

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of:

Excellent USA, Inc.
141 W. Jackson Blvd., Suite 3706
Chicago, Illinois 60604-3201, and

John F. Gallwas
801 S. Plymouth Ct. #L
Chicago, Illinois 60605,

Respondents.

SD 01-01

CFTC Docket No.: 01-20

COMPLAINT, NOTICE OF INTENT TO
CONDITION, SUSPEND, REVOKE OR
RESTRICT REGISTRATION AND NOTICE
OF HEARING PURSUANT TO SECTIONS
6(c), 6(d) and 8a(4) OF THE COMMODITY
EXCHANGE ACT, AS AMENDED

The Commodity Futures Trading Commission (“Commission”) has received evidence from its staff which tends to show, and the Commission’s Division of Enforcement (“Division”) alleges, that:

I.

SUMMARY

1. Respondents Excellent USA Inc. (“Excellent USA”) and its managing director, John F. Gallwas, failed to supervise the handling of the customer omnibus accounts of Excellent, Inc. (“Excellent”) and its spin-off, Core Creation, Inc. (“Core”). Excellent and Core were Japanese commodity brokers that used boiler room tactics to cheat and defraud Japanese retail customers. From 1987 to 1998, Excellent and, later, Core solicited Japanese investors to place orders to trade individual commodity futures contracts. However, Excellent and Core did not transmit those orders as individual orders. Instead, Excellent and Core combined different

customer and house orders into spread orders before relaying them to the U.S. for execution through omnibus accounts. Because Excellent and Core placed only spread orders, they had to send only minimal amounts of money to post as margin with the U.S. futures commission merchants (“FCMs”) carrying the positions. Excellent and Core employees engaged in what the Japanese criminal authorities described as “customer-killing” trading techniques designed to maximize commissions and reported trading losses to their customers’ accounts. The principals of Core were subsequently indicted and convicted in connection with these practices.

2. Excellent established Excellent USA as a registered non-clearing FCM to handle its U.S. futures business. Between 1994 and January 1998, Excellent USA introduced the Excellent and Core foreign omnibus accounts on a disclosed basis to LFG, a registered FCM. The Excellent and Core omnibus accounts represented almost all of Excellent USA’s business. Excellent USA failed to have in place an adequate supervisory structure to monitor the trading in the Excellent and Core omnibus accounts and as a result missed warning signs of trading irregularities in the Excellent and Core omnibus accounts. By failing to adequately supervise in violation of Commission Regulation 166.3, Excellent USA failed to provide meaningful customer protection.

3. John Gallwas was the managing director of Excellent USA. He was responsible for overseeing the day-to-day operation of Excellent USA. He controlled Excellent USA and did not establish a systematic and meaningful system for supervising the trading in the Excellent and Core customer omnibus accounts, in violation of Commission Regulation 166.3.

II.

RESPONDENTS

4. Excellent USA, Inc. is an Illinois corporation that maintained its principal place of business at 141 W. Jackson Blvd., Suite 3706, Chicago, Illinois 60604-3201. Excellent USA has been registered with the Commission as an FCM since July 13, 1990, pursuant to Sections 4d and 4f of the Act. Excellent and Toshio Yokoyama, a Japanese citizen who was the managing director and chief executive officer of Excellent, are the principals of Excellent USA.

5. John F. Gallwas resides at 801 S. Plymouth Ct. #L, Chicago, Illinois 60605. He has been registered with the Commission as an associated person (“AP”) pursuant to Section 4k(1) of the Act since at least 1982. During the relevant period of time, Gallwas was registered as an AP of Excellent USA and was the managing director of Excellent USA.

III.

FACTS

Failure to Supervise

6. In October 1987, Toshio Yokoyama and two others formed Excellent as a Japanese corporation to act as a brokerage firm offering trading in U.S. commodities markets. Excellent solicited Japanese investors to place orders to buy or sell outright positions in futures contracts traded on the U.S. markets. Excellent collected margins from its customers for outright trades, representing to them that Excellent had to send the full margin to the U.S. However, Excellent combined its customers' orders into spreads before relaying them to the U.S. for execution. Because Excellent placed only spread orders, it had to send only minimal amounts of money to the U.S. FCM to margin the trades. Excellent kept the balance in Japan and used the funds to pay the firm's operating expenses and to support Yokoyama's extravagant lifestyle.

