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COR#03/074

Variation Order

Excel Asset Management Inc., Excell Asset Management Inc., Excel Funding Inc., Excel International Investment Corp., Diomondmark Investments Limited, Gary Stanhiser, Del Knowlton and Linda Knowlton

And

The Loma Trust

Section 171 of the *Securities Act*, RSBC 1996, c. 418

¶ 1 On September 12, 1997 the Executive Director issued a Temporary Order and Notice of Hearing herein pursuant to section 161 of the *Securities Act*, RSBC 1996, c. 418 (the Temporary Order) which included *inter alia* the following terms:

3. NOW THEREFORE the Executive Director, considering that it would be in the public interest to do so, orders, pursuant to section 161(2) of that Act that:

3.1 the exemptions described in section 44 to 47, 74, 75, 98 or 99 of the Act do not apply to the Respondents, pursuant to section 161(1)(c) of the Act.

¶ 2 The Commission, by subsequent orders herein, extended the Temporary Order until a hearing was held and a decision rendered in respect of the allegations in the Notice of Hearing, as subsequently amended by the Executive Director on September 10, 1998.

¶ 3 On March 20, 2000, the Commission issued a decision herein (the Decision) in which it ordered, *inter alia*, that:

... under section 161(1)(c) of the *Act* that the exemptions described in sections 44 to 47, 74, 75, 98 or 99 of the Act do not apply to Excel Asset, Excell Asset, Excel Funding, Excel International, Diomondmark and the Loma Trust;

... under section 161(1)(c) of the *Act*, that the exemptions described in sections 44 to 47, 74, 75, 98 or 99 of the *Act* do not apply to Stanhiser for the rest of his life;

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(the Final Orders).

¶ 4 The Commission, in the Decision, found that:

Excell Asset Management Inc. was incorporated by Gary Stanhiser as the vehicle for an investment scheme carried out in British Columbia and California. The company actually carried on its business under the name of Excel Asset Management Inc. Client representatives of Excel Asset ... raised money from clients, which would then be pooled in accounts at Canaccord Capital Corporation in the name of Stanhiser, Knowlton or one of the Excel companies (Excel Funding Inc., Excel International Investment Corp. or Diomondmark Investments Limited). In only a handful of cases did a single client actually invest \$97,000 or more. Once sufficient funds had accumulated, one of the Excel companies, the Loma Trust or Stanhiser purchased shares of a company pursuant to a previously negotiated private placement. The shares were then allocated to the clients in the records of Excel Asset. In a very few cases the client actually took delivery of their shares.

These distributions were purported to be made under the “\$97,000” exemptions from the registration and prospectus requirements of the *Act*, which require that the aggregate acquisition cost to the purchaser is not less than \$97,000. We found that those exemptions were not available in respect of the distributions, and that all of the Respondents had carried out acts, solicitations, conduct or negotiations in furtherance of the distributions. Consequently, we found that all of the Respondents had traded in securities without being registered, contrary to section 34(1) of the *Act*, and distributed securities without filing and obtaining a receipt for a prospectus, contrary to section 61(1) of the *Act*. We also found that, through his participation in the distribution of securities through the Excel investment scheme, Stanhiser had perpetrated a fraud on persons in British Columbia, contrary to section 57 of the *Act*.

At the hearing on September 8, Commission staff provided us with a report prepared by Arthur Anderson respecting the financial activities of Excel Asset. Excel raised \$14,173,758 from its clients. Those clients got back cash of \$1,591,508 and shares

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valued (at cost) at \$2,164,243, which meant that Excel raised a net amount of \$10,418,007.

Excel Asset paid a total of \$1,069,033 of those funds, net of cash receipts, to the various individuals associated with Excel Asset.

...

Excel Asset orchestrated 22 private placements totalling \$12,804,500. Clients of Excel are still owed shares valued, at cost, at \$8,802,194. The majority of these shares are held by a firm of trustees in the Channel Islands and it is unclear at this time who has control over those shares. Their value has declined greatly from the time the private placements were made and it is unclear whether the clients will ever be able to get back the remainder of their money or their shares.

...

Excel Asset (and Excell Asset), Excel Funding, Excel International and Diomondmark, as well as the Loma Trust, were the primary vehicles through which the distributions were made. It was through their accounts at Canaccord that the clients' money was funneled to the companies issuing the shares and the newly issued shares funneled back, in unfortunately very few instances, to the clients. It was through these entities that Stanhiser was able to carry out the fraud that we have found he committed.

