-mail he sent to Thiessen and Chapuis on October 1, 2003, immediately following the Accident, that stated:

> We ship FOB. I believe that GSK has the insurance claim … . We still bill … .

(b) Miszuk's Immediate Response to the Accident

[136] Miszuk testified that on October 2, 2003, after learning of the Accident, he obtained details related to the last WXL shipments made to GSK on September 30 and he obtained a copy of the accurate GSK delivery term. As a result, he testified that he understood that revenues associated with the WXL product involved in the Accident could not have been recognised by Biovail in its third quarter financial results. He asked Smith to prepare the preliminary estimate of the WXL revenues associated with the Accident that is referred to in paragraph 181 of these reasons. Miszuk testified that he told Crombie on October 2 that, based on his review of the GSK Agreement, the WXL revenues associated with the WXL product involved in the Accident could not be recognised in Biovail's third quarter financial results. That is key testimony in this matter. Crombie testified that he had no recollection of the conversation. That conversation may, however, have been why Crombie prepared the disclosure in the draft news release referred to below.

(c) The Draft Release

[137] On October 2, 2003 at 3:00 p.m., Crombie sent to Melnyk by e-mail attachment a draft news release announcing the Earnings Miss that he had prepared (the "**Draft Release**"). The Draft Release stated accurately that the GSK delivery term was F.O.B. GSK and that the revenue associated with the WXL product involved in the Accident could not be recognised in Biovail's third quarter. That paragraph of the Draft Release provided as follows:

> The Biovail product [involved in the Accident] was a material amount of Buproprian [*sic*] being shipped to Biovail's licensee. This product must be returned to Biovail's manufacturing plant in Manitoba Canada to ensure it is still within specifications. Since the supply agreement between Biovail and its licensee stipulates F.O.B. the licensee's warehouse, the revenue on this product cannot be recognised in Q3, 2003. The product, either the existing shipment once approved, or replacement shipment will be shipped within ten days. However this replacement shipment and its associated revenue will now be recognised in Q4 not Q3.

[138] As a result, while Crombie denied it in his testimony, it is clear that he knew the accurate GSK delivery term and its implications for revenue recognition before the October 3 Release was issued. Melnyk testified that he did not read the Draft Release in the chaos leading up to and

surrounding the disclosure of the Earnings Miss and that it was not Crombie's role to prepare such releases. It seems to us unlikely that Melnyk and Crombie would not have discussed the information in the Draft Release referred to above prior to the issue of the October 3 Release.

(d) The Thompson Opinion

[139] Mark Thompson, an in-house lawyer at Biovail ("**Thompson**"), prepared a preliminary opinion with respect to the meaning of the GSK delivery term. He sent that opinion to Crombie by e-mail at 11:20 a.m. on October 8, 2003. Crombie would have received the e-mail before the issue of the October 8 Release but there is no evidence that he actually saw or read it at that time. Thompson concluded that the risk of loss and title to a WXL shipment did not pass until it was delivered to GSK at its facility in the United States. "Freight collect" meant that GSK named the carrier and paid for shipment. Thompson applied the United States Uniform Commercial Code to come to these conclusions. Melnyk submitted to us that there was no reason or justification for Thompson to have done so. Thompson was admittedly not a lawyer qualified to practise New York law and he had no experience in interpreting delivery terms. In any event, we recognise that Thompson's analysis does not resolve the meaning or proper interpretation of the GSK delivery term. Melnyk was not copied on the original e-mail from Thompson to Crombie, but he acknowledged that he was subsequently informed of the substance of it.

(e) Interpretation of the GSK Delivery Term

[140] Counsel for Melnyk referred to a number of U.S. legal decisions that interpreted delivery terms, including the words "freight collect". While the legal analysis appears to be relatively complex, the ultimate conclusion appears to be that the interpretation of a particular delivery term turns primarily on the intention of the parties to the relevant agreement discerned from all of the circumstances. It was stated, for instance, in C.I.F. AND F.O.B. Contracts, Third Edition, David M. Sassoon and H. Orren Merren, London, Stevens & Sons, 1984 at p. 328:

> The foregoing description, though brief, should suffice to indicate that any rigid and inflexible interpretation of the f.o.b. term which failed to take account of the various factors surrounding a particular transaction would be doing violence to reality.

[141] In his testimony, Deeth stated that the term "freight collect" in the GSK delivery term was inserted in the agreement because, regardless of the F.O.B. term, GSK wanted control over any WXL shipment from the moment it left Biovail's manufacturing facility. GSK therefore wanted to arrange and pay for the shipping. GSK apparently had an unfortunate experience with a different manufacturer in which product was damaged while in transit.

[142] As noted above, Melnyk submits that it would not make business sense for Biovail to have agreed to give up control over shipping WXL product to GSK while retaining title and the risk of loss to that product until it was delivered.

[143] We do not agree with that submission. In the circumstances, Biovail had an interest in doing precisely that.

[144] The GSK delivery term provided for delivery F.O.B. GSK, meaning that title to the WXL product passed to GSK upon delivery to GSK at its U.S. facility. GSK wanted control over the shipping. The GSK delivery term therefore provided for delivery "freight collect", meaning delivery was at GSK's cost and under its control. We note that with respect to the risk of loss, Biovail stated in the October 3 Release that "[t]he manufacturing cost value of this shipment was fully insured". Accordingly, there seems to us to have been a business rationale for the formulation of the GSK delivery term and it is possible to give it a reasonable interpretation in the circumstances. It does not appear to us that the term "freight collect" affects the question of when title to the WXL product passes to GSK.

[145] The conclusion in paragraph 144 of these reasons is consistent with the position taken by GSK in the Hull Letter (see paragraph 97 of these reasons). The Hull Letter stated that "as interpreted under the laws of the State of New York", the GSK Agreement "provides that title to and risk of loss with respect to the product would not have passed to GSK until the product was delivered to GSK's facility in the U.S.A." That conclusion is also consistent with the Thompson opinion (see paragraph 139 of these reasons).

(f) Biovail's Revenue Recognition Policy

[146] The meaning of the GSK delivery term affects revenue recognition for purposes of Biovail's financial results.

[147] Scullion testified that revenue is recognised for accounting purposes when the risks and rewards of ownership to a product are transferred. Lundie testified that, in his view, if the GSK delivery term had been F.O.B. Biovail, then the revenue associated with the WXL product shipped on September 30 would have been recognised in Biovail's third quarter financial results irrespective of the Accident. Scullion testified that if the GSK delivery term was F.O.B. GSK, then no revenue related to that shipment could have been included in Biovail's revenues for the third quarter.

[148] On November 7, 2003, Dushi Srinathan, an internal auditor at Biovail, sent a memorandum to Miszuk and a number of Biovail employees involved in internal control, entitled "Q4 – 2003 Sales Cut-Off Procedures". That memorandum stated that:

> Biovail Corporation's policy for recognizing revenue on product sales is as follows:
>
> Product sales revenue is recognised when the product is shipped to the customer, provided that the Company has not retained any significant risks of ownership or future obligations with respect to the product shipped.
>
> …

[149] That policy was referred to as being a significant accounting policy in Biovail's 2002 Annual Report. The memorandum went on to address the meaning and accounting implications of the term "F.O.B.". The memorandum stated that:

> When the terms of our sale agreement with a customer state that the shipping terms are "F.O.B. – Biovail's Warehouse", title for the products will pass to the customer the moment the shipment leaves Biovail's Warehouse. Consequently, revenue on the sale would be recognised at this point …
>
> When the terms of our sale agreement with a customer state that the shipping terms are "F.O.B. – Destination", title for the products will pass to the customer the moment the shipment arrives at the Destination. Under these terms, Biovail should only recognise the revenue when the customer receives the product …

[150] While the memorandum referred to above is dated November 7, 2003 and was prepared after the events of September and October, 2003, it appears to reflect Biovail's revenue recognition policy during that period, as indicated by the disclosure of that policy in Biovail's 2002 Annual Report. Melnyk's assumption that any WXL shipment on September 30, 2003 would be recognised in Biovail's third quarter financial results was also consistent with that policy (because he assumed at the time that the GSK delivery term was F.O.B. Biovail).

(g) Deeth's Testimony

[151] Counsel for Melnyk submitted that Staff's case as to the meaning and interpretation of the GSK delivery term utterly failed as a result of Deeth's testimony. We have reviewed that testimony with care and we do not agree. Deeth acknowledged that he was not an expert on the interpretation or meaning of delivery terms and his testimony related primarily to the circumstances in which the GSK delivery term was negotiated and the positions taken by the parties at the time.

[152] Deeth had a clear understanding that the words "freight collect" meant only that GSK was to pay for delivery of the WXL product. Deeth must have thought he understood the meaning of the GSK delivery term because it was included in the agreement he negotiated. We give little weight to his acknowledgement in cross-examination that he still does not know what the GSK delivery term means in terms of transfer of title to a WXL shipment.

[153] On October 2, 2003 at 10:38 a.m., Deeth sent an e-mail to Chapuis related to the Accident. Deeth's e-mail stated:

> The agreement, and the PO [purchase order], say FOB GSK facilities, freight collect. We should still bill.

[154] Accordingly, it is clear that Deeth and Chapuis knew the accurate GSK delivery term on the morning of October 2, 2003. We do not take the words "[w]e should still bill" as an opinion by Deeth with respect to the meaning of the GSK delivery term or whether revenue associated with the WXL product involved in the Accident could be recognised by Biovail in its third quarter financial results. That was simply practical advice in the circumstances, intended to keep Biovail's options open, and it was consistent with Melnyk's own initial reaction (see paragraph 135 of these reasons).

(h) Amendment of the GSK Delivery Term

[155] Following the Accident, there was a relatively long negotiation between Biovail and GSK with respect to what the provisions of a new delivery term should be for purposes of the GSK Agreement. Ultimately, Biovail and GSK agreed to a new delivery term that clearly distinguished between transfer of title to WXL product and the risk of loss. In our view, that agreement does not affect the meaning or interpretation of the GSK delivery term at the time of the Accident.

(i) Miszuk's View of the Circumstances by the End of October

[156] Miszuk testified that by October 16, 2003, it was clear that revenue associated with the three WXL shipments on September 30 could never have been recognised in Biovail's third quarter. Miszuk's view was based in part on Thompson's opinion as to the meaning and interpretation of the GSK delivery term.

[157] In this respect, Miszuk sent an e-mail to Melnyk and Crombie on October 16, 2003 with the subject heading "Q3 Financials", which stated in part:

> With respect to the Q3 financials … I am developing position papers for the following:
>
> GSK – pursuant to the agreement that Biovail is required to ship product FOB-GSK, we have determined that for revenue recognition purposes that shipments to GSK will be cut-off 2 days prior to the end of the month-end (as delivery time is approx 36 to 40 hours). For Q2 [*sic*] this means that we will adjust the last 3 shipments completed in September (which includes the truck accident) … Total adjustment $7m in revenue.

[158] Crombie testified that Miszuk's e-mail stated a "preliminary" conclusion and, in his view, the matter had not been "finalized". He acknowledged that "[w]e continued to debate [the conclusion] for another week or ten days, but it did not change."

[159] When cross-examined about Miszuk's October 16, 2003 e-mail, Melnyk did not accept Miszuk's view, but acknowledged that he did not recall questioning it:

> Q. You got it on October 16th. This is a live issue and your controller is saying adjustment is $7 million and the reason is because the term FOB GSK we can't recognize revenue for the last two days?
>
> A. That was – I don't recall this and – looking at our road show schedule I may have been on the road show. I don't know where this came from.
>
> Q. It's coming from Mr. Miszuk.
>
> A. I know it's coming from Mr. Miszuk. There's no reconciliation or anything to look at before so I question where this came from. We're still working with the

> $10 to $20 million and if he's saying its $7 million for the last three shipments that's what we would have gone out and said. There was nothing to hide here. The number is what it is. Just get it right.
>
> Q. Mr. Miszuk is giving you that information?
>
> A. He's sending it to Mr. Crombie and I don't know if Mr. Crombie verified it at that point or not. I have no idea what the significance was of that number.
>
> Q. You have no reason to question that information coming from the controller?
>
> A. Until it's vetted by Mr. Crombie, I would, yes.
>
> Q. You never questioned it?
>
> A. I don't know if I did. I don't recall that.

[160] Accordingly, it appears clear that Biovail and Melnyk had sufficient information as of October 30, 2003 to reasonably determine the amount of, and the proper accounting treatment for, the WXL revenue associated with the Accident.

(iii) Conclusions

[161] We heard no compelling evidence that Biovail or Melnyk had any legitimate reason to believe that the WXL revenue associated with the WXL product involved in the Accident could have been recognised in Biovail's third quarter financial results given the GSK delivery term as it read at the relevant time. Melnyk did not submit any expert evidence that, under New York law, the GSK delivery term meant that title to WXL product passed to GSK when it left Biovail's manufacturing facility. The weight of the evidence was to the contrary (including the testimony of Miszuk, Hull, Scullion and Lundie, the conclusions reached by Thompson in his opinion and the terms of Biovail's revenue recognition policy at the time). We do not accept that the words "freight collect" in the GSK delivery term affected when title to WXL product passed to GSK or the appropriate revenue recognition from an accounting perspective.

[162] In all of the circumstances, we believe that both parties to the GSK Agreement intended, by including an F.O.B. destination delivery term in the GSK Agreement, that title to WXL product would not pass to GSK until it was delivered to GSK's facility in the United States. That is what Miszuk understood on October 2, 2003 and what Crombie must have understood when he prepared the Draft Release on that basis. We believe that Melnyk and the other senior officers of Biovail, once they became aware that the GSK delivery term was F.O.B. GSK, understood that title to the WXL product shipped on September 30 had not passed to GSK at the time of the Accident and therefore that revenues associated with that product could not have been reflected in Biovail's third quarter financial results.

[163] As noted in paragraph 156, Miszuk acknowledged in his testimony that, in any event, by October 16, 2003 it was clear that Biovail could not have recognised any revenue associated with the WXL product involved in the Accident in its third quarter financial results.

[164] Given the meaning and reasonable interpretation of the GSK delivery term and the time the three trucks carrying the WXL shipments left Biovail's manufacturing facility on September 30, 2003, we find that the Accident did not and could not have had any effect on Biovail's 2003 third quarter revenues or earnings. Accordingly, the Accident Contribution Statement made by Biovail was misleading or untrue at the time and in the light of the circumstances under which that statement was made in the October 3 Release and at any time thereafter. Biovail knew or should have known that was the case. We address later in these reasons whether the Accident Contribution Statement was misleading or untrue in a material respect.

E. Was the Revenue Loss Statement Misleading or Untrue?

[165] We will now address whether the Revenue Loss Statement was misleading or untrue at the time it was made in the October 3 Release and thereafter, as alleged by Staff. If we conclude that it was, we will then determine whether it was misleading or untrue in a material respect.

(i) Positions of the Parties

Staff's Position

[166] Staff alleges that the Revenue Loss Statement was misleading or untrue in a material respect because the $10 to $20 million revenue range reflected in that statement was grossly inflated and did not represent a reasonable estimate of the revenues associated with the WXL product involved in the Accident. Staff says that Biovail and Melnyk knew or should have known that at the time of the October 3 Release and at any time thereafter.

Melnyk's Position

[167] Melnyk submits that at the time the October 3 Release was issued it was not possible to determine accurately the revenue loss associated with the WXL product involved in the Accident because that revenue was based on GSK "net sales" (as defined in the GSK Agreement) and those sales could not be determined until a subsequent reconciliation was provided by GSK. That reconciliation was not required to be delivered by GSK until after the end of the third quarter (in accordance with the terms of the GSK Agreement). Melnyk also says that there was uncertainty on October 3, 2003 as to whether all three trucks that left Steinbach late on September 30 were involved in the Accident and therefore uncertainty as to the associated revenue loss as a result of the Accident.

[168] Further, Melnyk submits that he is not an accountant and he relied properly and in good faith on Crombie and other members of senior management who had appropriate expertise for financial and accounting matters. He says that he did not focus on and was not aware of the revenue numbers related to WXL included in Biovail's internal financial reports and forecasts at the time. He also says that there was a crisis and chaos on October 2 and 3 surrounding the issue of the October 3 Release, which announced Biovail's first ever earnings miss.

[169] Finally, Melnyk says he acted reasonably and with due care and diligence in approving the October 3 Release and the Revenue Loss Statement made in that release.

(ii) Analysis

(a) Bulk Trade Shipment

[170] In considering whether the Revenue Loss Statement made in the October 3 Release was misleading or untrue, we will review the relevant circumstances at that time.