7. Excellent employees engaged in trading techniques to maximize the commissions and trading losses to its customers' accounts, while minimizing the money Excellent had to post with the U.S. FCMs to margin the commodity futures positions. Excellent traded exclusively in spreads so that it could significantly reduce the amount of margin funds deposited with the U.S. FCMs. It then intended that its customers incur commissions and losses equal to their margin deposit so that Excellent would not have to return funds to its investors.

8. Each day, Excellent staff compiled the individual customer orders into spread orders before transmitting them to the U.S. for execution. Excellent sought to maintain a balance between the long and short positions in each futures contract. Excellent's sales managers instructed their salesmen to solicit the type of orders Excellent needed to balance the long and short positions from retail customers. At other times, the sales managers encouraged the sales staff to avoid discussing particular delivery months, so that Excellent could assign the customers long or short positions in the contract months Excellent needed to balance its spread orders. When unable to obtain the necessary orders from its retail customers, Excellent took trades into accounts its principals owned through related corporations in order to maintain that balance.

9. On or about November 1987, Excellent Inc. opened a customer omnibus account at a U.S. FCM. Gallwas was the AP who brought the Excellent account to the FCM.

10. In July 1990, Excellent established Excellent USA as a non-clearing FCM to process its orders through an omnibus account. Excellent USA also was responsible for ensuring that Excellent's and Core's trading was in compliance with U.S. laws and regulations.

11. Gallwas joined Excellent USA as a managing director in or about April 1991 to oversee the operation, to develop additional business in Asia and to provide training programs to

familiarize Excellent's and Core's staff with the U.S. markets. Gallwas participated in the day-to-day operation of the firm and shared in the income generated by Excellent USA.

12. In March 1994, some of the principals of Excellent, including Toshio Yokoyama, formed Core to conduct business in the same manner as Excellent.

13. Between March 1994 and January 1998, Excellent and Core placed their orders by faxing an order sheet to Excellent USA overnight. Most of the Excellent and Core orders instructed Excellent USA to place orders to buy or sell spreads in the Chicago Board of Trade ("CBOT") grain contracts. Both Excellent and Core regularly entered various spread orders, including simultaneously entered orders to buy or sell the same spread that resulted in their omnibus accounts holding almost equal and offsetting positions in each futures month. Excellent USA accepted these orders from Excellent and Core without seeking any clarification of the customers' intent and transmitted all of Excellent's and Core's orders for the day to the LFG floor desk at the CBOT before the market opened.

14. Throughout the entire time that Excellent USA introduced the Excellent and Core accounts to LFG, Excellent USA received a daily equity run the next day showing that the omnibus accounts held almost equal and offsetting open positions in each futures month. Excellent USA staff reviewed the daily equity run every day for accuracy. Nevertheless, it never questioned Excellent or Core about the almost equal and offsetting open positions in each futures month in the omnibus accounts even though the trading had the appearance of wash sales.

15. Excellent USA supervised Excellent and Core by periodically requesting that they complete a compliance questionnaire. One set of questionnaires Excellent USA sent to Excellent and Core asked if the company used separate order tickets for customer spread orders. Both companies responded "No." However, the daily order sheets faxed by Excellent and Core

assigned different order numbers to each spread leg, thus indicating that each leg could be for a different customer. Excellent USA and Gallwas failed to reconcile this apparent inconsistency.

16. Excellent USA and Gallwas ignored the warning signs that Excellent and Core were engaged in customer fraud. For instance, in March 1997, Yokoyama told Gallwas that the customer complaints at Excellent were worse than he had expected and that he intended to “wind down” Excellent and “wind up” Core. By this time, Gallwas knew that Excellent was under investigation by Japanese regulators. Nevertheless, Gallwas and Excellent USA failed to question Excellent Inc.’s July 1997 compliance questionnaire response that it only had two customer complaints.

IV.