¶ 5 Counsel for the Plaintiffs (Class Counsel) and counsel for the Defendants John Brian Johnston and Canaccord Capital Corporation (Canaccord), in civil proceedings styled *William Gerber and E. Jon Oksenholt v. John Brian Johnston, Canaccord Capital Corporation, and Gary Stanhiser*, commenced in the Supreme Court of British Columbia, Vancouver Registry, under Action #S003549 (the Class Action) represent that:

1. the Class Action has, by way of court order, been certified on behalf of:
 - (a) all persons residing both inside and outside of British Columbia, who directly or indirectly provided funds to Canaccord Capital Corporation, for the purpose of advancing those funds to one of [sic] more of the defendant Gary Stanhiser, Excel Asset Management Ltd. or one or more of the "Offshore Corporations" (as that term is defined in the Further Amended Statement of Claim in this matter) (the Class);

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- (b) the Class as presently constituted (after voluntary opt-outs by British Columbia Residents and voluntary opt-ins by non-residents of British Columbia) is estimated, based on records of Excel Asset and its agents, to include persons who, in aggregate, appear to be owed approximately \$8,625,869 of the total \$8,805,362 (or 98.0%) in cash and shares (valued at cost) apparently owed to Excel investors in connection with the Excel investment scheme;
- (c) the Representative Plaintiffs have, by way of a Second Further Amended Statement of Claim filed in the Class Action, asserted *inter alia* a claim on behalf of the Class to a constructive trust (the Constructive Trust Claim) in respect of assets held in the name of, or to the credit of the “Offshore Corporations” or their nominees (the Excel Assets);
- (d) the Class will be applying to have the Constructive Trust Claim certified as a common issue in the Class Action;
- (e) certain of the Excel Assets (the Available Excel Assets), having a fluctuating market value, recently estimated at approximately \$1,000,000, are apparently in the possession or control of certain domestic and foreign custodians, including:
 - (i) Britannia Corporate Management Ltd. and Britannia Securities Ltd., of the Cayman Islands, B.W.I.;
 - (ii) Lovell Jackson Mathews, of Jersey;
 - (iii) Stephen E. Dadson of British Columbia; and,
 - (iv) Canaccord of British Columbia;(collectively the Custodians)
- (f) the Available Excel Assets consist primarily but not exclusively of shares issued to the Offshore companies, in connection with (some of) the 22 private placements that formed a part of the Excel investment scheme;
- (g) the Representative Plaintiffs, on behalf of the Class, have entered into a conditional pre-trial settlement of the Class Action with John Brian Johnston (Johnston) and Canaccord (Canaccord), pursuant to the terms of which Canaccord will pay a total of \$3.5 million for the benefit of the Class, subject, *inter alia*, to the Class’s recovery and transfer to

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Canaccord of the Available Excel Assets and court approval of the settlement;

- (h) provided the Available Excel Assets are brought within British Columbia, the Representative Plaintiffs, on behalf of the Class, intend to apply for summary judgment on the Constructive Trust Claim and seek consequential relief appointing Class Counsel, or their nominees, as trustees of the Available Excel Assets on behalf of the Class, and effecting the transfer of legal title to the Available Excel Assets into the name of Class Counsel as trustees for the Class, such that the Available Excel Assets may be transferred to Canaccord by Class Counsel as trustees for the Class upon Court approval of the Settlement; and
- (i) the Custodians have each advised that they would be prepared to deliver possession and/or control of the Available Excel Assets to counsel in British Columbia and to provide such counsel with instructions to deal with the Available Excel Assets as the Custodians or their counsel may be directed by order of the Supreme Court of British Columbia (a Court Order), provided *inter alia* that:
 - (i) the Commission vary the Final Orders to the extent necessary to allow the Custodians to deliver possession and/or control of the Available Excel Assets to counsel in British Columbia and allow the Custodians and their counsel to deliver possession and/or control of the Available Excel Assets as directed by a Court Order;
 - (ii) any Court Order directing the Custodians or their counsel to deliver up possession and/or control of the Available Excel Assets to any one other than the Custodians also provide that the Custodians and their counsel shall, upon delivery in compliance with the Court Order, be discharged of liability in respect of the Available Excel Assets delivered and of any responsibility for any loss in value to the Available Excel Assets from the date they were received by the Custodians until the date of delivery.

¶ 6 Commission Staff advise that it would be in the public interest to have the Available Excel Assets delivered to counsel in British Columbia and dealt with by order of the Supreme Court of British Columbia.

¶ 7 The Commission considers that it would not be prejudicial to the public interest; THE COMMISSION ORDERS, pursuant to sections 171 of the Act, that:

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1. on the condition that the Custodians forthwith deliver possession and/or control of applicable Available Excel Assets to their counsel in British Columbia, the Final Orders be and are hereby varied to the extent necessary to permit such delivery;
2. on the condition that the Supreme Court of British Columbia makes an order directing the Custodians or their counsel to deliver possession and/or control of the Available Excel Assets to Church & Company as trustees for the Class, the Final Orders be and are hereby varied to the extent necessary to permit such delivery; and
3. on the condition that the Supreme Court of British Columbia makes an order which has the effect of transferring title to the Available Excel Assets to Church & Company as trustees for the Class, the Final Orders be and are hereby varied to the extent necessary to permit such transfer of title.

¶ 8 April 29, 2003

Adrienne Salvail-Lopez
Vice Chair