

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BARRY LAVENDER and HOWARD FERGUSON

Plaintiffs

- and -

MILLER BERNSTEIN LLP

Defendant

Proceeding under the *Class Proceedings Act, 1992*

FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiffs' lawyer or, where the plaintiffs do not have a lawyer, serve it on the plaintiffs, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

AMENDED THIS 9 July 10
MODIFIÉ CE
 PURSUANT TO
RÈGLE/LA RÈGLE 26.02 / A CONFORMÉMENT A
 THE ORDER OF
L'ORDONNANCE DU DATED / FAIT LE
BETWEEN
M. Sagaria
REGISTRAR
GRIFFIER
COUR SUPÉRIEURE DE JUSTICE



Date: November 16th, 2005

Issued by A. VAICIULENAS
Local registrar

Address of 393 University Avenue
court office 10th Floor
Toronto, Ontario
M5G 1E6

TO: MILLER BERNSTEIN LLP
20 Eglinton Avenue West
Toronto, Ontario M4R 1K8

CLAIM

1. The Plaintiffs claim:

- (a) an order certifying this proceeding as a class proceeding and appointing Barry Lavender (“Lavender”) and Howard Ferguson (“Ferguson”) as representative Plaintiffs on their own behalf and on behalf of a class consisting of each and every person, wherever resident, who: (i) became a client of Buckingham Securities Corporation (“Buckingham”) at any time from the inception of Buckingham’s operations through to July 26, 2001 (the “Class Period”) and who was a client of Buckingham on July 6, 2001, including, without limitation, those persons who filed claims in the receivership of Buckingham, but excluding the Excluded Persons; for purposes hereof, “Excluded Persons” means: (i) the Defendant, Miller Bernstein LLP (“Miller”); (ii) any partner or employee of Miller, and any member of the immediate family of any such partner or employee; (iii) any person who served as an officer or director of Buckingham at any time, and any member of the immediate family of any such officer or director; (iv) Buckinghamshire Holdings Inc., GS Investments Inc., HSS Investments Inc., Deekay Investments Inc., Scriblerus Holding Corporation, George Seidel, Harold Seidel, Norman Frydrych, Lloyd Bruce, Deborah Krofchick, David Seidel, 1195154 Ontario Ltd., David Lieberman, 7928 Investments Ltd., David Bromberg, AKH Investments Ltd. and Rose Brinder (collectively, the “Insiders”), together with any other beneficial shareholders of Buckingham, and members of their immediate families; (v) any entity in respect of which any of the persons identified in (i) to (iv) above has a direct or indirect controlling interest; (vi) any person who ultimately controls an entity that is an Excluded Person; and (vii) the legal representatives, heirs, successors and assignees of any Excluded Person (together with Lavender and Ferguson, the “Class”);
- (b) a declaration that all cash and securities of the Class should have been segregated and held in trust by Buckingham on a client by client basis in accordance with the requirements of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the

“*Securities Act*”) and the regulations promulgated thereunder (the “Regulations”) on a proper and timely basis;

- (c) a declaration that all written terms contained in any Buckingham client account agreement with any member of the Class that purport to allow for dealings in Buckingham clients’ securities other than in accordance with the requirements of the *Securities Act* and the Regulations, are void and unenforceable;
- (d) a declaration that all of the audit opinions delivered by Miller with respect to the financial reporting of Buckingham and all the attestations delivered by Miller with respect to Buckingham’s Form 9s were each given for the purpose of allowing Buckingham to continue to operate as a securities dealer registered in Ontario pursuant to the *Securities Act* and Regulations and with the expectation and knowledge that the Ontario Securities Commission (the “OSC”) would rely on Miller’s opinions and the Miller Representations (as defined below) as the basis for: (i) OSC registration renewals; and (ii) continued, additional or new investment by members of the Class;
- (e) a declaration that Miller owed a duty of care to the Class;
- (f) a declaration that Miller repeatedly and continuously breached the duty of care it owed to the Class by recklessly and/or negligently performing its professional services and that such recklessness and/or negligence caused the Class to suffer the damages claimed and described herein;
- (g) special damages and general damages in the sum of \$10,000,000 or such further sum as this Honourable Court may find appropriate;
- (h) punitive damages of \$5,000,000;
- (i) prejudgment interest pursuant to Section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s.128;
- (j) post judgment interest pursuant to Section 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 129;

- (k) costs of this action on a substantial indemnity basis, including any applicable taxes; and
- (l) such further and other relief as to this Honourable Court seems just.