[171] Because FDA approval of WXL was not granted until late August 2003, the commercial product launch of WXL did not occur until early September 2003. As September progressed, management of Biovail was aware that there was an increasing risk that Biovail would not meet its revenue and earnings guidance for its third quarter. Biovail was having production problems in manufacturing and packaging the amount of WXL product it wanted to ship to GSK in the third quarter and there were also issues relating to sales of other products (see the October 3 Release).

[172] It is clear that Biovail was desperately attempting to ship as much WXL product as possible by the end of the day on September 30, 2003 so that the revenue associated with those shipments could be included in Biovail's third quarter financial results. Melnyk wanted to ensure that Biovail shipped "trade" rather than "sample" WXL tablets because the latter had a very low revenue value to Biovail (close to Biovail's manufacturing cost) compared to "trade" tablets. As of September 30, sample WXL tablets were invoiced to GSK at a set price of approximately 19% or 23% of the price of the trade tablets, depending on the size of the tablet. In an e-mail on August 20, 2003 to Chapuis, copied to Crombie and Miszuk, Melnyk responded to a proposed increased WXL sample order from GSK for September 2003:

> Under no circumstances. We need TRADE in September NOT SAMPLES. ARE THEY TRYING TO KILL US? WE LOSE MONEY ON SAMPLES!!! WE WANT TO SHIP MORE TRADE!

[173] On September 22, 2003, Chapuis sent an e-mail to Smith, copied to Miszuk and Crombie, that stated in part that:

> Eugene has asked that GSK accept bulk printed trade for them to inspect, then return to Steinbach for packaging as we can NOT package all product printed before quarter end …

[174] On September 23, 2003, Miszuk sent an e-mail on this topic to Melnyk and Crombie saying:

> I am having difficulty with the strategy to ship bulk product to GSK for inspection and then returned [*sic*] to Biovail for testing, QA release and packaging … How can we bill this at the rate of 22% of NS [net sales] (less [an amount] for packaging) …
>
> This is product deemed work in process inventory and I cannot see the rationale to even transfer ownership of the product to GSK … considering the product is being returned to Biovail … GSK is only completing a sub routine

> of mfg … In no way is this deemed qualified product in support of the agreement or even fall into a category that I can support within Revenue Recognition Regulations.

[175] In a subsequent e-mail exchange with Melnyk and Crombie, Miszuk stated:

> We are sacrificing integrity to come with numbers that at the end of the day will not achieve expectations … and if we do, we need a bigger event for Q4 … can we not just accept reality and develop the right story line, realign expectations and announce the restructure … Bring the market down and over achieve going forward. A small setback but one we can overcome as We have a great company and the future is unbelievable …
>
> Eugene … I have been with you for a long time, supported you 100% … and will do anything for you and the company … but I am concerned with the determination to achieve the market expectations no matter what.

[176] Ultimately, Biovail did not proceed with the proposal to ship WXL bulk trade tablets to GSK for return and packaging by Biovail. A strategy that Biovail did adopt to increase third quarter revenue was to convince GSK to accept WXL "trade" tablets shipped in bulk in drums rather than packaged and ready for sale by GSK. The trade tablets shipped in bulk were to be packaged by GSK.

[177] On September 25, 2003, agreement was reached between Biovail and GSK with respect to the shipment by Biovail of trade tablets in bulk. The agreement was confirmed in an e-mail from Stuart G. J. Norman to Chapuis, the relevant portion of which is as follows:

> Carol – to confirm our discussion today about this key issue:
>
> GSK would be able to pack trade bottles at our Zebulon [North Carolina] factory once change parts had been fitted. This is estimated to take about two months and would cost $160,000. GSK would be willing to absorb these costs. An initial packing run should be about 250,000 bottles. We would need to reach agreement on the cost of this operation and ongoing use of the GSK packing line to recoup some of the investment. Please let me know as soon as possible whether you agree in principle to this proposal so that we can proceed with the purchase of change parts.
>
> . . .
>
> Stuart G. J. Norman
> NPS Director - Neurology & Psychiatry
> Ware, UK

Chapuis forwarded this e-mail to Thiessen, copied to Crombie, Miszuk and Smith, on September 30, 2003.

[178] As a result, the WXL product on the truck involved in the Accident consisted primarily of WXL bulk trade tablets shipped in drums to be packaged at GSK's facility in North Carolina.

[179] On September 30, 2003, Melnyk was tracking by telephone on an hourly basis, directly with employees at Steinbach, shipments of WXL from Steinbach to GSK. He was doing that because he assumed that the GSK delivery term provided for delivery F.O.B. Biovail. As a result, Melnyk believed at the time that revenue from all WXL shipments leaving Biovail's manufacturing facility on September 30 would be recognised as revenue in Biovail's third quarter financial results.

[180] We do not accept Melnyk's testimony that he was not aware of the revenue value of the WXL shipped from Steinbach on September 30, 2003. To the contrary, we believe that he was focused on that very question.

(b) Biovail Estimates After the Accident

[181] On October 2, 2003, at Miszuk's request, Smith prepared a preliminary calculation of the revenue associated with the WXL product on the truck involved in the Accident, and concluded that the revenue value was approximately $4.9 million. He concluded that the revenue associated with the WXL product on all three trucks that left Steinbach late on September 30, 2003 was approximately $7.7 million. It is telling to us that this preliminary estimate, prepared immediately after the Accident and before the October 3 Release was issued, came so close to the final numbers determined by Biovail. Ultimately, the March 04 Release disclosed that the Biovail third quarter revenue loss associated with the Accident was $5.0 million (see paragraph 270 of these reasons for a discussion of the $5.0 million revenue loss number).

[182] Biovail also knew by October 3, 2003 that its third quarter WXL revenue for all of September was estimated to be below $10 million. That information was disclosed on the Analysts Call but not in the October 3 Release. The revenue range reflected in the Revenue Loss Statement meant that the sales value to GSK of the WXL on the truck involved in the Accident was in the range of approximately $45 to $90 million. Davis testified that the revenue range disclosed in the October 3 Release represented the equivalent of about $100 million of GSK sales. He said that "we barely sold over $100 million in the entire third and fourth quarters" (see paragraph 94 of these reasons).

(c) Market Response

[183] The response by analysts and investors to the $10 to $20 million revenue range contained in the October 3 Release was immediate skepticism, particularly as to how wide the range was. For example, on October 5, 2003, Howling received an e-mail from an investor asking a number of questions and stating "[T]here is $10 MM difference in between. Do you people think the this [*sic*] statement wouldn't not [*sic*] be questioned?" A reporter for Business Week also e-mailed Howling on October 5, 2003, " … Why don't you have a precise value to the shipment? What is the exact hit to your revenues for Q3? … Why was the company carrying up to $20 million of tablets in one truck?" On October 6, 2003, Howling e-mailed Melnyk and Crombie requesting that Biovail put out a release indicating the exact revenue associated with the WXL product

involved in the Accident. He indicated that investors were saying "that this will go a long way to restoring credibility …". A reporter for the Wall Street Journal sent an e-mail to Howling on October 8 (which was forwarded to Melnyk) indicating that "[s]ome analysts and investors consider it odd that Biovail would ship $60 million in retail value worth of product on the last day of the quarter".

(d) The Maris Report

[184] The Maris Report was issued on October 8, 2003. Melnyk attacked the Maris Report on the basis that it was an "extraordinary and utterly irresponsible report that was scathing in its criticism" and led directly to market rumours that the truck involved in the Accident was in fact empty. Melnyk says that, as a result of the Maris Report, the market price of Biovail's shares fell approximately $4.00 per share or approximately 13.9% (see paragraph 229 of these reasons).

[185] The Maris Report did raise concerns based on the publicly available facts. The report stated with respect to the Accident that, "[f]ollowing our own review, we believe that this bears further investigation as there are serious unanswered questions regarding Biovail's statements".

[186] With respect to the question whether the truck involved in the Accident was empty, the Maris Report made the following statement:

> After studying the photographs and video of the scene available on the website, we believe that the Penner truck looks empty where the back of the vehicle is ripped open. From the angle, we estimate that one could see perhaps approximately 1/3 to 1/2 of the interior truck cargo bay. No material is visible.

[187] The Maris Report went on to state that:

> [w]e asked Biovail that the range of $15 to $20 million impact seemed like a large range, and they indicated that they simply did not have all the details of the accident. They emphasized that they were being conservative in their estimate … $20 million worth of tablets at average pricing would be a large volume of product and we wonder if this would be visible in the photos of the accident. While we are not in a position to know this for certain, we believe Biovail making the Bills of Lading available easily resolves this. While admittedly an unusual request, we are curious to see whether this was a $20 million shipment.

[188] Howling sent an e-mail to Melnyk and Crombie prior to the issue of the October 8 Release. It stated that:

> [w]e should consider either advising how many tablets were on the truck or have a statement issued by Pennier [*sic*] confirming that the truck was not empty as the biggest "short end" story out there is that the truck was empty and given our credibility (comment from Angela from Investors), *no one is believing us when we say it was not empty*. [emphasis added]

[189] It appears to us that the Maris Report was raising legitimate questions as a result of skepticism related to the WXL revenue range reflected in the Revenue Loss Statement and the other circumstances surrounding the Accident. We also note that the Maris Report used the $15 to $20 million WXL revenue range stated by Crombie on the Analysts Call.

[190] In any event, as a result of the Maris Report and the market rumours, Biovail issued the October 8 Release.

(e) Determining WXL Revenue

[191] Biovail attempted to justify in the March 04 Release why it was not able to determine accurately the WXL revenue loss associated with the Accident at the time of the October 3 Release and thereafter. Melnyk made similar submissions to us. Those rationalizations, explanations and submissions are not convincing.

[192] In our view, determining the 2003 third quarter revenue to Biovail associated with the WXL product involved in the Accident was not as complicated as Melnyk makes out. WXL tablets were invoiced by Biovail to GSK at a price that varied based on the size of the tablet and whether the tablets were "trade" tablets or "samples" (see paragraph 172 of these reasons). The pre-determined invoice price for trade tablets was based on GSK's estimated "net sales" of such tablets. Under the GSK Agreement, in determining net sales, a number of amounts were to be deducted from GSK's gross sales, including amounts for discounts, allowances and rebates granted by GSK to its customers. In establishing the pre-determined invoice price for WXL trade tablets, a percentage discount rate for such deductions was assumed.

[193] It was clear on October 3, 2003 that GSK's net sales of WXL for the third quarter would not exceed $110 million, the threshold for moving to Tier Two pricing under the GSK Agreement. Biovail knew that its total sales of WXL to GSK for the third quarter were estimated to be below $10 million, making it impossible for GSK to have net sales in the third quarter of more than $110 million. (The same conclusion applies using year to date sales of WXL.) Accordingly, the total revenue to Biovail from the sale of WXL to GSK for the third quarter was never going to be more than 22% of GSK net sales. While revenue to Biovail could be affected by deductions that GSK was permitted in determining net sales, in our view, there was never any reasonable possibility that the revenue to Biovail from the WXL product involved in the Accident was going to range from $10 to $20 million.

[194] The WXL product shipped on September 30 could not, as a practical matter, have been sold by GSK in the third quarter because that product was not received by GSK until after the end of that quarter. Further, the WXL product shipped in bulk on September 30 was required to be packaged by GSK before it could be sold. As a result, any reconciliation of net sales provided by GSK to Biovail related to Biovail's 2003 third quarter would not reflect the subsequent sale by GSK of that product in the fourth quarter.

[195] While admittedly it was a preliminary estimate, Smith concluded on October 2, 2003 that revenue associated with the WXL product on the truck involved in the Accident was approximately $4.9 million. That number is very close to the $5.0 million revenue loss ultimately

attributed by Biovail to the Accident in the March 04 Release. Even if one includes the revenue associated with the WXL product shipped on all three trucks on September 30 (which we conclude below is not appropriate), Smith's estimate of the total revenue loss was approximately $7.7 million (see paragraphs 318 to 320 of these reasons for a discussion of whether the WXL product on all three trucks should ever have been included in the WXL revenue loss number).

[196] It is striking how accurate Biovail's revised overall guidance for 2003 revenues and earnings announced in the October 3 Release turned out to be. In our view, it was much more difficult to determine that overall guidance than to determine the revenue value of the WXL product involved in the Accident. It seems improbable to us that Biovail would get the Revenue Loss Statement so wrong when it got all of the other more complex numbers right.

(f) Analysts' Estimates and Variables

[197] The March 04 Release indicated that "[i]n calculating the high end of the estimate range, Biovail also took into consideration the variables that analysts were generally using in their models to estimate the Wellbutrin XL revenues, which included typically higher pricing, higher percentage supply prices and did not reflect the typical gross to net deductions". Neither the October 3 Release nor the October 8 Release disclosed that analysts' estimates and variables were a consideration in determining the $10 to $20 million revenue range. Investors were led to believe by those news releases that the Revenue Loss Statement represented the actual revenue loss to Biovail associated with the Accident for its 2003 third quarter. If the revenue range reflected in the Revenue Loss Statement was based even in part on analysts' estimates and variables, that should have been clearly disclosed in the October 3 Release and the October 8 Release. It was not. That failure to disclose rendered the Revenue Loss Statement in those releases misleading or untrue for that reason alone.

(iii) Conclusions

[198] At the end of the day, we believe that Biovail seized on the Accident as a ready excuse or justification for a portion of the Earnings Miss and, in proffering that excuse, grossly inflated the WXL revenue loss associated with the Accident.

[199] Based on all of these considerations, we have concluded that the WXL revenue loss associated by Biovail with the Accident was grossly inflated and that was or should have been obvious to Biovail at the time of the October 3 Release. There was no reasonable possibility that the 2003 third quarter WXL revenue loss associated with the Accident was ever going to exceed approximately $5.0 million and that amount could be reasonably estimated at the time of the October 3 Release (as it was estimated by Smith). Accordingly, we find that the Revenue Loss Statement was misleading or untrue at the time and in the light of the circumstances under which it was made in the October 3 Release and at any time thereafter. Biovail knew or should have known that was the case. We address below whether the Revenue Loss Statement was misleading or untrue in a material respect.

F. Were Biovail Statements Misleading or Untrue in a Material Respect?

[200] We concluded above that the Accident Contribution Statement made by Biovail in the October 3 Release and at any time thereafter, and the Revenue Loss Statement made by Biovail in the October 3 Release and at any time thereafter, were misleading or untrue at each time those statements were made. As a result, the Truck Accident Statement was also misleading or untrue. We must now consider whether the Truck Accident Statement, the Accident Contribution Statement and/or the Revenue Loss Statement were misleading or untrue *in a material respect*. In reaching our conclusions with respect to the materiality of those statements, we have taken into account the following evidence and considerations.

(i) Expert Evidence

[201] We received an expert report prepared at Staff's request by Dr. Craig McCann ("**McCann**"), and two expert reports prepared at Melnyk's request, one report by Dr. Ronald Miller ("**Miller**") and one report by Dr. Charlotte Chamberlain ("**Chamberlain**"). McCann, Miller and Chamberlain are economists, and all were qualified by us as expert witnesses. They took different approaches to determining materiality. McCann concluded that the Truck Accident Statement made in the October 3 Release was important to investors and therefore material. Miller and Chamberlain concluded that it was not.

(a) McCann's Evidence

[202] McCann conducted an event study to assess the significance of the statements made in the October 3 Release and on the Analysts Call. He concluded that the October 3 Release reduced the market's consensus estimate of the value of Biovail's shares by a statistically significant amount, and that, to the extent the market believed the Accident explained $10 to $20 million, or $15 to $20 million, of the revenue variance reflected by the Earnings Miss, the Truck Accident Statement was material to investors. It was also McCann's opinion, based on his review of analyst reports following the October 3 Release, that analysts and investors believed the explanation proffered by Biovail in the October 3 Release through the making of the Truck Accident Statement. Accordingly, analysts and investors would have adjusted Biovail's revenue for the 2003 third quarter upwards by approximately $15 million.

[203] McCann noted that Biovail's share price dropped approximately $4.00 per share or 13.9%, a statistically significant amount, following the release of the Maris Report and the issue of the October 8 Release, which was intended by Biovail to address issues raised by the Maris Report and market rumours (see paragraph 229 of these reasons.) In McCann's opinion, this demonstrated that the Truck Accident Statement, which attributed the WXL revenue variance to a one-time event, was important to investors. However, McCann did not consider that the October 8 Release contained any meaningful new information for investors.

[204] Melnyk submitted that we should not accept McCann's evidence because, among other things, he did not carry out a separate event study with respect to each of the two alleged misstatements (the Accident Contribution Statement and the Revenue Loss Statement), and did not isolate those statements from the unquestionably correct statements made in the October 3

Release, in particular, the statements disclosing the Earnings Miss. Melnyk submitted that McCann, in his testimony, placed too much reliance on the Maris Report, which was not referred to at all in his report, and that he failed to provide any empirical support for his opinions. Melnyk also submitted that McCann did not testify impartially but rather as an advocate for Staff. That would be inconsistent with McCann's role as an expert.

