

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE  
JUSTICE M. CULLITY

)  
)

THURSDAY, THE 20<sup>th</sup> DAY  
OF JULY, 2010

BETWEEN:

BARRY LAVENDER and HOWARD FERGUSON

Plaintiffs

- and -

MILLER BERNSTEIN LLP

Defendant

Proceeding under the *Class Proceedings Act, 1992*

**ORDER**

**THIS MOTION**, made by the Plaintiffs, Barry Lavender and Howard Ferguson, for an Order certifying the within action (the "Action") as a class proceeding pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "CPA"), was heard June 10, 2010 at Osgoode Hall, 130 Queen St. W., Toronto, Ontario.

**ON READING** the materials filed, including the consent Agreement to Settle Certification dated April 29, 2010, and on hearing the submissions of counsel for the parties to this proceeding:

1. **THIS COURT ORDERS** that, for the purposes of this Order, the following definitions apply:
  - (a) "Buckingham" means Buckingham Securities Corporation;
  - (b) "Defendant" means Miller Bernstein LLP;

- (c) "Excluded Persons" means: (i) the Defendant; (ii) any partner or employee of The Defendant, 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; and
2. **THIS COURT ORDERS** that, pursuant to section 5 of the *CPA*, this action is certified as a class proceeding.
  3. **THIS COURT ORDERS** that the nature of the claims asserted on behalf of the Class are negligence, negligent performance of professional services and knowing assistance of breach of contract. The Class seeks damages in the amount of \$15 million in connection with the claims asserted.
  4. **THIS COURT ORDERS** that the class is defined as follows:

Each and every person, wherever resident, except the Excluded Persons, who created or maintained an investment account with Buckingham at any time after March 17, 1997 through July 26, 2001 (the "Class Period") and who maintained such an investment account on July 6, 2001, including, without limiting the foregoing, those persons who filed claims in the receivership of Buckingham (the "Class").
  5. **THIS COURT ORDERS** that there will be two subclasses, defined as follows:

Each member of the Class who corresponded directly with the Defendant and, as part of such correspondence, communicated discrepancies in their respective investment accounts with Buckingham ("Subclass 1").

Each member of the Class who corresponded directly with the Defendant and, as part of such correspondence, did not indicate whether their respective investment accounts with Buckingham were correct or incorrect ("Subclass 2").

5. **THIS COURT ORDERS** that the Plaintiffs, Barry Lavender and Howard Ferguson, are appointed as Representative Plaintiffs for the Class.
6. **THIS COURT ORDERS** that the Plaintiffs may bring a motion to propose one or more representative plaintiffs for either or both subclasses and that the Defendant may bring a motion to ~~propose or~~ require one or more representative plaintiffs for either or both subclasses.
7. **THIS COURT ORDERS** that Siskinds LLP ("Class Counsel") is appointed as class counsel.
8. **THIS COURT ORDERS** that the common issues are:
- (a) Did the Securities Act, R.S.O. 1990, c. S.5 and the regulations thereunder (the "OSA") require Buckingham to segregate the cash and securities of its clients from its own cash and securities?
  - (b) Did Buckingham fail to segregate its clients' cash and securities in violation of the OSA and, if so, when did Buckingham fail to do so?
  - (c) Did the Defendant owe a duty of care to the Class and/or one or more of the subclasses and what is the nature and extent of that duty?
  - (d) If the answer to (c) is yes, did the Defendant breach that duty of care to the Class and/or one or more of the sub-classes, either negligently or recklessly?
  - (e) If the answer to (d) is yes, was the Defendant's breach of that duty a cause of damages to all of the Class and/or all of one or more of the sub-classes?
    - (1) If the answer to (e) is yes, can such damages be determined on a class wide basis in respect of the class and/or one or more of the sub-classes?
    - (2) If the answer to (e)(1) is yes, how should the damages to be payable by the Defendant be calculated?
  - (f) Does Ontario law recognize a tort of knowing assistance of breach of contract and, if so, what are the elements of that tort?

(1) If the answer to (f) is yes, have the elements of that tort been met by all of the Class and/or all of one or more of the sub-classes?

"Re Blawieffs"

9. **THIS COURT ORDERS** that the Plaintiffs provide notice to the Class, at ~~their~~ expense, in the following manner:

- former approved by the Court and in the*
- (a) Notice shall be sent to each class member known to BDO Dunwoody Limited, in its capacity as Court-Appointed Receiver and Manager of Buckingham pursuant to the Order of Madame Justice Swinton dated July 26, 2001;
  - (b) Notice shall be posted by Class Counsel on their website at the address <http://classaction.ca/content/actions/millerbernstein.asp>;
  - (c) Notice shall be provided by Class Counsel to any person who requests it;
  - (d) Notice shall be available orally by recorded message at Class Counsel's toll-free line;
  - (e) Notice shall be posted on the website at <http://www.bdo.ca/buckingham>; and
  - (f) Class Counsel shall issue a press release of the form attached as Schedule "A."


10. **THIS COURT ORDERS** that persons may opt out of the Class in writing to Class Counsel within 90 days of the completion of notice as described in paragraph 9.

11. **THIS COURT ORDERS** that no costs are payable in connection with the certification motion.

12. **THIS COURT ORDERS** that the Defendant shall file and serve a Statement of Defence on or before August 15, 2010.

13. **THIS COURT ORDERS** that the parties shall agree to a discovery plan as contemplated by Rule 29.1 of the *Rules of Civil Procedure* on or before September 6, 2010. If the parties cannot so agree, they shall make a motion to this Court for directions on or before September 10, 2010.

14. **THIS COURT ORDERS** that no other proceeding relating to this action may be commenced without leave of the Court save and except for any third party proceedings commenced by the Defendant.

  
THE HONOURABLE  
JUSTICE M. CULLITY

BARRY LAVENDER and HOWARD FERGUSON  
Plaintiffs

MILLER BERNSTEIN LLP  
and  
Defendant

Court File No: 05-cv-300430CP

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act, 1992*

**ORDER**  
**(CERTIFICATION)**

SISKINDS LLP  
Barristers & Solicitors  
680 Waterloo Street  
P.O. Box 2520  
London, ON N6A 3V8

Michael J. Peerless (LSUC #: 34127P)  
Tel: (519) 660-7866  
Fax: (519) 660-7867

A Dimitri Lascaris (LSUC#: 50074A)  
Tel: (519) 660-7844  
Fax: (519) 660-7845

Daniel E. H. Bach (LSUC#: 52087E)  
Tel: (416) 362-8334  
Fax: (519) 660-2085

Class Counsel

1350786.3