Background

2. Buckingham was incorporated pursuant to the *Business Corporations Act*, R.S.O. 1990, c. B.16, as amended (the “*OBCA*”) on August 16, 1996 with its registered head office in Toronto, Ontario.

3. Buckingham applied for registration as a securities dealer pursuant to the *Securities Act* in December of 1996 at which time it was represented that the shareholders would be as follows:

	SHARES
Buckinghamshire Holdings Inc. (“Buckinghamshire”) is a corporation whose shares are owned by GS Investments Inc. (“GS Investments”) as to a 33.34% interest; HSS Investments Inc. (“HSS Investments”) as to a 22.22% interest; Deekay Investments Inc. (“Deekay Investments”) as to a 22.22% interest and Scriblerus Holding Corporation (“Scriblerus”) as to a 22.22% interest. GS Investments Inc. is a holding corporation of which all shares are owned by George Seidel of 148 Fisherville Road, North York, Ontario, M2R 3C2; HSS Investments Inc. is a holding corporation of which all shares are owned by Harold Seidel of 76 Mulholland Drive, Thornhill, Ontario, L4J 7T7; Deekay Investments Inc. is a holding corporation of which all shares are owned by Deborah Krofchick of 148 Fisherville Road, North York, Ontario, M2K 3C2, and Scriblerus Holding Corporation is a holding corporation of which all shares are owned by David Seidel of 3636 Bathurst Street, Suite 601, North York, Ontario, M6A 2Y5	315 common
1195154 Ontario Ltd. (“1195154”) (controlled by David Lieberman)	185 common
7928 Investments Ltd. (“7928 Investments”) (controlled by David Bromberg)	250 common
AKH Investments Ltd. (“AKH Investments”) (controlled by Rose Brinder)	250 common

4. Miller was appointed as auditor of Buckingham in 1996 and was continuously retained as auditor of Buckingham at all material times.

The Class

5. The Plaintiff Lavender became a client of Buckingham on August 9, 1999 and remained a client at the time of Buckingham's receivership in July 2001.

6. The Plaintiff Ferguson became a client of Buckingham on or about January 26, 2001 and remained a client at the time of Buckingham's receivership in July 2001.

The Claim

7. At all material times, Miller owed a duty to the Class to:

- (i) audit Buckingham's financial statements in accordance with generally accepted auditing standards ("GAAS");
- (ii) ensure the presentation of Buckingham's financial statements was in accordance with generally accepted accounting principles ("GAAP");
- (iii) issue audit reports on Buckingham's financial statements for delivery to, *inter alia*, the Ontario Securities Commission ("OSC");
- (iv) review the Form 9s which Buckingham was required to file with the OSC in accordance with the additional standards expected of an audit firm undertaking such specialized work; and
- (v) confirm to the OSC that Buckingham's Form 9s were accurate.

8. The Plaintiffs plead and rely upon the *OBCA* and, in particular, sections 149, 151, 152, 153, 155, 158 and 159. In addition the Plaintiffs plead and rely upon the regulations promulgated under the *OBCA* and, in particular, Regulation 62, sections 40, 41 and 42.

9. Miller had a duty to understand, and knew or ought to have known, the requirements of the *Securities Act* and Regulation applicable to the conduct of Buckingham's business. The Plaintiffs plead and rely upon the *Securities Act* and, in particular, sections 19, 21.10, 25, 26, 29, 31, 122 and 143. The Plaintiffs also plead and rely upon the Regulations and, in particular, Regulation 1015, Parts V and XIII as well as Forms 3, 5, 9 and 10.

10. Buckingham was required to segregate and hold in trust the cash and securities of the Class on a client by client basis at all times pursuant to the *Securities Act* and the Regulations which governed Buckingham as a registered "securities dealer".