(b) The Evidence of Miller and Chamberlain

[205] Miller compared the estimated economic impact of the Truck Accident Statement with the estimated economic impact of several alternative correct statements that could have been made. He also considered the market response to the Releases. In his opinion, there was no economic significance to Biovail attributing its 2003 third quarter revenue shortfall to the Accident rather than to the GSK delivery term or to a two-day delay in shipping. It was also Miller's opinion that any alleged overstatement of the revenue associated with the WXL product involved in the Accident would have had an economic impact that was small relative to the daily fluctuations in Biovail's share price.

[206] Miller also stated that Biovail's share price did not react to further news related to the Accident after October 3, 2003, which, in Miller's view, was consistent with statements made about the Accident being generally immaterial to investors. In Miller's opinion, the market reacted as if Biovail's reduction in earnings guidance on October 3, 2003 was a recurring event, which supports the view that the misstatements alleged by Staff were not material to investors.

[207] Chamberlain testified that the important information disclosed in the October 3 Release and on the Analysts Call was that Biovail's 2003 third quarter revenues would significantly miss its revenue and earnings guidance and analysts' consensus estimates by specified amounts. This resulted in a substantial downward revision in analysts' estimates for WXL revenues and total revenues for 2003, bringing them closer to the actual WXL revenues and total revenues disclosed in Biovail's March 04 Release. In Chamberlain's opinion, this shows that the Truck Accident Statement did not mask any ongoing revenue issues for analysts or investors.

[208] According to Chamberlain, the difference between postponed revenue recognition caused by a truck accident and postponed revenue recognition due to a misunderstanding as to the legal interpretation or effect of the GSK delivery term was not material to investors because neither was a recurring event.

[209] Chamberlain expressed the view that the estimated impact of the Accident on Biovail's third quarter revenues of $15 to $20 million equalled roughly 1% to 2% of Biovail's 2003 total annual revenue guidance, and was therefore not material. She testified that the rule of thumb threshold for materiality is generally viewed to be approximately 5% of revenues. Chamberlain also noted that even if Biovail had recorded $20 million in WXL revenues for the third quarter (i.e., the high end of the range), revenues for the third quarter would still not have met Biovail's third quarter revenue and earnings guidance.

[210] Staff submitted that we should not accept the evidence of Melnyk's experts because, among other things, Miller compared the low end of the revenue range reflected in the Revenue

Loss Statement to the revenue associated with the shipments on all three trucks that left Steinbach late on September 30 (approximately $7.7 million), rather than to the revenue associated with the WXL on the one truck involved in the Accident (approximately $4.9 million). Miller and Chamberlain also compared Biovail's disclosure in the Releases to theoretically correct disclosure, and considered the impact of the Accident on Biovail's annual, rather than quarterly, revenues and earnings. Staff submitted that Miller and Chamberlain were not impartial experts but advocates for Melnyk. That would be inconsistent with their roles as experts.

(c) Conclusions as to the Expert Evidence

[211] The experts' evidence was helpful in identifying issues and factors that we should consider in assessing the materiality of the Truck Accident Statement, the Accident Contribution Statement and the Revenue Loss Statement. However, at the end of the day, the experts did not, in our view, resolve the basic question whether those statements were material to investors at the various times they were made. One of the difficulties is that the Truck Accident Statement was initially made in the October 3 Release which also announced the Earnings Miss. The Earnings Miss constituted clearly material information and the public announcement of it had an immediate and significant negative effect on Biovail's share price (see paragraph 216 of these reasons). Similarly, it is not possible to assess the market impact, if any, of the statements made in the October 8 Release given the issue of the Maris Report and the rumours in the market at that time.

[212] However, the reasonable investor standard does not impose a market impact test such as that reflected in the definitions of "material change" and "material fact" (see paragraphs 70, 72 and 73 of these reasons). The question in applying the reasonable investor standard is whether there is a substantial likelihood that a reasonable investor would consider a particular statement to be important in making an investment decision. The impact of the statement on share price is clearly relevant to that assessment but a market impact is not necessary in order for us to conclude that a statement is material.

[213] Ultimately, materiality is a question of mixed fact and law that falls squarely within the specialized expertise of the Commission. It is for us to determine whether the statements made by Biovail were, in a material respect and at the time and in the light of the circumstances under which they were made, misleading or untrue.

[214] Given our conclusions with respect to reliance on the experts' testimony and reports, we do not consider it necessary to address the allegations made as to the experts' lack of impartiality.

(ii) Factors Considered in Determining Materiality

[215] In addition to the expert reports described above, the following are the factors we considered in addressing the materiality of the Truck Accident Statement, the Accident Contribution Statement and the Revenue Loss Statement.

(a) The Earnings Miss

[216] The disclosure in the October 3 Release that was clearly material (regardless of whichever materiality test is applied) was the fact that Biovail had substantially missed its third quarter 2003 revenue and earnings guidance. That was a fact that, when disclosed, substantially and adversely affected Biovail's share price, which fell from approximately $37.77 per share on October 2, 2003 (the trading day prior to the public announcement of the Earnings Miss in the October 3 Release) to approximately $31.10 per share on October 3, 2003 (immediately following the public announcement of the Earnings Miss). That is a drop in share price of approximately 17.7%. There is no dispute as to the materiality of the fact that Biovail would miss its 2003 third quarter revenue and earnings guidance.

[217] Melnyk and the other senior officers of Biovail knew that the information related to the Earnings Miss disclosed in the October 3 Release would have a substantial negative impact on Biovail's share price. That is one of the reasons they wanted to publicly release that information as soon as possible. Doing so was clearly appropriate so that all investors had access to that information in making investment decisions with respect to Biovail's shares.

[218] It is not possible to isolate the impact of the Truck Accident Statement in the October 3 Release on the market price of Biovail's shares because that statement is contained in the news release that announced the Earnings Miss. While McCann, Staff's expert, conducted an event study of the effect of the October 3 Release on Biovail's share price, that study could not overcome this basic problem.

(b) One-Time Event

[219] The implication of the Truck Accident Statement to analysts and investors was that the revenue loss Biovail associated with the Accident was a one-time event out of the control of management, and not a recurring event that would affect future financial reporting periods. It suggested that to "normalise" 2003 third quarter revenues as a result of that event, one would add back to Biovail's revenues for the third quarter an amount of between $10 and $20 million.

[220] That conclusion is also consistent with the testimony we heard that the $10 to $20 million revenue range, or at least the high end of that range, was determined by Biovail based in part on analysts' estimates and variables (as Crombie stated on the Analysts Call). Crombie testified that analysts appropriately adjusted their financial models for future financial reporting periods based on the revenue range reflected in the Revenue Loss Statement. The fact that Biovail used analysts' estimates and variables in determining the revenue range was disclosed on the Analysts Call and in the March 04 Release. Neither the October 3 Release nor the October 8 Release disclosed that analysts' estimates and variables were used in determining the Revenue Loss Statement. In our view, the failure to do so rendered the Truck Accident Statement made in those releases misleading or untrue.

[221] Staff suggested that the WXL revenue variance in the third quarter was the result of manufacturing problems and ineffective management, both factors that could have a recurring effect on Biovail's future financial performance. It appears to us that the circumstances

surrounding the Accident and the failure to ship more WXL product in the 2003 third quarter were likely one-time events that would not have a recurring effect on Biovail's financial performance in future periods. Accordingly, we have assessed the materiality of the statements made by Biovail based on the assumption that the third quarter variance in WXL revenues reflected in the Revenue Loss Statement was a one-time event. That gives the benefit of any doubt to Biovail and Melnyk. That is not to say, however, that the fact that the WXL revenue variance was a one-time event was not meaningful or relevant information to investors.[2]

(c) Contributing Reasons for the Earnings Miss

[222] The Accident was one of three reasons given by Biovail in the October 3 Release for the Earnings Miss. The two other reasons were a net income shortfall associated with sales of generic omeprazole and a revenue shortfall related to the failure of the supplier to fill back orders of Cardizem CD. It is difficult for us to determine from the October 3 Release the precise financial impact of the latter two circumstances, although they appear to have been of a similar financial magnitude to that reflected in the Truck Accident Statement.

[223] Counsel for Melnyk submitted that the Earnings Miss was fully and accurately disclosed in the October 3 Release and that should be the end of the matter in terms of the materiality of the statements made in the October 3 Release.

[224] It is clear, however, that Biovail itself considered the Accident Contribution Statement to be meaningful and relevant information to investors. Biovail stated in the first paragraph of the October 3 Release disclosing the Earnings Miss that the Accident contributed significantly to this unfavourable variance. In the second paragraph of that release, Biovail referred to "a material shipment of Wellbutrin XL" as having been involved in the Accident. Melnyk also emphasised the importance of WXL to Biovail's future when he referred on the Analysts Call to the "huge impact" of WXL on Biovail's future financial performance (see paragraph 33 of these reasons). As noted in paragraph 219 of these reasons, we believe that Biovail intended the Truck Accident Statement to convey to investors that the third quarter revenue shortfall associated with the Accident was a one-time event out of the control of management and that revenues for the 2003 third quarter could be "normalised" by adding back the $10 to $20 revenue shortfall. We understand that it also led financial analysts to appropriately adjust their financial models.

[225] We recognise that even if the WXL revenue loss attributed by Biovail to the Accident had not occurred, Biovail would nonetheless have substantially missed its 2003 third quarter revenue and earnings guidance. If there had been no Earnings Miss but for the Accident, the disclosure about the Accident would have been clearly material to investors. However, in our view, disclosure relating to the Accident can be misleading or untrue in a material respect, even if the Accident was only one of three significant contributing factors to the Earnings Miss.

[2] When we refer to "meaningful" or "relevant" statements or information in these reasons, we are using neutral words that are intended to convey that such statements or information are of some relevance to investors but not necessarily material in accordance with the reasonable investor standard.

(d) Quantitative Analysis

[226] The WXL revenue loss attributed by Biovail to the Accident constituted approximately 4.6% to 9.2% (based on the low and high end of the revenue range of $10 to $20 million) of Biovail's total third quarter revenues ($215.3 million) disclosed in the October 30 Release. (We believe that is a reasonable comparison, although one could have used other comparisons, such as the corrected third quarter revenue guidance as of October 3, 2003.) Chamberlain testified that a percentage of approximately 5% of revenues is often viewed by market participants as approaching a level of materiality (although she compared the revenue loss to Biovail's annual rather than quarterly revenues). There was also testimony that Ernst & Young considered $10 million of revenues to be material for accounting purposes for Biovail's 2003 third quarter financial statements. There is, of course, no hard and fast rule or principle that a variation of 5% or more of revenues is material for securities law purposes. Based on this quantitative analysis, the Revenue Loss Statement may be viewed as being material.

(e) Share Price Decline on October 8, 2003

[227] As noted above, the October 8 Release was issued by Biovail in response to (i) the skeptical reaction of analysts and investors to the Revenue Loss Statement in the October 3 Release, and (ii) the Maris Report and the market rumour that the truck involved in the Accident had not, in fact, contained any WXL product.

[228] The October 8 Release repeated the Revenue Loss Statement when it stated that "Biovail re-confirms that the sales value of those goods is within previously stated guidance". As noted above, we believe that a reasonable investor would also have understood that statement as reconfirming and repeating the Accident Contribution Statement.

[229] The market price of Biovail's shares fell from $29.05 per share on October 7, 2003 (the day prior to the issue of the October 8 Release) to $25.20 per share at the close of trading on October 8, 2003, but the share price recovered to $28.43 per share by October 13, 2003. The drop in Biovail's share price on October 8, 2003 was approximately $4.00 or approximately 13.9% of the closing share price on the previous day. In our view, that was a significant effect on Biovail's share price. However, Melnyk attributed the share price loss to the issue of the Maris Report and rumours in the market, not to the issue of the October 8 Release. While it is impossible to determine one specific cause of that share price decline, that decline suggests that investors considered the disclosure related to the Accident as meaningful information that was relevant to them. We note that the only new information contained in the October 8 Release was that "60% of the shipment [was] salable" and "may be re-shipped within the next 30 days".

[230] One would expect the Truck Accident Statement, if it was a material statement, to have had any impact on Biovail's share price only the first time that statement was publicly made. Once the information conveyed by that statement was publicly known, it would be reflected in Biovail's share price thereafter. However, a statement may continue to be important to a reasonable investor in making an investment decision even if that statement has already been reflected in the issuer's share price and repeating it has no subsequent effect on that share price.

[231] While the October 8 Release provided little additional information to the market, Biovail nonetheless clearly concluded that it was important to issue the October 8 Release as a response to the Maris Report and market rumours. That suggests that Biovail considered the questions around the Accident and the making of the Truck Accident Statement to have been meaningful and relevant to investors.

(f) Market Skepticism

[232] As discussed above, it is clear that investors and analysts were immediately skeptical of the $10 to $20 million revenue range reflected in the Revenue Loss Statement. That is evidenced by various e-mails received by Biovail following the issue of the October 3 Release (including the e-mails referred to in paragraph 183 of these reasons). Investors were skeptical about the size of the stated revenue loss and management's apparent inability to determine the revenue associated with the Accident except by providing a $10 million range. We note that at the time, Biovail had estimated that its entire WXL revenue for the third quarter would be less than $10 million (as stated on the Analysts Call).

(g) Integrity of Management

[233] We agree with the statement of the Alberta Securities Commission in *Re Ironside,* 2006 ABASC 1930 at para. 615 ("***Ironside***") that "[t]he market price of the securities of a public company reflects, in large part, the market's confidence in the fitness and integrity of that company's management team". A public statement can take on more significance to investors than it might otherwise have if it causes investors to question the integrity or competence of management. The Truck Accident Statement had that effect in this case. Howling acknowledged that when he stated that an explanatory release "will go a long way to restoring credibility" (see paragraph 183 of these reasons). The Truck Accident Statement contributed to a crisis of confidence in Biovail management. That lack of confidence was reflected in the rumour that the truck involved in the Accident had contained no WXL at all. This is a qualitative factor in assessing the materiality of the Truck Accident Statement.

(h) Comparison to Correct Statement

[234] Melnyk and Chamberlain suggested that we should determine the materiality of a statement alleged to be misleading or untrue in a material respect by assessing the difference between the alleged misstatement and a correct or accurate statement. As noted in paragraph 78 of these reasons, we have considered that approach in assessing the materiality of the statements made by Biovail in this matter. We certainly recognise that in determining whether a particular statement is misleading or untrue in a material respect, one must have an understanding as to what a correct or accurate statement would have been.

[235] For this purpose, a correct or accurate statement by Biovail with respect to the 2003 third quarter revenue effect of the Accident would have been along the following lines:

> A truck carrying WXL product for delivery to GSK was involved in a traffic accident outside Chicago, Illinois on October 1, 2003. Some of the product was

> damaged and all of it will be returned to Biovail for inspection. All undamaged product will be re-shipped to GSK in the fourth quarter. The accident did not have any effect on Biovail's 2003 third quarter financial results because the revenues associated with the product on the truck involved in the accident would have been recognised in Biovail's fourth quarter in any event. The total revenue value to Biovail of the WXL product on the truck involved in the accident was approximately $5 million. The manufacturing cost value of the shipment was fully insured.

[236] In our view, a correct or accurate statement of that kind would not have been material to investors in the circumstances, primarily because of the $5.0 million revenue value referred to and the statement that the Accident had no effect on Biovail's 2003 third quarter financial results. However, the Truck Accident Statement was by its terms a much more meaningful and relevant statement to investors than this accurate statement. That suggests to us that the difference between the Truck Accident Statement and an accurate statement may have been material to investors in accordance with the reasonable investor standard.

(i) Objective Standard

[237] As noted in paragraph 80 of these reasons, the legal test for determining materiality that we are applying is an objective one based on the reasonable investor standard. In making that determination, we do not need any evidence submitted to us as to whether any particular investor actually considered the Truck Accident Statement to be misleading or untrue in a material respect. No investor testified in this matter.

(iii) Conclusions as to the Materiality of the Statements Made in the October 3 Release

[238] We have considered the experts' reports, the testimony of the experts and the factors and considerations discussed in paragraphs 216 to 236 of these reasons in assessing whether the Truck Accident Statement, the Accident Contribution Statement and/or the Revenue Loss Statement contained in the October 3 Release was misleading or untrue in a material respect. There is no doubt that determining whether those statements were material to investors in the circumstances is a matter of judgement. Unlike the Earnings Miss, those statements are not obviously or clearly material. At the same time, in our view, the Truck Accident Statement, the Accident Contribution Statement and the Revenue Loss Statement were on their face statements that were communicating meaningful information that was relevant to investors in making investment decisions.

(a) The Materiality of the Truck Accident Statement Made in the October 3 Release

[239] The Earnings Miss was clearly material information, the disclosure of which had an immediate and adverse impact on the market price of Biovail's shares. Disclosure of the reasons for the Earnings Miss permitted an investor to assess the implications of the Earnings Miss for Biovail's future financial performance. In our view, it makes a significant difference to investors whether the reasons for the Earnings Miss were one-time events out of the control of management, such as a truck accident, and whether those reasons would have a recurring

financial effect in future financial periods. That, in our view, is why Biovail highlighted the Accident in the October 3 Release and why Melnyk referred on the Analysts Call to the three principal causes of the Earnings Miss as one-time events. The Truck Accident Statement communicated to investors the meaningful and relevant information that one of the significant causes of the Earnings Miss was not a recurring event that would affect future financial periods. It also quantified the revenues that investors should impliedly add back to determine Biovail's normalised revenues for the 2003 third quarter unaffected by that one-time event, and also guided analysts to appropriately adjust their financial models going forward.

[240] There is equally no doubt that revenues from WXL were an important component of Biovail's future financial performance (see paragraph 33 of these reasons).

[241] The Truck Accident Statement also precipitated a loss of confidence by analysts and investors in Biovail's management. As Howling stated in his e-mail to Melnyk on October 8, 2003, "no one is believing us when we say [the truck] was not empty" (see paragraph 188 of these reasons).

[242] On balance, we find that there is a substantial likelihood that, at the time of the October 3 Release, a reasonable investor would have considered the Truck Accident Statement important in making an investment decision with respect to Biovail's shares. That means that, in our view, the Truck Accident Statement made in the October 3 Release was, *in a material respect* and at the time and in the light of the circumstances under which it was made, misleading or untrue. We have also concluded that the difference between the Truck Accident Statement made in the October 3 Release and an accurate statement was material to investors. We find that Biovail knew or should have known that was the case.

(b) The Materiality of the Accident Contribution Statement Made in the October 3 Release

[243] The Accident Contribution Statement stated that the Accident contributed to the variance in revenues and earnings for Biovail's 2003 third quarter. For the reasons discussed above, we have concluded that statement was misleading or untrue because the Accident did not contribute at all to that variance or affect Biovail's 2003 third quarter financial results. The Accident Contribution Statement does not, however, quantify the variance referred to; the second sentence of the October 3 Release simply says that the Accident contributed "significantly" to the variance. The variance in WXL revenues as a result of the Accident is addressed and quantified by the Revenue Loss Statement. While it is a close call, on balance, we conclude that a reasonable investor would not have considered the Accident Contribution Statement that the Accident contributed significantly to the variance in Biovail's revenues and earnings for the third quarter, standing alone, to be material in making an investment decision. Accordingly, we find that the Accident Contribution Statement made in the October 3 Release was not, *in a material respect* and at the time and in the light of the circumstances under which it was made, misleading or untrue.

[244] The Accident Contribution Statement takes on much greater importance as part of the Truck Accident Statement because it provides the causal link of the Revenue Loss Statement to Biovail's 2003 third quarter financial results and the Earnings Miss.

(c) The Materiality of the Revenue Loss Statement Made in the October 3 Release

[245] The Revenue Loss Statement made in the October 3 Release provided a range for the WXL revenue loss to Biovail associated with the Accident.

[246] The Revenue Loss Statement quantifies the purported WXL revenue associated with the WXL product involved in the Accident. It does not, however, standing alone, characterize the significance of that revenue loss or indicate that it has any effect on Biovail's 2003 third quarter financial results. As noted above, the Revenue Loss Statement takes on much greater importance when it is linked by the Accident Contribution Statement to Biovail's 2003 third quarter financial results and the Earnings Miss. While it is a close call, on balance, we conclude that a reasonable investor would not have considered the Revenue Loss Statement, standing alone, to be material in making an investment decision. Accordingly, we find that the Revenue Loss Statement made in the October 3 Release was not, *in a material respect* and at the time and in the light of the circumstances under which it was made, misleading or untrue.

(iv) Conclusions as to the Materiality of the Truck Accident Statement Made on the Analysts Call

[247] The Truck Accident Statement was also made by Biovail on the Analysts Call immediately following the issue of the October 3 Release. However, Crombie stated on that call that Biovail's WXL revenue loss associated with the Accident was in the range of $15 to $20 million (thereby increasing the lower end of the range from the $10 million reflected in the Revenue Loss Statement). There is no evidence before us that Biovail ever repeated or expressly corrected that statement.

[248] It is fairly obvious that Crombie changed the lower end of the revenue range to $15 million in order to lead analysts to his fourth quarter revenue guidance going forward (see paragraph 34 of these reasons) and because he realized that a $10 million revenue range was not credible.

[249] The Analysts Call was held immediately following the issue of the October 3 Release. Accordingly, the circumstances in which the Truck Accident Statement was made during the Analysts Call had not changed. We also note that Crombie stated on the Analysts Call that Biovail's total WXL revenues for the third quarter would be below $10 million. That statement was not made in the October 3 Release. That disclosure does not affect our assessment of the materiality of the Truck Accident Statement in the circumstances in which it was made on the Analysts Call.

[250] Consistent with our conclusion in paragraph 242 of these reasons, on balance, we find that there is a substantial likelihood that, at the time of the Analysts Call, a reasonable investor would have considered the Truck Accident Statement important in making an investment decision with respect to Biovail's shares. That means that, in our view, the Truck Accident Statement made on the Analysts Call was, *in a material respect* and at the time and in the light of the circumstances under which that statement was made, misleading or untrue. We have also concluded that the difference between the Truck Accident Statement made on the Analysts Call

and an accurate statement was material to investors. We find that Biovail knew or should have known that was the case.

(v) Conclusions as to the Materiality of the Statements Made in the October 8 Release

[251] The October 8 Release included the statement that "[f]urthermore, Biovail re-confirms that the sales value of these goods [the WXL involved in the Accident] is within previously stated guidance". We have concluded that Biovail thereby repeated the Revenue Loss Statement and, in our view, a reasonable investor would understand in the context of the October 8 Release that the Accident Contribution Statement was being repeated by necessary implication. Accordingly, in our view, the Truck Accident Statement was repeated in the October 8 Release.

[252] We must assess the materiality of the Truck Accident Statement repeated in the October 8 Release in light of the circumstances on October 8, 2003. We note that those circumstances had not changed in any significant way from those on October 3, 2003. In fact, the October 8 Release was issued because of concerns being expressed by investors and others with respect to the veracity of the Truck Accident Statement contained in the October 3 Release. While the October 8 Release provided some new information (see paragraph 229 of these reasons), in substance it was primarily repeating the Truck Accident Statement.

[253] Consistent with our conclusion in paragraph 242 of these reasons, on balance, we find that there is a substantial likelihood that, at the time of the October 8 Release, a reasonable investor would have considered the Truck Accident Statement important in making an investment decision with respect to Biovail's shares. That means that, in our view, the Truck Accident Statement made in the October 8 Release was, *in a material respect* and at the time and in the light of the circumstances under which that statement was made, misleading or untrue. We have also concluded that the difference between the Truck Accident Statement made in the October 8 Release and an accurate statement was material to investors. We find that Biovail knew or should have known that was the case.

(vi) Conclusion as to the Statements Made in the Roadshows

[254] The Roadshows were held over the period of October 13 to 16, 2003. Melnyk, Crombie and Howling participated in them, although Melnyk testified that he may not have attended all of them.

[255] The objective of the Roadshows was to explain Biovail's business strategy and financial prospects, particularly in light of the Earnings Miss. The Roadshows began only five days after the issue of the October 8 Release. Roadshows were hosted by, among others, Citicorp, J.P. Morgan, Deutsche Bank, National Bank Financial and RBC Capital Markets. The presentation material for the roadshow held on October 15, 2003 at the Royal York Hotel in Toronto, includes one page in the slide presentation deck addressing the Accident. It indicates that the Accident affected Biovail's 2003 third quarter financial results and that the revenue impact was $10 to $20 million. We heard testimony that Biovail did not necessarily use or review the whole slide presentation in any particular meeting, although copies of the presentation were available to participants. Howling testified that reference was made to the Truck Accident Statement in the

Roadshows and it seems to us to be highly unlikely that the Truck Accident Statement would not have been made and discussed at the Roadshows.

[256] On balance, however, we are not satisfied that there is sufficient direct evidence to conclude that the Truck Accident Statement was actually made during the Roadshows and if so, by whom and whether Melnyk was present when that statement was made. Accordingly, we dismiss that allegation.

(vii) Conclusions as to the Materiality of the Statements Made in the October 30 Release

[257] Biovail stated in the October 30 Release announcing its 2003 third quarter financial results that:

> [a] late third quarter 2003 shipment of WXL involved in an accident outside of Chicago was returned to Biovail's facility on October 8, 2003 for inspection. No revenue was recognised from this shipment in Q3 2003. The shipment included both bulk and fully packaged material. All bulk tablets, which are packaged in plastic drums, were salvaged and have already been shipped to GSK. A small portion of the packaged goods (less than 1,000 bottles) was effected [*sic*] in the accident and could not be re-shipped.

That paragraph was the only reference made by Biovail to the Accident in the 14-page October 30 Release. We will refer to that paragraph as the "**October 30 Accident Statement**".

[258] Staff alleges that the October 30 Release continued to disseminate or implicitly reinforce the materially misleading or untrue information reflected in the Truck Accident Statement.

(a) Was the October 30 Release Factually Accurate?

[259] The October 30 Release announced Biovail's actual 2003 third quarter financial results for the period ending September 30, 2003 and the financial results for the nine months ended on that date. Those financial results necessarily provided better information to investors than the amended revenue and earnings guidance contained in the October 3 Release. Crombie stated on the Analysts Call that WXL revenues for the third quarter were estimated to be below $10 million. The October 30 Release disclosed that Biovail's actual WXL revenues for the third quarter were $8.2 million and for the nine-month period ended on that date were $16.3 million.

[260] We note that the Truck Accident Statement was not expressly repeated in the October 30 Release.

[261] The October 30 Accident Statement disclosed that the WXL product involved in the Accident was returned to Biovail for inspection and that no revenue was recognised from the shipment in Biovail's third quarter financial results. Both those statements are true. The October 30 Release also provides information with respect to Biovail's actual WXL revenues in the 2003 third quarter and for the nine months ended September 30, 2003. Accordingly, we have no reason to believe that the October 30 Accident Statement was not factually accurate.

(b) Did the October 30 Release Repeat the Truck Accident Statement by Necessary Implication?

[262] Staff alleges, however, that the Truck Accident Statement was repeated or implicitly reinforced in the October 30 Release.

[263] Staff is not alleging that Biovail had a positive legal obligation to correct the materially misleading or untrue Truck Accident Statement that was made in the October 3 Release and repeated on the Analysts Call and in the October 8 Release. What Staff is alleging is that, in the particular circumstances, the October 30 Release repeated the Truck Accident Statement by necessary implication. As a result, we will not address in these reasons whether Biovail had a positive duty to correct the previously made materially misleading or untrue Truck Accident Statement.

[264] The October 30 Release disclosed Biovail's 2003 final third quarter revenues and earnings, the very financial results that Biovail had previously stated in the October 3 Release had been significantly affected by the Accident. We concluded above that the Truck Accident Statement was, in a material respect, misleading or untrue at the time and in the circumstances under which it was made on October 3 and October 8, 2003. By referring to the Accident in the October 30 Release and by saying nothing with respect to the Truck Accident Statement in that release, Biovail continued to allow the Truck Accident Statement to be relied upon by investors. Investors were entitled to assume that the Truck Accident Statement continued to be relevant to Biovail's third quarter financial results and they were entitled to make investment decisions based on that assumption.

[265] Melnyk argues, however, that by October 30, 2003 circumstances had changed. He submits that once Biovail's final 2003 third quarter financial results were announced in the October 30 Release, it became irrelevant whether the inability to recognise revenues associated with the WXL product involved in the Accident was a result of the Accident or the interpretation and meaning of the GSK delivery term. In either case, the market knew that no revenues related to the Accident were included in Biovail's third quarter financial results.

[266] We do not agree with that submission. Biovail disclosed on the Analysts Call on October 3 that WXL revenues for the third quarter were estimated to be below $10 million. The October 30 Release announced that Biovail's actual WXL revenues were $8.2 million for the third quarter. Accordingly, the October 30 Release provided little additional information to investors on that topic. Investors already knew, based on the Truck Accident Statement, that the revenue associated with the WXL involved in the Accident would not be recognised in the third quarter and they had no reason to believe that there had been any change in that position or the reasons for it.

[267] Having said that, we are not prepared to conclude that the Truck Accident Statement was repeated by necessary implication in the October 30 Release. The October 30 Accident Statement appears to be factually accurate and the October 30 Release did not expressly repeat the Truck Accident Statement. The October 30 Release was otherwise silent with respect to the

Truck Accident Statement. Accordingly, we find that the Truck Accident Statement was not repeated by necessary implication in the October 30 Release.

(c) Did the October 30 Release Omit Necessary Information?

[268] There is, however, a remaining question whether the October 30 Release omitted to state any facts that were required to be stated or that were necessary to make the October 30 Accident Statement not misleading, as alleged by Staff.

[269] By the time of the October 30 Release, it was or should have been clear to Biovail that the revenue associated with the WXL involved in the Accident could never have been recognised in its 2003 third quarter financial results. Miszuk acknowledged that was clearly the case by October 16, 2003 (see paragraph 156 of these reasons). In our view, Biovail knew or should have known by October 30 that the Accident Contribution Statement was misleading or untrue.

[270] In addition, by October 30, 2003, Biovail had re-shipped to GSK all of the undamaged WXL product involved in the Accident (excluding only a "small portion of the packaged goods"). Biovail knew by October 30 that it had re-shipped that WXL product *as samples* and not trade tablets. The intention to ship the WXL product as samples was confirmed by an e-mail dated October 20, 2003 from Chapuis to Melnyk, Crombie and Miszuk. As a result, Biovail could determine the exact revenue value of that shipment because, as samples, WXL tablets were sold to GSK at a set price that was not subject to any subsequent adjustments. The revenue value of the re-shipment, as samples, was substantially below even the $5.0 million revenue loss attributed in the March 04 Release to the WXL product involved in the Accident. Further, Crombie testified that, except for the September 30 shipments, no WXL product had ever been shipped by Biovail as trade tablets in bulk for packaging by GSK. These circumstances raise a serious question whether the higher revenue value for WXL trade tablets should ever have been used as a basis for the Truck Accident Statement.

[271] By October 30, 2003, Biovail had all of the information necessary to correct the Accident Contribution Statement and the Revenue Loss Statement and to make appropriate disclosure of the information and matters referred to in paragraphs 269 and 270 of these reasons. In our view, silence was not an option in the context of the October 30 Release, which announced Biovail's 2003 third quarter financial results.

[272] We find that the omission by Biovail to disclose in the October 30 Release the information and matters referred to in paragraph 271 of these reasons resulted in that release not stating facts that were required to be stated or that were necessary to make the October 30 Accident Statement not misleading. We find that Biovail knew or should have known that was the case.

(viii) Conclusion as to the Materiality of the Accident Contribution Statement Made in the March 04 Release

[273] The March 04 Release announced Biovail's audited financial results for the 2003 fourth quarter and for the 2003 financial year. That news release consisted of 15 pages and contained the following disclosure related to the Accident and the revenue impact of it:

> As part of a comprehensive earnings guidance press release on October 3, 2003, Biovail announced that its estimated revenue from Wellbutrin XL for third quarter 2003 would be less than $10.0 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 $10.0 million to $20.0 million. Numerous variables that were not known and were unavailable on October 3, 2003 are now determinable given better information and the reconciliation provided by GSK to Biovail.
>
> Variables that determine Biovail's revenue that were not then known include levels of discounts, free goods or rebates that would have been deducted from GSK's gross sales and the percentage of GSK's net sales Biovail is to receive. In calculating the high end of the estimate range, Biovail also took into consideration the variables that analysts were generally using in their models to estimate the Wellbutrin XL revenues, which included typically higher pricing, higher percentage supply prices and did not reflect the typical gross to net deductions. This analysis with analyst estimates was completed to better explain why revenue in third quarter 2003 would be less than previously expected by analysts.
>
> *After a subsequent review of all of the facts, the actual revenue loss from the accident was determined to be $5.0 million.* Calculated with analysts' assumptions for these variables, the revenue loss estimate would range from $7.5 million to $8.0 million.
>
> [emphasis added]

Clearly, the last paragraph of that excerpt provides the definitive information that Biovail's actual WXL revenue loss from the Accident was $5.0 million. That statement corrects the previously made misleading or untrue Revenue Loss Statement.