11. Buckingham had an obligation to immediately report to the OSC any deficiency with respect to: (i) cash or securities which were required to be held in segregation by Buckingham in accordance with the requirements of the *Securities Act* and Regulations on a proper and timely basis; (ii) minimum required capital of Buckingham; (iii) minimum required insurance of Buckingham; or (iv) any material misstatements or omissions contained in any material filed with the OSC on behalf of Buckingham (the "Deficiencies").

12. Members of the Class reasonably expected that all securities deposited by Class members with Buckingham or purchased on their behalf by Buckingham would be segregated and held in trust for Class members on a client by client basis, and that all cash deposited by Class members with Buckingham or realized from the sale of their securities by Buckingham would be segregated and held in trust for the Class members on a client by client basis, all in accordance with the requirements of the *Securities Act* and Regulations. At all material times, Miller intended that the OSC would rely upon those and other representations alleged herein to have been made by Miller, and Miller knew or ought to have known that the falsity of those representations would cause the OSC to act or omit to act in such a way as to cause injury to the Class Members.

13. Members of the Class would not have opened accounts with Buckingham or continued to entrust their cash or securities with Buckingham if they or the OSC had been made aware that Buckingham:

- (a) would not or did not segregate their securities and hold them in trust separately for them in accordance with the requirements of the *Securities Act* and Regulations;
- (b) would not or did not segregate their cash and hold it in trust separately for them in accordance with the requirements of the *Securities Act* and Regulations;
- (c) would or did borrow or pledge their securities in support of Buckingham's indebtedness in contravention of the *Securities Act* and Regulations;
- (d) was in breach of any applicable regulatory requirements of the OSC;
- (e) was underinsured;
- (f) was undercapitalized; and/or
- (g) was insolvent.

14. Members of the Class reasonably expected that Buckingham and Miller would promptly inform the OSC of any and all Deficiencies.

15. Miller knew or ought to have known the facts alleged above in paragraphs 10 through 14 inclusive.

16. Miller owed the Class a continuing duty of care to diligently investigate and uncover reasonably discoverable Deficiencies as well as any misstatements or omissions in the Miller Representations.

17. Miller owed the Class a continuing duty of care to promptly advise the OSC of any Deficiencies as well as any misstatements or omissions in the Miller Representations of which Miller became aware or ought to have become aware.

18. At all material times Miller knew or ought to have known that the Class would suffer damage if Miller breached any of the duties it owed to the Class.

19. Miller repeatedly represented to Buckingham and the OSC, and the OSC reasonably relied on such representations, that: (i) Buckingham was segregating the securities of the Class in accordance with the requirements of the *Securities Act* and Regulations on a proper and timely basis; (ii) Buckingham was segregating the cash of the Class in accordance with the requirements of the *Securities Act* and Regulations on a proper and timely basis; (iii) Buckingham was maintaining appropriate levels of net free capital in accordance with the requirements of the *Securities Act* and Regulations; (iv) Buckingham was maintaining the appropriate type and amount of insurance required by the *Securities Act* and the Regulations; (v) Buckingham was fairly reporting the results of its operations in its financial statements and Form 9s in accordance with the requirements of the *Securities Act* and Regulations as well as GAAP; (vi) Buckingham was solvent; (vii) Miller was unaware of any material misstatements or omissions in any material filed with the OSC on behalf of Buckingham; and (viii) Miller had conducted appropriate testing and other auditing procedures in accordance with GAAS and other additional procedures necessary to verify that the foregoing representations were correct (collectively the “Miller Representations”).

20. More particularly, Miller filed a series of audit reports with the OSC with respect to Buckingham dated January 14, 1997, April 15, 1998, June 25, 1998, June 22, 1999, June 29, 1999, June 8, 2000 and June 29, 2000 (collectively the “Audit Reports”) as well as annual Form 9s, each of which repeated the Miller Representations and upon which the OSC reasonably relied.