[274] However, the reasonable conclusion an investor would take from that excerpt is that the Accident caused an actual revenue loss of $5.0 million for Biovail's 2003 third quarter. It was absolutely clear to Biovail by March 3, 2004 that the Accident had had no effect on third quarter WXL revenues. Accordingly, that statement in the March 04 Release was misleading or untrue. Melnyk acknowledged that in his cross-examination when he stated that the March 04 Release was "mis-worded" to that extent (see paragraph 333 of these reasons).

[275] We have concluded that the Accident Contribution Statement made in the October 3 Release was misleading or untrue but that it was not, in a material respect, misleading or untrue (see paragraphs 164 and 243 of these reasons).

[276] Further, we must determine the materiality of the Accident Contribution Statement made in the March 04 Release at the time and in the light of the circumstances under which that statement was made. Once the 2003 year-end and fourth quarter financial results are known, the financial results for the third quarter relative to the fourth quarter become much less important to investors. Biovail's financial results for the 2003 financial year included results for both quarters. In addition, disclosure of the fact that "the actual revenue loss from the accident was determined to be $5.0 million" corrects the Revenue Loss Statement and, in our view, renders the Accident and its financial consequences not material to investors at the time of the March 04 Release. The question of the integrity of Biovail management may have continued to be an issue but that does not, in our view, make the Accident Contribution Statement made in the March 04 Release misleading or untrue in a material respect. Accordingly, we find that the Accident Contribution Statement made in the March 04 Release was not, *in a material respect* and at the time and in the light of the circumstances under which it was made, misleading or untrue.

[277] The March 04 Release is, however, notable for three other reasons.

[278] First, the March 04 Release states that "[a]s part of a comprehensive earnings guidance press release on October 3, 2003, Biovail announced that its estimated revenue from Wellbutrin XL for third quarter 2003 would be less than $10.0 million … " (see paragraph 273 of these reasons). Biovail did not, in fact, disclose that information in the October 3 Release. To the contrary, that sentence was deleted from the proposed news release and the Revenue Loss Statement was included in the final release instead. We suspect that was done, at least in part, because it is difficult to reconcile the less than $10 million estimated total WXL third quarter revenues with a revenue range of $10 to $20 million associated with the WXL product involved in the Accident. There was evidence that Melnyk required that change to the release and, in any event, he approved it. In our view, that means that highly relevant financial information was dropped from the October 3 Release and replaced by the Revenue Loss Statement that we have concluded was misleading or untrue. The less than $10 million estimated total WXL third quarter revenues were, however, selectively disclosed to those who listened to the Analysts Call on October 3, 2003. That selective disclosure was not appropriate. In addition, in our view, the omission to disclose the estimated WXL revenues for the 2003 third quarter in the October 3 Release rendered the October 3 Release misleading or untrue.

[279] Second, Biovail states that "[i]n calculating the high end of the estimate range, Biovail also took into consideration the variables that analysts were generally using in their models to estimate the Wellbutrin XL revenues, which included typically higher pricing, higher percentage supply prices and did not reflect the typical gross to net deductions. This analysis with analyst estimates was completed to better explain why revenue in third quarter 2003 would be less than previously expected by analysts."

[280] That is an express acknowledgement by Biovail that the Revenue Loss Statement was misleading or untrue because it failed to disclose that the WXL revenue range reflected in that

statement was based in part on analysts' estimates and variables. The October 3 Release and the October 8 Release purported to disclose the actual WXL revenue loss for the 2003 third quarter associated with the Accident. It did not purport to describe some theoretical revenue range reflecting analysts' estimates and variables intended to assist analysts in correcting their financial models. If that is what the revenue range reflected in the Revenue Loss Statement was based on, even in part, that should have been expressly stated in the October 3 Release and thereafter whenever the revenue range was used or referred to. In our view, the failure to make that disclosure rendered the Revenue Loss Statement misleading or untrue each time it was made.

[281] Finally, the March 04 Release is full of rationalizations and justifications for why the revenue range reflected in the Revenue Loss Statement could not be accurately determined when that statement was made on October 3 and October 8, 2003. In our view, those statements were misleading in suggesting that the original $10 to $20 million revenue range was a reasonable attempt to estimate Biovail's third quarter WXL revenue loss associated with the Accident. We find that there was no reasonable basis for the revenue range reflected in the Revenue Loss Statement. We have expressed our conclusions above with respect to the accuracy of the Revenue Loss Statement and the ability of Biovail to know that statement was misleading or untrue (see paragraphs 191 to 196 of these reasons). If it was so difficult to determine the revenue range reflected in the Revenue Loss Statement, then that statement should not have been made or that uncertainty should have been expressly stated and discussed each time the Revenue Loss Statement was made.

[282] We note that each of the Releases contained a form of general "safe harbour" warning that any forward-looking information contained in such release was subject to risks and uncertainties. It does not appear to us that the Revenue Loss Statement contained or constituted forward-looking information. That statement purported to reflect the actual WXL third quarter revenue loss associated with the Accident. In any event, there must be a reasonable basis for any forward-looking information or estimate. Melnyk has not satisfied us that there was any reasonable basis for the revenue range reflected in the Revenue Loss Statement. Further, in these circumstances, we do not believe that the general safe harbour warnings contained in the Releases protect the Revenue Loss Statement from the allegation made by Staff that it was misleading or untrue in a material respect. If there was significant uncertainty with respect to the determination of the revenue range reflected in the Revenue Loss Statement, that uncertainty should have been specifically disclosed and discussed. A general warning with respect to the risks and uncertainties related to forward-looking information was not enough.

G. Melnyk's Responsibility for Biovail's Misleading Statements

(i) Positions of the Parties

[283] We must now address Melnyk's responsibility for Biovail's misleading or untrue statements.

[284] Staff submits that Melnyk authorized, permitted or acquiesced in all of Biovail's misleading or untrue statements, and that he knew or should have known that such statements were misleading or untrue in a material respect each time those statements were made. Staff also

submits that Melnyk has the onus of establishing that he acted with due care and diligence and that he has failed to satisfy that onus.

[285] Melnyk's position is summarized in paragraphs 51 to 56, paragraphs 127 to 131 and paragraphs 167 to 169 of these reasons.

(ii) Melnyk's Knowledge of a Likely Earnings Miss

[286] Staff submits that Melnyk knew or should have known, well before October 2, 2003 (when the decision was made by Biovail to announce the Earnings Miss), that Biovail would likely miss its 2003 third quarter revenue and earnings guidance. As a result, Staff submits that Melnyk cannot rely on the chaos and crisis atmosphere at the time of the issue of the October 3 Release as an excuse for the misstatements it alleges were made in that release.

[287] Melnyk denies that he knew or should have known, in advance of October 2, 2003, that the Earnings Miss would occur.

[288] In considering this issue, we note that because FDA approval of WXL was not granted until late August 2003, the commercial product launch of WXL did not occur until early September 2003. As September progressed, management of Biovail was aware that there was an increasing risk that Biovail would not meet its revenue and earnings guidance for the third quarter. Biovail was having production problems in manufacturing and packaging the amount of WXL it wanted to ship to GSK in the third quarter. Melnyk was well aware of this risk. It is clear that Biovail was attempting to ship as much WXL product as possible by the end of the day on September 30, 2003 so that revenue from those shipments could be included in its 2003 third quarter financial results (see paragraph 172 of these reasons). Melnyk was directly involved in decisions related to Biovail's attempts to meet its revenue and earnings guidance in the 2003 third quarter.

[289] In response to a Biovail employee's e-mail on September 13, 2003 stating that the employee wished to exercise a grant of options, Melnyk replied on September 15, 2003 that:

> … before you do anything, take five minutes to speak with me and John. I know there are narrow openings to sell for Insiders but you should be made aware of the 3rd quarter earnings risks that exist. We are working at filling those gaps but the gap is definitely there.

The employee responded, "… I can't remember a quarter in my history here that there weren't earnings risks." Melnyk replied, "not this challenging …".

[290] On cross-examination, Melnyk stated that the 2003 third quarter was Biovail's most challenging financial quarter ever.

[291] While we heard a significant amount of testimony and submissions as to the risk that Biovail would not meet its 2003 third quarter revenue and earnings guidance and as to when Biovail knew or should have known that the Earnings Miss would occur, we do not believe that anything turns on that issue. The decision to issue the October 3 Release announcing the

Earnings Miss was made on October 2, 2003. At that point, Biovail made the decision to provide revised financial guidance, and information with respect to the three principal reasons for the Earnings Miss that were described in the October 3 Release. It was certainly in the best interests of Biovail shareholders to receive as much accurate information as possible with respect to the Earnings Miss. No advance planning for a possible earnings miss public announcement was going to make these circumstances easy for Biovail management to address. The circumstances were compounded by the fact that this was Biovail's first ever announcement of an earnings miss. We accept Melnyk's testimony that these circumstances created a crisis and a chaotic environment in which senior management was scrambling to settle the appropriate disclosure and issue the October 3 Release. That does not excuse, however, the making of any misleading or untrue statements in the October 3 Release.

(iii) Melnyk's Knowledge related to the Accident Contribution Statement

[292] It appears that Biovail's usual practice was to include in its licensing agreements a delivery term that specified delivery F.O.B. Biovail's manufacturing facility (and not F.O.B. the customer or licensee).

[293] Melnyk testified that he became aware that the GSK delivery term was F.O.B. GSK (freight collect) on October 3 shortly after the issue of the October 3 Release. He testified that he assumed, until the afternoon of October 3, 2003, that the GSK Agreement contained the usual delivery term used by Biovail (providing for delivery F.O.B. Biovail). Further, Melnyk knew that the usual delivery term meant that Biovail recognised the revenue from a shipment as of the date the shipment left Biovail's manufacturing facility. That is what Biovail does under its other licensing arrangements that provide for delivery F.O.B. Biovail and that was why Melnyk was tracking shipments of WXL from Steinbach during the last hours of September 30. Melnyk testified that he assumed that if WXL was shipped from Steinbach before midnight on September 30, any such shipment would be reflected in Biovail's third quarter revenues. He testified that had he known the accurate GSK delivery term or that there was any uncertainty with respect to the meaning of that term, he could have arranged for Biovail to deliver the WXL September shipments by air rather than by truck, ensuring delivery by the end of the day on September 30. That would have resulted in the revenues associated with those shipments being recognised in Biovail's third quarter financial results.

[294] It appears that the delivery term in the GSK Agreement was changed, in the last or close to last draft of the GSK Agreement before it was signed, from the delivery term that Biovail usually used in its licensing agreements. Melnyk testified that the last-minute change to the delivery term was made without his knowledge (he signed signature pages in executing the GSK Agreement but testified that he did not read the executed agreement). He may also have been misled by an incorrect summary of the GSK Agreement prepared and used by Biovail for internal purposes that referred to the usual F.O.B. Biovail delivery term and not the delivery term that was actually in the GSK agreement.

[295] It is clear that Deeth, Chapuis and Miszuk were aware of the accurate GSK delivery term on October 2, 2003 (see paragraphs 136 and 153 of these reasons). It is also clear, despite his denials, that Crombie knew the accurate GSK delivery term and its implications for revenue

recognition before the October 3 Release was issued (see paragraphs 137 and 138 of these reasons). Melnyk testified, however, that he did not know the accurate GSK delivery term when the October 3 Release was issued and that he did not read or know the contents of the Draft Release as it related to the GSK delivery term.

[296] We find it surprising that Melnyk says that he did not know the accurate GSK delivery term on October 2 when Deeth, Chapuis, Miszuk and Crombie clearly did. It seems to us unlikely that the accurate GSK delivery term and its implications for revenue recognition were not discussed by Crombie with Melnyk when it was so clearly relevant to the disclosure in the October 3 Release and had been addressed by Crombie in the Draft Release. While we are sceptical of Melnyk's testimony in this respect, we are prepared to give him the benefit of the doubt.

(a) Melnyk's Knowledge at the Time of the October 3 Release

[297] Accordingly, on balance, we are prepared to accept that at the time of the Accident and the October 3 Release, Melnyk had a mistaken belief that the delivery term in the GSK Agreement was F.O.B. Biovail and that, accordingly, he understood that revenue from the WXL product shipped on September 30 could be recognised in Biovail's 2003 third quarter financial results. That means that Melnyk did not know that the Accident Contribution Statement was misleading or untrue at the time of the October 3 Release or at the time of the Analysts Call that immediately followed.

(b) Melnyk's Knowledge After the October 3 Release

[298] Melnyk testified that he became aware of the accurate GSK delivery term on the afternoon of October 3, after the issue of the October 3 Release but well before the issue of the October 8 Release. At 9:13 a.m. on the morning of October 8, Howling forwarded Dyer's e-mail (referred to in paragraph 96 of these reasons) to Crombie and Melnyk. That e-mail stated that Biovail had made an incorrect statement on the Analysts Call because title to the WXL product involved in the Accident did not transfer to GSK until delivery at its U.S. facility. Dyer requested that Biovail refrain from making further incorrect statements. Melnyk testified that his response to the GSK position was to consider a retroactive amendment to the GSK delivery term.

[299] On October 8, 2003, Thompson sent Crombie by e-mail his preliminary opinion with respect to the meaning of the GSK delivery term (described in paragraph 139 of these reasons). Melnyk acknowledged in his testimony that Crombie told him Thompson's conclusions. Melnyk says, however, that the Thompson opinion did not resolve the issue, which Biovail's lawyers and accountants were continuing to examine throughout October.

[300] On October 9, 2003, the day after the issue of the October 8 Release, Melnyk received the Hull Letter reiterating the contents of Dyer's e-mail the day before (see paragraph 97 of these reasons).

[301] Melnyk testified that he initially focused in his discussions with GSK on implementing a retroactive amendment to the GSK delivery term to provide for delivery F.O.B. Biovail. On

October 27, 2003, Deeth sent an e-mail to Crombie and Miszuk concerning the possible implications of a retroactive amendment for the relevant insurance coverage. Melnyk testified that Deeth's advice put an end to the discussions about such an amendment.

[302] Melnyk continues to characterize the meaning and interpretation of the GSK delivery term as an open question. We reject that position for the reasons set forth in paragraphs 161 to 164 of these reasons.

[303] Melnyk acknowledged that he knew by the time he approved the October 8 Release that the GSK delivery term was F.O.B. GSK (freight collect) and he knew by that time of GSK's interpretation of that term. Melnyk also knew at that time Biovail's policy with respect to revenue recognition based on F.O.B. terms. Further, by the time of the October 8 Release, the initial crisis and chaos created by the Earnings Miss had passed and Melnyk had had sufficient time to make the inquiries that he should have made as CEO in approving a news release containing the Accident Contribution Statement. Accordingly, based on our conclusions in paragraphs 161 to 164 of these reasons, we find that Melnyk knew or should have known that the Accident Contribution Statement made in the October 8 Release was misleading or untrue.

[304] In any event, Melnyk could not have had any reasonable doubt as to the meaning of the GSK delivery term and its implications for revenue recognition purposes by the time the October 30 Release was issued.

[305] Accordingly, we find that Melnyk knew or should have known that the Accident Contribution Statement made in the October 8 Release and at any time thereafter was misleading or untrue at the time and in the light of the circumstances under which that statement was made.

(iv) Melnyk's Knowledge related to the Revenue Loss Statement

[306] Melnyk testified that he did not know that the revenue range reflected in the Revenue Loss Statement was misleading or untrue at any time that statement was made by Biovail. Melnyk says that he relied on Crombie for financial matters. Melnyk says that Crombie prepared the revenue numbers reflected in the Revenue Loss Statement and assured him that they were accurate. Melnyk says he was entitled to rely on an expert such as Crombie for such matters.

[307] Melnyk also says that it was not possible on October 3 or 8, 2003 to produce accurate revenue numbers with respect to the WXL product involved in the Accident. First, he says that the revenues to Biovail from WXL are determined based on a percentage that changes as GSK net sales increase (see paragraphs 16 and 17 of these reasons). In addition, in determining net sales, deductions are made for discounts, allowances and rebates given by GSK to its customers. As a result, Melnyk says that Biovail could not determine its revenues associated with the September 30 WXL shipments until all of those numbers were provided and reconciled after quarter end by GSK. Melnyk also says that this issue was further complicated because September 2003 was the first month WXL had been shipped to GSK and, accordingly, Biovail had never received a reconciliation statement from GSK.

[308] Melnyk also submits that there was a crisis and chaos on October 2 and 3, 2003 because Biovail was issuing its first ever earnings miss news release and that he and the other senior officers were scrambling to settle the re-issued guidance for revenue and earnings for the 2003 third quarter together with the related disclosure. He submits that Biovail was attempting to provide as much meaningful information to investors as possible. He also notes that he was not physically in Biovail's corporate office in Toronto over this period but was participating by phone from his home in Barbados.