21. There were material omissions and misstatements with respect to the Audit Reports, Form 9s and Miller Representations, upon which the OSC reasonably relied, including the following:

- (a) the securities of the Class were not segregated in accordance with the requirements of the *Securities Act* and Regulations;
- (b) the minimum capital required by the *Securities Act* and Regulations was not present;

- (c) the minimum insurance required by the *Securities Act* and Regulations was not maintained;
- (d) securities of the Class were pledged to third parties in contravention of the *Securities Act* and Regulations;
- (e) the Audit Reports and Form 9s were materially misstated;
- (f) there were material omissions in the Audit Reports and Form 9s;
- (g) Miller had not conducted appropriate testing and audit procedures at Buckingham and, consequently, departed from both GAAS and the higher additional standard required of an audit firm preparing Form 9s; and
- (h) Miller did not properly understand Buckingham's business, the *Securities Act* or Regulations, and, consequently, provided inaccurate and misleading opinions in the Audit Reports and Form 9s.

22. The Form 9s, and certain other documents Miller generated during the Class Period and in the course of its audit engagement, depended in whole or in part on, and incorporated, information relating to the accounts of the Class Members, including the segregation of funds. In particular, in Schedule 16 to the Form 9s, Miller reported certain of the holdings of certain of Buckingham's clients.

23. Miller repeatedly and continuously breached the duty it owed to the Class by failing to investigate, detect and report upon Deficiencies as well as the material misstatements and omissions in the Audit Reports, Form 9s and/or Miller Representations.

24. As part of its audit of Buckingham, Miller communicated directly during the Class Period with some or all of the Class Members. In addition, in the course of Miller's audit, and/or on other occasions during the Class Period, certain Class Members communicated directly to Miller that they had concerns about, inter alia, Buckingham's record keeping in regard to their accounts, and that they were concerned about other compliance issues. Miller failed to report these concerns to the OSC.

25. More particularly, as part of its audit, Miller contacted certain or all of the Class Members by letter to verify that Buckingham's internal client account records were complete and accurate. In reply to Miller's inquiries, certain of those Class Members alerted Miller to serious discrepancies between Buckingham's internal account records and the actual holdings and activity within their accounts with Buckingham. Miller ignored, or failed adequately to act upon, those warnings from those Class Members.

26. Miller failed to conduct a competent audit of Buckingham despite warnings it received from Class Members in relation to Buckingham's compliance with regulatory requirements. Had Miller conducted a competent audit, the Class Members would not have lost funds, or would have sustained smaller losses.

27. At all material times, Miller knew:

- (a) the identities and contact information of some or all of Buckingham's clients;
- (b) that some or all of the Class Members knew that Miller was Buckingham's auditor;
- (c) that its audit would directly affect the Class Members;
- (d) the holdings in some or all of the Class Members' accounts;
- (e) the segregation status of some or all of the Class Members' accounts;
- (f) the fact that the funds of the Class Members were not properly segregated; and
- (g) that the purpose of its audits was, in part, to enable Buckingham to receive and hold cash and securities owned by the Class Members.

28. The Class Members, or some of them, were aware during the Class Period that Miller was Buckingham's auditor.

29. Miller knew or ought to have known that the OSC renewed Buckingham's registrations annually and formulated its specific regulatory approach to Buckingham in reliance upon the Miller Representations and that, absent the Miller Representations, Buckingham would not have

been able to: (i) obtain a renewal of its registration from the OSC; (ii) retain access to its existing clients, including Lavender and other similarly situated members of the Class, or their investments; or (iii) gain access to new clients, including Ferguson and other similarly situated members of the Class, or their investments, and that members of the Class would reasonably rely upon the fact that Buckingham, based on the Miller Representations, was able to do so.

30. In June 2001, the OSC attended at Buckingham's offices to perform an inspection of its books and records. The OSC concluded that there had been a failure to properly segregate the securities of Buckingham's clients and that Buckingham had a capital deficiency.

31. Consequently on July 6, 2001 the OSC issued a cease trade order prohibiting the trading of securities by Buckingham and on July 26, 2001 a Receivership Order was issued by the Ontario Superior Court of Justice (Commercial List) appointing BDO Dunwoody Limited as Receiver and Manager of Buckingham.