[309] Melnyk submits that there was added confusion as to whether only one or all three trucks that left Biovail's manufacturing facility late on September 30, 2003 were involved in the Accident.

[310] Melnyk submits that all of these considerations make it unreasonable to conclude that he should have known that the revenue range reflected in the Revenue Loss Statement was misleading or untrue.

(a) The Information Available to Melnyk at the time of the October 3 Release

[311] As noted above, on September 30, 2003, Melnyk was tracking by telephone, on an hourly basis, shipments of WXL made by Biovail to GSK from its Steinbach manufacturing facility. We do not accept that he would be tracking those shipments without being well aware of their financial impact on third quarter revenues. Melnyk was very alive to the financial impact of shipping WXL as samples rather than trade product (see paragraph 172 of these reasons).

[312] It was immediately obvious to analysts and investors that the Revenue Loss Statement raised significant questions (see paragraphs 183 to 187 of these reasons).

[313] The Revenue Loss Statement used a range of $10 to $20 million. Melnyk knew on October 3, 2003 that WXL revenues for the third quarter were estimated to be less than $10 million (meaning, presumably, less than a one truck shipment if the Revenue Loss Statement was to be believed). Those numbers raised an obvious question and inconsistency.

[314] Crombie testified that the high end of the revenue range ($20 million) was based on the WXL product shipped on all three trucks that left Steinbach late on September 30, 2003. Melnyk testified that he was not aware of that until the time of the Roadshows. Crombie also testified that Melnyk knew before the issue of the October 3 Release that the high end of the revenue range was based on analysts' estimates and variables. Melnyk denied that, but he clearly knew that as a result of participating on the Analysts Call. As noted above, neither the October 3 Release nor the October 8 Release disclosed that analysts' estimates and variables were used in determining the Revenue Loss Statement.

[315] While Melnyk was entitled to place reasonable reliance on Crombie and other members of senior management, we find that Melnyk had knowledge and information that should have led him to question, at the time of the October 3 Release, the $10 to $20 million revenue range reflected in the Revenue Loss Statement.

[316] Limited evidence was submitted to us as to how the revenue range reflected in the Revenue Loss Statement was calculated and certainly no satisfactory explanation was given (see, for instance, Crombie's explanation on the Analysts Call set out in paragraph 34 of these reasons). Certainly, the estimates prepared by Smith on October 2, 2003 and known to Miszuk provided no support for the revenue range. Those estimates were available to Melnyk for the asking. As CEO, Melnyk should have required a detailed explanation from Crombie as to how the Revenue Loss Statement was determined. There is no evidence before us that he obtained that explanation.

[317] Melnyk says, however, that Biovail could not accurately determine the revenue associated with the WXL involved in the Accident because revenues to Biovail under the GSK Agreement were based on GSK net sales. Melnyk says those revenues could not be determined until a reconciliation statement was provided by GSK following the end of a financial quarter. We have rejected that submission for the reasons set forth in paragraphs 191 to 196 of these reasons.

(b) Uncertainty As to the Number of Trucks Involved in the Accident

[318] Melnyk also says there was initially some uncertainty whether only one or all three trucks that left Biovail's manufacturing facility late on September 30, 2003 were involved in the Accident. That position was apparently based on a reference to "two Penner drivers" (Penner was the transport company delivering the September 30 WXL shipments to GSK) having been involved in the Accident. We do not accept that as a justification for the revenue range reflected in the Revenue Loss Statement. On October 1, 2003 at 5:38 p.m., Melnyk received the following e-mail from Larry Thiessen:

> Not good news, we were just informed that the semi carrying the last shipment bulk tablets and 1 lot of packaged 300mg was in an accident near Chicago. It appears from what we know right now that the semi was part of a bigger accident and was rear ended with substantial damage to the trailer and the cargo. How much we don't know at this point.

It seems clear from that e-mail that Biovail and Melnyk knew that only one truck was involved in the Accident.

[319] The October 3 Release also seems clear to us that "a truck carrying a material shipment of Wellbutrin XL" was involved in the Accident. Melnyk's letter to employees on October 3, 2003 stated that "one of the vehicles" involved in the Accident contained a shipment of WXL. On October 3, 2003 at 8:30 a.m., Crombie sent an e-mail to Chapuis asking whether the "other two trucks" had arrived at GSK. Chapuis responded that she would confirm with GSK. In any event, the total revenue associated with all three trucks was estimated at the time by Smith to be approximately $7.7 million. Even if we accepted (which we do not) that there was uncertainty in the number of trucks involved in the Accident as a complicating factor in the context of the October 3 Release, there was no uncertainty at the time the October 8 Release was issued or thereafter.

[320] In our view, there was never any reasonable basis to include the WXL revenue associated with the WXL product shipped on all three trucks on September 30 in the Revenue Loss Statement. Biovail and Melnyk knew from the beginning that only one truck was involved in the Accident.

(c) Conclusions

[321] For the reasons discussed above, we do not accept that confirming the WXL revenue range reflected in the Revenue Loss Statement was as complex or difficult as Melnyk suggests.

[322] We also note that there was evidence that it was Melnyk who required that revenue information with respect to the WXL involved in the Accident be included in the October 3 Release in substitution for the very relevant statement that estimated third quarter WXL revenues were below $10 million.

[323] If there was such great uncertainty about the revenue to Biovail associated with the WXL product involved in the Accident, then the revenue numbers should not have been used in a news release until Biovail had a sufficient degree of certainty with respect to those numbers. Certainly, there was no specific disclosure in the October 3 Release, on the Analysts Call or in the October 8 Release as to any uncertainty related to calculating the revenue range disclosed or the reasons for that uncertainty. To the contrary, Crombie stated on the Analysts Call that the revenue range was conservative.

[324] For the reasons discussed above, we find that Melnyk knew or should have known that the Revenue Loss Statement made in the October 3 Release was, at the time and in the light of the circumstances under which that statement was made, misleading or untrue. It follows that Melnyk knew or should have known that the Revenue Loss Statement made at any time thereafter was also misleading or untrue.

[325] We would add that, on the Analysts Call on the afternoon of October 3, 2003, Crombie made the statement that the WXL revenue loss associated with the Accident was in the range of $15 to $20 million (increasing the lower end of the revenue range reflected in the Revenue Loss Statement by $5.0 million). Melnyk testified that was the first time he had heard that range and was surprised by it. Notwithstanding, Melnyk repeated the $15 million low end of the range on that call. Melnyk was clearly on notice as a result of Crombie's statement on the Analysts Call that there was a serious issue with the WXL revenue range being put forward by Crombie. Melnyk apparently did nothing to resolve that issue or to clarify the accurate range. To the contrary, Melnyk approved the making of the Revenue Loss Statement in the October 8 Release referring to the $10 to $20 million revenue range.

(v) The Truck Accident Statement Made in the October 8 Release

[326] We concluded above that:

> (1) Melnyk knew or should have known that the Accident Contribution Statement made in the October 8 Release and at any time thereafter was misleading or untrue (see paragraph 305 of these reasons);

(2) Melnyk knew or should have known that the Revenue Loss Statement made in the October 3 Release and at any time thereafter was misleading or untrue (see paragraph 324 of these reasons); and

(3) the Truck Accident Statement made in the October 8 Release was misleading or untrue *in a material respect* (see paragraph 253 of these reasons).

It follows that Melnyk knew or should have known that the Truck Accident Statement repeated by Biovail in the October 8 Release was, *in a material respect* and at the time and in the light of the circumstances under which that statement was made, misleading or untrue.

(vi) The Omissions from the October 30 Release

[327] As concluded in paragraph 269 of these reasons, by October 30, 2003, Biovail knew or should have known that the revenue associated with the WXL product involved in the Accident could never have been recognised in its 2003 third quarter financial results. Further, by that date Biovail had re-shipped the undamaged WXL product involved in the Accident as samples, which had a revenue value to Biovail substantially below even the $5 million revenue loss attributed to the Accident in the March 04 Release. Melnyk knew or should have known that (see paragraph 270 of these reasons).

[328] On cross-examination, Melnyk testified that, by the time of the October 30 Release, he was aware of the correct shipping term (he became aware of that on the afternoon of October 3, 2003) and that he was aware that the Earnings Miss was entirely unrelated to the Accident. He also acknowledged that Deeth's e-mail of October 27, 2003, just three days before the October 30 Release was issued, put an end to discussions about any retroactive amendment to the GSK delivery term. We find that Melnyk could not have had any reasonable doubt as to the meaning of the GSK delivery term and its implications for revenue recognition by the time the October 30 Release was issued.

[329] Melnyk also testified that he could not recall whether he knew, by the time the October 30 Release was issued, that the revenue range reflected in the Revenue Loss Statement was proposed to be adjusted to $7.0 million, but acknowledged that he "could have been aware of it". By that time, Melnyk knew or should have known that the undamaged WXL involved in the Accident had been re-shipped to GSK as samples.

[330] Although Melnyk testified that the October 30 Release was reviewed by internal and external counsel, he acknowledged that he could not recall instructing counsel, or asking anyone at Biovail to instruct counsel, whether Biovail should correct the Truck Accident Statement. We note in this respect that Scullion testified that he reviewed the October 30 Release only to ensure that the numbers disclosed were factually correct and consistent with the financial statements.

[331] Based on the foregoing and our conclusion in paragraph 272 of these reasons, we find that Melnyk knew or should have known that the October 30 Release did not state facts that were required to be stated or that were necessary to make the October 30 Accident Statement not misleading.

(vii) The Accident Contribution Statement Made in the March 04 Release

[332] The March 04 Release corrected the revenue range reflected in the Revenue Loss Statement but repeated the Accident Contribution Statement. The March 04 Release stated that "[a]fter a subsequent review of all of the facts, the actual revenue loss from the accident was determined to be $5.0 million".

[333] In cross-examination, Melnyk acknowledged that sentence was "mis-worded":

> … it is not correctly written because by this time we certainly know that it was the issue of the shipping term. So you're right, that is miswritten. And how that was missed, it's not meant to mislead, it was meant to say, That truck that we all talked about and was all over the newspapers, it ended up being 5 million. And if you looked at the research reports coming out, we were ridiculed. Okay, in all fairness, we were ridiculed. How did you get the 5 million, boy, we were right all along, it wasn't 10 to 20 million, it was 5 million. So that's what that was meant to say. [*sic*]

[334] Melnyk was directly involved in the preparation of the March 04 Release, including the language relating to the Accident. For example, in an e-mail exchange with Howling on February 10, 2004, Melnyk stated that a draft of the language relating to the truck accident "needs a lot of work"; Howling replied that he would "take a stab at it" and send it back to him. Melnyk replied, "keep in mind that it will be buried in our Earnings release".

[335] Accordingly, we find that Melnyk knew or should have known that the statement made in the March 04 Release referred to in paragraph 332 of these reasons was, at the time and in the light of the circumstances under which that statement was made, misleading or untrue because that statement repeated the Accident Contribution Statement. However, consistent with our conclusion in paragraph 243 of these reasons, we find that statement was not *in a material respect* misleading or untrue.

(viii) Conclusions

[336] Our conclusions are summarized as follows. We were not persuaded that Melnyk knew or should have known that the Accident Contribution Statement made in the October 3 Release was misleading or untrue, but we have found that he knew or should have known that the Accident Contribution Statement made in the October 8 Release and at any time thereafter was misleading or untrue; however, the Accident Contribution Statement, standing alone, was not, in a material respect, misleading or untrue. We have found that Melnyk knew or should have known that the Revenue Loss Statement made in the October 3 Release and at any time thereafter was misleading or untrue; however, the Revenue Loss Statement, standing alone, was not, in a material respect, misleading or untrue. We have found that Melnyk knew or should have known that the Truck Accident Statement repeated in the October 8 Release was, *in a material respect* and at the time and in the light of the circumstances under which it was made, misleading or untrue. We have found that Melnyk knew or should have known that the October 30 Release did not state facts that were required to be stated or that were necessary to make the October 30

Accident Statement not misleading. Finally, we have concluded that Melnyk knew or should have known that the Accident Contribution Statement made in the March 04 Release was misleading or untrue; but that statement was not, in a material respect, misleading or untrue.

H. Did Biovail Contravene Section 122 of the Act?

(i) Positions of the Parties

[337] Staff submits that the Releases contravened subsection 122(1) of the Act and that Melnyk "as CEO of Biovail, authorized, permitted or acquiesced in Biovail's conduct and is therefore liable for Biovail's breaches of Ontario securities law under sections 122(3) and 129.2 of the Securities Act." Staff submits that subsection 122(1)(b) of the Act applies to any news release filed under the Act, not just those "required to be filed". In the alternative, Staff submits that any news release filed under the Act is "submitted to the Commission" within the meaning of subsection 122(1)(a) of the Act.

[338] Melnyk submits that subsection 122(1)(b) of the Act does not apply in the circumstances because Biovail was not "required to file" any of the Releases or a material change report in respect of them. Melnyk submits that, in order for the Releases to be required to be filed, a material change with respect to Biovail's business, operations or capital must have occurred within the meaning of section 75 of the Act. Melnyk notes that Staff has not alleged in the Statement of Allegations that a material change occurred at any time.

[339] Melnyk notes that Biovail did not file a material change report in respect of the October 3 Release, the October 8 Release or the October 30 Release. Biovail did file a material change report in connection with the March 04 Release. Melnyk submits, however, that fewer than five of the 51 paragraphs of that news release concerned the Accident and third quarter WXL revenues, and it did not "suggest, state or indicate that there was any material change in Biovail's business, operations or capital, either in March 2004 or at any other time". Melnyk submits that Biovail's decision to file a material change report does not establish that a material change occurred.

[340] Melnyk submits that subsection 122(1)(a) of the Act does not apply because, although Biovail posted all of the Releases on the System for Electronic Document Analysis and Retrieval ("**SEDAR**"), a document posted on SEDAR is not thereby "submitted" to the Commission within the meaning of subsection 122(1)(a) of the Act.

(ii) Sections 122(1)(a) and (b) of the Act

[341] Sections 122(1)(a) and (b) of the Act provide as follows:

> 122(1) Every person or company that,
>
> (a) makes a statement in any material, evidence or information *submitted to the Commission*, a Director, any person acting under the authority of the Commission or the Executive Director or any person appointed to make an investigation or examination under this Act that, in a material respect and at the time and in the

> light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading;
>
> (b) makes a statement in any application, *release*, report, preliminary prospectus, prospectus, return, financial statement, information circular, take-over bid circular, issuer bid circular or other document *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 it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading; or
>
> ...
>
> is guilty of an offence ... [emphasis added]

(iii) The Interpretation of Subsection 122(1)(b) of the Act

(a) Further Staff Submissions

[342] Staff relies on *Felderhof, supra,* at p. 97 for the proposition that the term "release" in subsection 122(1)(b) of the Act includes news releases such as the Releases (*Felderhof*, *supra*, at pp. 179-180). The Court stated in *Felderhof* that subsection 122(1)(b) applies only to news releases that are "required to be filed" under Ontario securities law (*Felderhof*, *supra*, at pp. 177-179). Staff submits, however, that *Felderhof* is not dispositive of that issue because in *Felderhof* the Crown elected to prove that the news releases at issue were required to be filed and the accused conceded that point.

[343] Staff submits that the phrase "required to be filed or furnished under Ontario securities law" in subsection 122(1)(b) of the Act qualifies the phrase "other document" but does not apply to the other documents listed earlier in paragraph (b), including releases. Staff submits that Melnyk's reading of paragraph (b) suggests that an issuer could be prosecuted for making misleading statements in a required news release but could mislead the investing public with impunity in a news release issued voluntarily, a result that is inconsistent with a purposive interpretation of the Act.

[344] Staff notes that the SEDAR Filer Manual: Standards, Procedures and Guidelines for Electronic Filing with the Canadian Securities Administrators, dated November 1, 1996, which is incorporated by reference into National Instrument 13-101 - *System for Electronic Document Analysis and Retrieval* ("*SEDAR*") ("**NI 13-101**") states:

> News releases and, where required, material change reports should not be filed with a securities regulatory authority in a jurisdiction if the electronic filer does not have a legal obligation to do so.
>
> (SEDAR Filer Manual, p. 99)

[345] Staff submits that this passage supports its position that documents filed on SEDAR are documents "required to be filed or furnished under Ontario securities law".

[346] Staff notes that documents now filed on SEDAR were, in the past, filed physically at the offices of the relevant securities regulator (in the days before SEDAR). NI 13-101 now states that an electronic filer that "is required or otherwise is proposing to file" certain documents, including news releases, is required to file the documents on SEDAR.