32. The Plaintiffs state that the Class was not made aware of the failure to segregate and capital deficiency prior to the publicity surrounding the OSC's intervention and that Miller ought to have discovered and reported upon same much earlier.

33. At all material times, it was an express or implied term of the contracts between Buckingham and the members of the Class that Buckingham would comply with its obligations under the *Securities Act* and the Regulation, including the obligation to segregate and hold in trust the cash and securities of the Class on a client by client basis, and Miller knew or ought to have known of that term of the contracts between Buckingham and the members of the Class.

34. By failing to discover and report on the Deficiencies, and by making the material misstatements and omissions in the Audit Reports and Form 9s and/or by making the Miller Representations, Miller assisted and/or facilitated Buckingham's breach of the contract term referred to in the preceding paragraph. In so doing, Miller was willfully blind to, and/or recklessly disregarded, the truth.

Negligence

35. The Class alleges that:

- (a) Miller owed a duty of care to the Class to properly prepare the Audit Reports and Form 9s;
- (b) Miller was retained in whole or in part for the specific purpose of preparing the Audit Reports and Form 9s such that Miller could operate and continue to operate;
- (c) Miller knew or ought to have known that the purpose, or at a minimum one of the core purposes, of the Audit Reports and the Form 9s was to protect the interests of the Class Members and, in particular, to ensure the preservation of those of the Class Members' assets that were invested with Buckingham;
- (d) Miller did not properly prepare the Audit Reports and Form 9s;
- (e) Miller did not prepare the Audit Reports and Form 9s in accordance with the standard required of it;
- (f) Miller was negligent in the preparation of the Audit Reports and Form 9s;
- (g) but for Miller's failure to properly prepare the Audit Reports and Form 9s the Class would not have invested with Buckingham or would have ceased to do business with Buckingham;
- (h) but for Miller's failure to properly prepare the Audit Reports and Form 9s the Class would not have been harmed;
- (i) Miller knew:
 - (i) that Buckingham had clients;
 - (ii) the identity of some or all of Buckingham's clients;
 - (iii) the number or approximate number of Buckingham's clients;

- (iv) that Buckingham's ability to operate was dependant, in whole or in part, on the preparation of accurate Audit Reports and/or Form 9s; and
- (v) that the Audit Reports and Form 9s were prepared, in whole or in part, to allow Buckingham to operate and to take funds from the Class; and
- (j) Miller knew or ought to have known that should Buckingham cease to operate, the Class could lose some or all of the funds placed with Buckingham.

36. Accordingly, the Class claims that Miller negligently performed its professional duties.

Damages

37. The Plaintiffs state that if the Defendant had complied with the duties it owed to the Class to investigate, detect and report any Deficiencies as well as material misstatements and omissions in the Audit Reports, Form 9s and Miller Representations to the OSC, Buckingham and/or the Class, Buckingham would not have been able to renew its registrations, thereby:

- (i) minimizing and/or avoiding further losses on the part of the existing Buckingham clients including Lavender and other similarly situated members of the Class,
- (ii) avoiding losses on the part of the potential Buckingham clients including Ferguson and other similarly situated members of the Class; and/or
- (iii) preventing Buckingham from incurring increased liability to the Class.

38. In the alternative, if Buckingham had been able to renew its registration after disclosure of any Deficiencies or material misstatements and omissions in the Audit Reports, Form 9s and Miller Representations, Buckingham would have been more closely scrutinized in order to ensure its practices conformed with the *Securities Act* and Regulations thereby:

- (i) minimizing and/or avoiding further losses on the part of the existing Buckingham clients, including Lavender and other similarly situated members of the Class;

- (ii) avoiding losses of the part of the potential Buckingham clients, including Ferguson and other similarly situated members of the Class; and/or
- (iii) preventing Buckingham from incurring increased liability to the Class.

39. The Plaintiffs propose that this action be tried at Toronto.

November 16, 2005

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Plaintiffs

and

MILLER BERNSTEIN LLP
Defendant

Court File No: . 05-CV-300430CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**FRESH AS AMENDED STATEMENT OF
CLAIM**

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