(b) Material Change; Material Fact

[347] Section 122(1)(b) of the Act should be considered in the context of subsection 75(1) of the Act, which states that "where a material change occurs in the affairs of a reporting issuer, it shall forthwith issue and file a news release authorized by a senior officer disclosing the nature and substance of the change."

[348] The Act defines "material change", which, for our purposes, means,

> a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer …

[349] The Act defines "material fact" as follows:

> "material fact", when used in relation to securities issued or proposed to be issued, means a fact that would reasonably be expected to have a significant effect on the market price or value of the securities.

[350] Accordingly, a "material change" triggers a requirement to forthwith issue and file a news release. In contrast, the existence of a "material fact" gives rise to restrictions on trading and tipping pursuant to section 76 of the Act but does not trigger a disclosure obligation. This distinction was addressed by the Supreme Court of Canada in *Kerr v. Danier Leather Inc.*, at para. 5, as follows:

> Although disclosure lies at the heart of an effective securities regime, the extent of the disclosure is a matter of legislative policy. Balancing the needs of the investor community against the burden imposed on issuers, the Ontario legislature adopted a policy governing the continuous disclosure requirements of an issuer that drew the line at "material change" in the "business, operations or capital of the issuer" (s. 1).

And, at para. 32:

> The *Securities Act* is remedial legislation and is to be given a broad interpretation: *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557. … At the same time, in compelling disclosure, the Act recognises the burden it places on issuers and in Part XV [Prospectuses – Distribution] sets the limits on what is required to be disclosed. The problem for the appellants is that when a

> prospectus is accurate at the time of filing, subsection 57(1) of the Act limits the obligation of post-filing disclosure to notice of a "material change", which the Act defines in section 1 in relevant part as
>
> > a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer ... ;
>
> An issuer has no similar express obligation to amend a prospectus or to publicize and file a report for the modification of material *facts* occurring after a receipt for a prospectus is obtained. That is where the legislature has drawn the line.
>
> (*Kerr v. Danier Leather Inc.*, [2007] 3 S.C.R. 331("***Danier Leather***"))

[351] The distinction between a "material change" and "material fact" was also at the heart of the Commission's decision in *Re AiT Advanced Information Technologies et al*. In that case, the Commission dealt with the different legal effects of a material change and a material fact as follows:

> … only in the event of a material change does section 75 of the Act require an issuer to issue a news release and also file with the Commission a material change report on a timely basis, or alternatively file a confidential material change report with the Commission. In contrast, section 76 of the Act does not require disclosure of either material changes or material facts, but prohibits anyone from purchasing or selling securities with knowledge of a material fact or material change that has not been generally disclosed to the public.
>
> (*Re AiT Advanced Information Technologies Corporation et al.* (2008), 31 O.S.C.B. 712 ("***Re AiT***"), at para. 210)

(c) Analysis and Conclusion as to the Application of Subsection 122(1)(b) of the Act

[352] OSC Policy 13-601, "Public Availability of Material Filed under the Securities Act" states that "[t]he word "filed" is one of precise meaning in the Act". That policy deals with "all of the classes and types of material that the Act and Regulation require to be filed." Included in that material are timely disclosure reports under subsections 75(1) and (2) of the Act.

[353] Subsection 122(1)(b) of the Act also applies to documents required to be "furnished" under Ontario securities law. That word suggests a requirement to provide a document to a person that is an obligation different from the requirement to "file" a document. In this case, Staff did not argue that the Releases were required to be furnished to anyone under Ontario securities law. Accordingly, we will not address the meaning of that element of subsection 122(1)(b).

[354] We note the statement from the SEDAR Filer Manual referred to in paragraph 344 of these reasons that Staff says supports its position. While that provision provides that news releases should not be filed on SEDAR if the filer has no obligation to do so, it does not create a

legal requirement to file news releases under the Act. Further, that statement may be addressing whether an issuer is a reporting issuer in a particular jurisdiction, and is therefore subject to timely disclosure obligations, rather than whether a material change has occurred. In any event, a comment in a procedural manual cannot determine the proper interpretation of a statutory provision such as subsection 122(1)(b). We also note that NI 13-101 by its terms applies to both documents required to be filed under SEDAR as well as documents that a filer is "proposing to file".

[355] We do not believe that the legislature intended that any "application, release, report, preliminary prospectus, prospectus, return, financial statement, information circular, take-over bid circular, [or] issuer bid circular" should attract liability under subsection 122(1)(b), whether or not the document is "required to be filed or furnished under Ontario securities law". Section 122(1)(b) could have been expressed to apply to a document "filed or furnished" under Ontario securities law but that is not what the section says. In our view, the language of subsection 122(1)(b) is relatively clear that the section applies only to the enumerated documents if they are "required to be filed or furnished under Ontario securities law".

[356] Further, it is consistent with the nature of section 122, which creates a quasi-criminal offence, that only documents "required to be filed" should subject a person to potential quasi-criminal charges under that section. The Act makes clear when a document is required to be filed. In particular, section 75 of the Act requires a news release and a material change report to be filed only when a material change has occurred. Notwithstanding, issuers often issue news releases and file them on SEDAR even though those documents may not be required to be filed under the Act.

[357] We agree with Staff that we should interpret subsection 122(1)(b) of the Act in a purposive manner within the context of the regulatory objectives of the Act (see, for example, *Bell ExpressVu Limited Partnership v. Rex*, 2 S.C.R. 599, at paras. 26-30). We do not condone any issuer making a misleading or untrue public statement that may be relied upon by investors, whether or not that statement is subject to subsection 122(1)(b). We cannot, however, ignore the clear words of the Act. The legislature could have created an offence for a materially misleading or untrue statement in any document filed under Ontario securities law, but it did not do so. It chose to address in that section only the enumerated documents that are "required to be filed".

[358] That conclusion is based on our interpretation of the language of subsection 122(1)(b) and is consistent with the decision in *Felderhof*. The Court in *Felderhof* appeared to consider it beyond dispute that subsection 122(1)(b) of the Act applies to news releases only when they are "required to be filed or furnished under Ontario securities law."

[359] The Alberta Securities Commission stated in *In the Matter of Cartaway Resources Corporation et al.* that:

> Subsection 161(1)(b) of the Act makes it an offence to make "a misrepresentation in any document required to be filed or furnished under this Act or the regulations". A news release may be required to be filed by subsection 118(1)(a) of the Act, but only if the news release relates to a material change.

> Although the information in the May 16, 1996 release was material, it is doubtful that it constituted a material change as defined by the Act. Therefore, the misrepresentation did not violate subsection 161(1)(b) of the Act.
>
> (*In the Matter of Cartaway Resources Corporation et al.* (2000), 9 ASCS 3092 at p. 26 ("***Cartaway***"))

[360] While section 161(1)(b) of the Alberta *Securities Act* (S.A. 1981, c. S-6-1, as amended) (the "**Alberta Act**") applies only to a "document required to be filed" under the Alberta Act and does not refer to a list of specific documents such as that contained in subsection 122(1)(b) of the Act, the decision in *Cartaway* is consistent with our interpretation and conclusion as to the application of subsection 122(1)(b).

[361] Staff has not alleged in the Statement of Allegations or in its submissions that a material change occurred with respect to Biovail at the time any of the Releases was issued. Nor has Staff alleged that Biovail contravened section 75 of the Act by failing to file a material change report with respect to the October 3 Release, the October 8 Release or the October 30 Release. Further, we are not persuaded that Biovail's decision to file a material change report in respect of the March 04 Release necessarily means that a material change occurred and, as a result, that subsection 122(1)(b) applies to that release. In any event, we did not conclude that the Accident Contribution Statement made in the March 04 Release was *in a material respect* misleading or untrue. As a result, Biovail did not breach subsection 122(1)(b) of the Act by making the Accident Contribution Statement in the March 04 Release.

[362] Accordingly, we find that Staff has not established that the Releases were required to be filed or furnished under the Act within the meaning of subsection 122(1)(b) of the Act. As a result, Staff has not established that subsection 122(1)(b) of the Act applies to any statement made in the Releases.

[363] We note that section 11.4 of National Instrument 51-102 - *Continuous Disclosure Obligations* creates a requirement that "a reporting issuer must file a copy of any news release issued by it that discloses information regarding its historical or prospective results of operations or financial condition for a financial year or interim period". That section came into effect on March 31, 2004, after the events that gave rise to this proceeding, and therefore has no application in this proceeding.

(iv) The Interpretation of Section 122(1)(a) of the Act

(a) Positions of the Parties

[364] Without conceding Melnyk's argument with respect to the interpretation of subsection 122(1)(b) of the Act, Staff submits that, even if that section does not apply to the Releases, subsection 122(1)(a) applies to all documents filed on SEDAR, whether voluntarily or required, because such documents are "submitted" to the Commission by virtue of such filing. Staff submits that subsection 122(1)(a) is intended to ensure that news releases filed on a voluntary basis provide full and accurate disclosure to investors. In effect, Staff submits that voluntarily

filing a document on SEDAR is “submitting” it to the Commission. Staff submits that SEDAR “not only widely disseminates disclosure documents, it lends them the imprimatur of the Canadian securities regulatory authorities” and therefore requires that they be free of material misstatements. Staff submits that this advances the policy aim of promoting full and accurate disclosure in the marketplace.

[365] Melnyk submits that subsection 122(1)(a) of the Act applies only to material, evidence or information that is “submitted to” the Commission (or the other persons named in that subsection) for its review and consideration. Melnyk submits that there is no evidence that any of the Releases were submitted to, received, read or reviewed by the Commission or any other such person.

(b) Analysis and Conclusion as to the Application of Subsection 122(1)(a) of the Act

[366] In our view, the fact that the four Releases were filed by Biovail on SEDAR does not make them materials, evidence or information "submitted to the Commission" within the meaning of subsection 122(1)(a) of the Act. Many types of documents are filed on SEDAR with no intention of submitting them to the Commission and with no expectation that they will be reviewed, considered or acted upon by the Commission. Rather, they are filed on SEDAR for the purpose of making them easily accessible to the public. In this respect, SEDAR's website expressly states that "continuous disclosure documents such as news releases … do not require the securities commissions' review" and are available to members of the public on SEDAR's website the day after filing.

[367] Further, accepting Staff’s interpretation of subsection 122(1)(a) of the Act would render subsection 122(1)(b) redundant, because the documents “submitted to the Commission” under subsection 122(1)(b) would always include the documents required to be filed under subsection 122(1)(a). Accordingly, Staff’s interpretation of subsection 122(1)(a) is inconsistent with our interpretation of subsection 122(1)(b).

[368] It appears that previous Commission decisions relating to the application of subsection 122(1)(a) of the Act have involved misleading documents or information that have been submitted to the Commission for its review and reliance, or misleading statements that were made to a person appointed by the Commission to conduct an investigation or examination. (See, for example, *Wilder v. OSC* (2001), 53 O.R. (3d) 519; *Re Limelight Entertainment Inc.* (2008), 31 O.S.C.B. 1727, *Re Fortuna-St. John* (1998), 21 O.S.C.B. 3851, and *Re Kader* (2006), 29 O.S.C.B. 4565.) In our view, material, evidence or information “submitted to the Commission” for purposes of subsection 122(1)(a) means material, evidence or information submitted to the Commission for its review or consideration with the intention or expectation that the Commission would rely on that material, evidence and information in connection with the administration of the Act. That would clearly include statements and representations made to the Commission or Staff in connection with an investigation or an examination under Part VI of the Act. In our view, the four Releases were not submitted to the Commission for its review, consideration or reliance. They were simply filed on SEDAR so that they would be publicly available.

[369] Accordingly, we find that Staff has not established that the Releases were submitted to the Commission within the meaning of subsection 122(1)(a) of the Act. As a result, Staff has not established that subsection 122(1)(a) of the Act applies to any statement made in the Releases.

(v) Conclusions as to the Application of Subsections 122(1)(a) and (b) of the Act

[370] For the reasons discussed above, we find that Staff has not established that subsections 122(1)(a) or (b) of the Act apply to the Releases or the statements made in them. Accordingly, we find that neither Biovail nor Melnyk contravened Ontario securities law as a result of the statements made in the Releases or on the Analysts Call that are addressed in these reasons. It remains for us to consider whether Melnyk has acted contrary to the public interest by reason of our findings against him.

I. Section 127: Conduct Contrary to the Public Interest

(i) Disclosure and the Commission's Public Interest Jurisdiction

(a) Positions of the Parties

[371] Staff submits that "in addition to constituting misstatements as defined in section 122 of the Act, all of the incorrect and/or misleading public disclosures identified by Staff in this case constitute conduct contrary to the public interest" within the meaning of section 127 of the Act. Staff describes section 122 and section 127 as "two separate grounds … two different lenses through which to view the conduct of Mr. Melnyk". Accordingly, Staff submitted that Melnyk's conduct was contrary to the public interest even if it did not violate Ontario securities law.

[372] Melnyk submits that Staff cannot make out its case under section 127 unless it can prove a breach of the Act or abuse of the capital markets. He submits that only an egregious misstatement going to the core of Biovail's business or existence could amount to abuse of the capital markets, not any misstatement. He says such misstatements must be egregious, like the misstatements at issue in *Re Standard Trustco* (1992), 15 O.S.C.B. 4322 ("***Re Standard Trustco***"), *Re YBM* and *Re Rex Diamond Mining Corp.* (2008), 31 O.S.C.B. 8337 ("***Re Rex Diamond***").

(b) Importance of Disclosure

[373] In order to determine whether Melnyk's conduct was contrary to the public interest, we must consider the regulatory context in which that conduct occurred.

[374] The Commission is entitled to make various sanctions orders under section 127 of the Act if it is of the opinion that doing so is in the public interest. In considering the Commission's power to make such orders in the public interest, the Supreme Court of Canada has observed that "the OSC has the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so" (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 ("***Asbestos***"), at para. 45). The Court indicated that this discretion is subject to two constraints:

> In exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally. In addition, s. 127(1) is a regulatory provision. The sanctions under the section are preventive in nature and prospective in orientation. Therefore, s. 127 cannot be used merely to remedy Securities Act misconduct alleged to have caused harm or damages to private parties or individuals.
>
> (*Asbestos*, *supra* at para. 45)

The Commission's public interest jurisdiction allows it to make an order under section 127 of the Act even if there is no breach of Ontario securities law or any conduct inconsistent with a policy statement. We recognise, however, that our public interest jurisdiction must be exercised with some caution and restraint.

[375] In *Re Cablecasting Ltd.*, the Commission applied its public interest jurisdiction to a going private transaction that was not effected in compliance with the disclosure requirements applicable to issuer bids under a policy of the Commission. In its decision, the Commission provided guidance as to when it is more likely to intervene on policy grounds under its public interest jurisdiction despite the absence of any breach of Ontario securities law. The Commission stated that:

> Another relevant consideration in assessing whether to act against a particular transaction is whether the principle of the new policy ruling that would be required to deal with the transaction is foreshadowed by principles already enunciated in the Act, the regulations or prior policy statements. Where this is the case the Commission will be less reluctant to exercise its discretionary authority than it will be in cases that involve an entirely new principle.
>
> (*Re Cablecasting Ltd.* [1978] O.S.C.B. 37 ("***Re Cablecasting***") at p. 43)

[376] Far from being a new principle, disclosure by reporting issuers is a fundamental cornerstone of securities regulation. Section 2.1 of the Act states:

> In pursuing the purposes of this Act, the Commission shall have regard to the following fundamental principles:
>
> …
>
> 2. The primary means for achieving the purposes of this Act are,
>
> > i. requirements for timely, accurate and efficient disclosure of information,
>
> …

[377] The Commission has emphasized the importance of disclosure to investors and capital markets in a number of decisions. In *Re Philip Services Corp.*, the Commission stated that:

> [d]isclosure 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.
>
> (*Re Philip Services Corp.* (2006), 29 O.S.C.B. 3941, at para. 7)

[378] In examining the consequences of a misleading news release issued by a reporting issuer, the Commission stated in *Re Standard Trustco* that:

> [a] sound financial disclosure system is fundamental to the operation of our capital markets, in terms of investor decisions, public confidence in the capital markets and the fair and efficient operation of the capital markets as a whole. A sound disclosure system is one of the underpinnings of the securities regulatory system.
>
> (*Re Standard Trustco, supra,* at p. 4358)

[379] Information that is publicly disclosed must be accurate and not misleading or untrue in order to accomplish the goals of our securities regulatory regime to protect investors from unfair or improper practices and to foster fair and efficient capital markets and confidence in those markets (*Re Rex Diamond, supra,* at para. 205). The Commission concluded in *Re Standard Trustco* that the issue of a misleading news release is itself injurious to capital markets.

[380] The Commission has applied its public interest jurisdiction to misleading disclosure in news releases in *Re Cineplex Corporation*, *Drabinsky and Gottlieb* (1983), 6 O.S.C.B. 3845, *Re Standard Trustco*, *Re YBM* and *Re Rex Diamond*. While those cases involved news releases required to be filed under the Act, it is clear that the Commission considered the making of inaccurate, misleading or untrue disclosure to be contrary to the public interest.

[381] The decision in *Re Canadian Tire Corp.* (1987), 10 O.S.C.B. 857 ("***Canadian Tire***") established that the Commission may exercise its public interest jurisdiction, even if there is no breach of Ontario securities law, where a take-over bid transaction is abusive of shareholders. Abuse was defined in that decision as something more than mere unfairness. We note that the *Canadian Tire* decision related to a take-over bid that was being carried out in full compliance with the take-over bid regime contained in the Act. *Canadian Tire* was not a disclosure case.

[382] In our view, where market conduct engages the animating principles of the Act, the Commission does not have to conclude that an abuse has occurred in order to exercise its public interest jurisdiction. That is no doubt one of the reasons why the Commission concluded in *Re Standard Trustco* that the issue of a misleading news release is itself injurious to capital markets. We should not interpret or constrain our public interest jurisdiction in a manner that condones inaccurate, misleading or untrue public disclosure regardless of whether that disclosure contravenes Ontario securities law. The issues raised by this matter directly engage the fundamental principle recognised in the Act for timely, accurate and efficient disclosure.

[383] There should be no doubt in the minds of market participants that the Commission is entitled to exercise its public interest jurisdiction where any inaccurate, misleading or untrue public statement is made, whether or not that statement contravenes Ontario securities law. It is, of course, a separate question whether the Commission should exercise its public interest jurisdiction under section 127 of the Act in any particular circumstances.

(c) The Responsibility of Corporate Officers

[384] Corporate directors and officers have a central role to play in ensuring that corporate disclosure is accurate and not misleading or untrue.

[385] Directors and officers of a reporting issuer are ultimately responsible for ensuring that information disclosed by the issuer complies with the Act:

> [t]he responsibility of companies to make timely and accurate financial disclosure ultimately rests with directors of those companies. In practice, the responsibility is shared by the directors, audit committees, chief executive officers, chief financial officers and other management. The company itself would also be responsible.
>
> The public has a right to expect that when a reporting issuer releases financial information to the public, the directors and officers of the company will have met certain standards of care in satisfying themselves that there is no question about the integrity of the information and that the information is accurate, complete and represents a fair picture of the financial condition of the company. The whole continuous disclosure system demands this from all directors and officers of reporting issuers.
>
> (*Re Standard Trustco, supra,* at p. 4364)

[386] More is expected of officers and directors with superior qualifications, such as experienced business people, and more is expected of inside directors who have much greater involvement in corporate decision making and much greater direct access to corporate information. In *Soper v. Canada*, a case concerning a director's responsibility for a company's failure to remit taxes, Robertson J.A. stated that:

> it is difficult to deny that inside directors, meaning those involved in the day to day management of the company and who influence the conduct of its business affairs, will have the most difficulty in establishing the due diligence defence. For such individuals, it will be a challenge to argue convincingly that, despite their daily role in corporate management, they lacked business acumen to the extent that that factor should overtake the assumption that they did know, or ought to have known, of both remittance requirements and any problem in this regard.
>
> (*Soper v. Canada* (1997), F.C.J. No. 881, at para. 41; see also *Re YBM*, *supra*, at paras. 177, 183 and 184)

[387] The Chief Executive Officer of a corporation plays a "pivotal" role in "co-ordinating, compiling and vetting material corporate disclosure" (*Ironside, supra,* at paras. 963 and 982; *Re Workum and Hennig*, 2008 ABASC 363, at para. 713).

(d) Conclusions as to Disclosure and the Commission's Public Interest Jurisdiction

[388] We do not agree that, in order for Melnyk's conduct in this matter to engage the Commission's public interest jurisdiction, we must find abusive or egregious conduct or misstatements for which he has responsibility. There is an essential public interest in ensuring that all public statements made by reporting issuers and others are accurate and not misleading or untrue and can be relied upon by investors in making investment decisions. It may make sense for the Act to create an offence under section 122 only with respect to statements in documents that are "required to be filed or furnished" under the Act or are "submitted to the Commission". Our public interest jurisdiction under section 127 of the Act is not and should not be so limited.

[389] If a reporting issuer makes a public statement or discloses information that is relevant to investors, it should take appropriate steps to ensure that the statement or information is accurate and not misleading or untrue. In our view, that obligation applies to a statement or information that is material to investors as well as to a statement or information that may not meet the applicable standard of materiality. It goes without saying that in exercising our public interest jurisdiction, we must consider all of the relevant circumstances including the nature and significance of the misleading or untrue statements and the circumstances in which they were made. We agree, in this respect, with the Commission's statement *In the Matter of Sterling Centrecorp Inc. and SCI Acquisition Inc.*, at para. 212, that:

> … [t]he Commission's "public interest" jurisdiction is broad and powerful, and it must be exercised with caution, as recognised in the *Re Canadian Tire* decision. When considering the exercise of this jurisdiction, the Commission needs to have regard to all of the facts, all of the policy consideration [*sic*] at play, all of the underlying circumstances of the case, and all of the interests affected by the matter and the remedy sought.
>
> (*In the Matter of Sterling Centrecorp Inc. and SCI Acquisition Inc.* (2007), 30 O.S.C.B. 6683, at para. 212)

(ii) Conclusions as to Biovail's Conduct

[390] Biovail has entered into a settlement agreement with the Commission with respect to the circumstances before us in this proceeding, as well as the other allegations made by Staff against Biovail in the Statement of Allegations. That settlement resolved to the Commission's satisfaction all of the allegations made by Staff against Biovail related to this proceeding. As a result, Biovail was not a party to this proceeding and did not participate in it. Notwithstanding, in order to address the allegations made by Staff against Melnyk, it is necessary for us to make certain findings with respect to Biovail's statements and omissions for purposes only of addressing Melnyk's conduct.

(a) Conclusions as to Biovail's Statements

[391] We have concluded that:

1. by making the Truck Accident Statement in the October 3 Release and on the Analysts Call, and by repeating that statement in the October 8 Release, Biovail made a statement that, *in a material respect* and at the time and in the light of the circumstances under which that statement was made, was misleading or untrue;

2. Biovail omitted to state facts in the October 30 Release that were required to be stated or that were necessary to make the October 30 Accident Statement not misleading; and

3. by making the Accident Contribution Statement in the March 04 Release, Biovail made a statement that, at the time and in the light of the circumstances under which that statement was made, was misleading or untrue; but that statement was not, *in a material respect*, misleading or untrue.

Staff did not establish that the making of those statements by Biovail, or the omission of such facts from the October 30 Release, breached Ontario securities law.

[392] Melnyk made much of the fact that Biovail acted appropriately in "opting for early disclosure of the Earnings Miss" by issuing the October 3 Release. The Earnings Miss was clearly material information that was disclosed to the market and investors promptly. However, that did not relieve Biovail or Melnyk of the obligation to ensure that the statements and information contained in the October 3 Release and later disclosures were accurate and not misleading or untrue.

(b) Other Biovail Conduct

[393] Apart from our conclusions referred to in paragraph 391 of these reasons, we have identified certain other actions or omissions by Biovail that appear to us to have constituted inappropriate conduct. Those actions or omissions include the following:

1. Biovail failed to disclose in the October 3 Release that its WXL revenues for the 2003 third quarter were estimated to be below $10 million;

2. Biovail selectively disclosed on the Analysts Call the information referred to in clause 1 above;

3. Crombie stated in the Analysts Call that the WXL revenue loss associated with the Accident was $15 to $20 million. Biovail subsequently repeated the $10 to $20 million revenue range in the October 8 Release and failed to ever expressly correct the $15 to $20 million range; and

4. Biovail failed to disclose that the WXL bulk trade tablets involved in the Accident were ultimately re-shipped to GSK by October 30, 2003 as sample tablets, which had a

fixed revenue value to Biovail that was substantially lower than the revenue value for the WXL trade tablets used as a basis for the Revenue Loss Statement.

[394] We are not making any finding against Biovail with respect to the matters referred to in paragraph 393 of these reasons. Further, while Melnyk authorized, permitted or acquiesced in the conduct referred to in that paragraph, we are not making any finding against him on that account because those matters were not the principal focus of the allegations made by Staff and were not the subject matter of submissions made to us.

(iii) Melnyk's Conduct

(a) Did Melnyk Authorize, Permit or Acquiesce in Biovail's Misleading Statements?

[395] Staff has alleged that Melnyk authorized, permitted or acquiesced to Biovail's conduct described in paragraph 391 of these reasons. In considering Melnyk's responsibility for Biovail's conduct, in our view, it is relevant whether Melnyk authorized, permitted or acquiesced to that conduct.

[396] We interpret the words "authorize, permit or acquiesce" as bearing their ordinary or dictionary meaning. In *R. v. Armaugh Corp.*, the Ontario Court of Justice stated that:

> In *Webster's New World Dictionary*, 3rd college edition **acquiesce** means to agree or consent quietly without protest. **Authorize** is defined in part as to give official approval or permission, to give power or authority, to give justification for, and **permit** is defined as to allow, consent to tolerate, to give permission, authorize permission especially in writing, a document granting permission, licence, warrant.
>
> (*R. v. Armaugh Corp.* (1993), 1 C.C.L.S. 87 (Ont. Ct. J.) at para. 20)

[397] It is clear that Melnyk participated in the preparation of and approved all of the Releases. There was evidence that Melnyk specifically requested that revenue information with respect to the WXL involved in the Accident be included in the October 3 Release. There was also evidence that he requested that the last sentence of the October 8 Release that repeated the Truck Accident Statement be included in that release. He had final approval over the content and issue of all Biovail news releases. Accordingly, we find that Melnyk authorized, permitted or acquiesced in the issue of each of the Releases and in making the disclosure and statements contained in each of them.

[398] It is also clear that Melnyk authorized, permitted or acquiesced in the making of the Truck Accident Statement on the Analysts Call. We have no evidence that he knew in advance that Crombie intended to change the low end of the revenue range reflected in the Revenue Loss Statement, but Melnyk heard that statement, repeated the $15 million revenue number on the Analysts Call and took no action after the call to confirm the accuracy of the Revenue Loss Statement made on that call or to expressly correct it. Accordingly, Melnyk acquiesced in the making of the Truck Accident Statement on the Analysts Call.

(b) Availability of a Due Diligence Defence

[399] We heard submissions as to whether a due diligence defence is available in connection with a public interest proceeding under section 127 of the Act. A due diligence defence is available under subsection 122(2) of the Act, which provides that no person or company is guilty of an offence under subsections 122(1)(a) or (b) of the Act if that person "did not know and in the exercise of reasonable diligence could not have known" that a statement was misleading or untrue. This proceeding is not brought under section 122, however, and we have concluded that subsections 122(1)(a) and (b) do not apply to the statements made by Biovail in the circumstances before us.

[400] Staff also alleges that Melnyk's conduct was contrary to the public interest. In our view, in considering whether Melnyk's conduct was contrary to the public interest, we should consider whether, in all of the circumstances, Melnyk has demonstrated that he exercised due care and diligence. If we are satisfied that he exercised such care or diligence, we would not conclude that it is in the public interest to issue an order against him under section 127.

(c) Conclusions as to Melnyk's Role

[401] Melnyk was the Chairman and CEO of Biovail at the relevant time. He was the founder and driving force of Biovail. At the end of the day, Melnyk cannot separate himself from the actions of Biovail. He had a heavy responsibility as Chairman and CEO to ensure that Biovail did not make inaccurate, misleading or untrue public statements. In particular, Melnyk (i) had access at any time to whatever information was known by Biovail and its senior officers and employees and could have obtained appropriate supporting information with respect to all of the statements made by Biovail addressed in these reasons, (ii) was directly involved in and made decisions related to the content and extent of the disclosure made by Biovail in the Releases and on the Analysts Call, and (iii) had final approval of the Releases and other public statements made by Biovail. Contrary to his testimony, the evidence has shown him to have been an active and hands-on CEO directly involved in the conduct of Biovail's business and the disclosure decisions made by Biovail. In our view, Melnyk cannot simply claim innocence on the basis that he relied in good faith on the other senior officers or employees of Biovail.

[402] Certain of Melnyk's submissions in this matter relied upon denials that he knew key information that other senior officers and employees of Biovail knew at a particular time. In our view, that position tends to undermine his submissions that he acted reasonably throughout and exercised due care and diligence.

[403] We do not consider this matter to be, at its core, a question whether there were red flags that should have alerted Melnyk to make further inquiries in the circumstances. Melnyk had direct responsibility and involvement in Biovail's various disclosure decisions and had an obligation to exercise due care and diligence in carrying out that responsibility. There is very limited evidence before us that Melnyk did anything at the relevant times to satisfy that obligation other than rely on the assurances that he says were given by Crombie and other Biovail senior officers. Having said that, there were a number of obvious red flags that arose in the circumstances including:

1. the revenue range itself reflected in the Revenue Loss Statement, particularly when that range is compared to Biovail's estimated total WXL third quarter revenues of less than $10 million at the time of the October 3 Release;

2. Melnyk's direct knowledge of the details of the WXL shipments made to GSK on September 30, 2003;

3. Melnyk's knowledge of Biovail's revenue recognition policies;

4. the statement by Crombie on the Analysts Call changing the revenue range reflected in the Revenue Loss Statement to $15 to $20 million, a statement that was never repeated or expressly corrected;

5. Melnyk's knowledge, following the Analysts Call, that the Revenue Loss Statement was based in part on analysts' estimates and variables;

6. Melnyk's knowledge, by the afternoon of October 3, 2003, of the accurate GSK delivery term;

7. the immediate skeptical reaction of analysts and investors to the Truck Accident Statement made in the October 3 Release, including the Maris Report; and

8. GSK's responses to the October 3 Release, which were communicated to Melnyk on October 8 and 9, 2003.

[404] We note that Ernst & Young was not consulted with respect to the disclosure in the October 3 Release and that Ernst & Young requested an opportunity to comment on the October 8 Release but was not given sufficient time to do so. It was immediately clear to Scullion and Lundie, upon reviewing the October 3 Release, that the F.O.B. delivery term was important to the disclosure in that release. They also recognized the questions raised by that disclosure with respect to revenue recognition. By October 8, 2003, Melnyk should have known about the meeting between Ernst & Young and Biovail employees on October 6 or 7 discussing delivery terms, cut off dates and their effect on revenue recognition. There was no evidence submitted to us that Biovail or Melnyk attempted to obtain outside legal or accounting advice prior to the issue of the October 3 Release or the October 8 Release.

[405] We reject Melnyk's submissions that Biovail's disclosure failures were the result only of the failures of others.

[406] Melnyk has the onus of establishing that he acted with due care and diligence in the circumstances. In our view, he has not satisfied that onus.

[407] Based on our conclusions in paragraphs 336, 397, 398 and 406 of these reasons, we find that Melnyk acted contrary to the public interest.

V. FINDINGS AGAINST MELNYK

[408] Based on the foregoing, we make the following findings with respect to Melnyk's responsibility for Biovail's misstatements and omissions referred to in paragraph 391 of these reasons:

1. Melnyk knew or should have known that the Revenue Loss Statement made by Biovail in the October 3 Release and on the Analysts Call was misleading or untrue at the time and in the light of the circumstances under which that statement was made; but that statement was not, *in a material respect*, misleading or untrue.

2. Melnyk knew or should have known that the Truck Accident Statement repeated by Biovail in the October 8 Release was, *in a material respect* and at the time and in the light of the circumstances under which that statement was made, misleading or untrue.

3. Melnyk knew or should have known that the October 30 Release omitted to state facts that were required to be stated or that were necessary to make the October 30 Accident Statement not misleading.

4. Melnyk knew or should have known that the Accident Contribution Statement made by Biovail in the March 04 Release was misleading or untrue at the time and in the light of the circumstances under which that statement was made; but that statement was not, *in a material respect*, misleading or untrue.

5. By reason of the foregoing, Melnyk did not contravene Ontario securities law but his conduct was contrary to the public interest.

[409] Staff and Melnyk should contact the Office of the Secretary of the Commission within thirty days to schedule a date for a sanctions hearing, failing which, a date will be set by the Office of the Secretary.

DATED in Toronto this 30th day of September, 2010.

"James E. A. Turner"

James E. A. Turner

"David L. Knight"

David L. Knight, F.C.A.

"Paulette L. Kennedy"

Paulette L. Kennedy