STATUTORY DISQUALIFICATION OF EXCELLENT USA

17. On February 9, 1999, the Tokyo District Public Prosecutor’s Office charged Yokoyama and six others with cheating and defrauding Japanese investors. Specifically, the indictment states that the defendants “took advantage of ... customers’ lack of knowledge [of] futures trading, and in reality intended to set up false [trades] against the [trades] ordered by customers, spen[t] the money they received from customers as [margin] money as they like[d] instead of investing in the market, [advised their customers to engage in] repeat selling and purchasing to the limit of [margin] money by using fluctuation[s] of [the] market, deliberately extend[ed] trading causing customers to lose money through their selling and purchasing, charge[d] them ... commission, cause[d] damage to customers through these so-called customer killing methods, and [did]not ... return [margin] money to them.”

18. Yokoyama pleaded guilty to the charges. On July 1, 1999, the Tokyo District Court First Criminal Division entered judgment against Yokoyama and his co-defendants. The Judge sentenced Yokoyama to seven years incarceration with credit for 80 days time served.

19. Yokoyama appealed his sentence. On February 29, 2000, the Tokyo High Court Second Criminal Division upheld the ruling of the lower court and found that Yokoyama and his co-defendants had “...in accordance with a manual plotted in advance, ...selected customers considered to have poor knowledge [of] overseas futures trading; provide[d] them with false information ...[and] invited them to get into trading [by] telling lies to them that [margin] money will be sent to overseas market while in reality customers’ [margin] money [was] not sent directly to overseas market because defendants signed on so-called omnibus account agreement and dealt with overseas market by spread order method, had them repeat unnecessary trading several times; deceived them to deposit [margin] money and took the money.” The appellate court found that the conduct was premeditated and systematic and involved total damages of 245.37 million yen,¹ which the court characterized as “huge.” The court found that Yokoyama had decided on the methods and directed the others involved in the criminal enterprise. Finally, the court noted that Yokoyama had “spent deceitfully obtained consignment guarantee money like water for personal pleasure.”

20. Since Yokoyama’s offense was punishable by more than one year imprisonment, it would constitute a felony under Federal law if he had committed the offense here in the United States.

¹ Using the exchange rate as of February 29, 2000, the date of the appellate court’s decision, 245.37 million yen is equivalent to \$2.2 million.

V.

VIOLATIONS OF THE ACT AND REGULATIONS

COUNT ONE

**VIOLATIONS OF SECTION 166.3
OF THE COMMISSION'S REGULATIONS:
FAILURE TO SUPERVISE**

21. The allegations contained in paragraphs 1 through 20 are realleged and incorporated herein by reference.

22. From at least in or about July 1996 to January 1998, Excellent USA and Gallwas have had supervisory duties relating to their respective business as registrants.

23. From at least in or about July 1996 to January 1998, Excellent USA and Gallwas failed to design, implement, monitor and follow a program of supervision and compliance designed to protect customers and to deter and detect violations of the Act or the Commission Regulations in relation to the trading in foreign omnibus accounts.

24. For all the foregoing reasons, Excellent USA and Gallwas failed to supervise diligently the handling by their partners, officers, employees or agents (or persons occupying a similar status or performing a similar function) of the Excellent Inc. and Core Creation Inc. foreign omnibus accounts that they carried, operated, advised or introduced, in violation of Commission Regulation 166.3, 17 C.F.R. § 166.3 (2001).

25. John Gallwas directly or indirectly controlled Excellent USA, and did not act in good faith or knowingly induced, directly or indirectly, the violations of Excellent USA described in paragraph 24 and thereby, pursuant to § 13(b) of the Act, 7 U.S.C. § 13c(b), violated Regulation 166.3.

26. Each individual failure to supervise by Excellent USA and Gallwas constitutes a separate violation of Regulation 166.3.

VI.

STATUTORY DISQUALIFICATION

COUNT TWO

STATUTORY DISQUALIFICATION OF EXCELLENT USA PURSUANT TO SECTION 8a(3)(N) OF THE ACT: CONVICTION OF PRINCIPAL

27. The allegations contained in paragraphs 1 through 20 are realleged and incorporated herein by reference.

28. Yokoyama would be subject to a statutory disqualification based upon his criminal conviction in Japan under Section 8(a)(3)(H) of the Act, 7 U.S.C. § 12a(3)(H). Since he is a principal of Excellent USA, this provides the basis for the statutory disqualification of Excellent USA.

29. The facts set forth above in Paragraphs 4 and 17 through 20 and 28 constitute a cause for statutory disqualification of Excellent USA from registration under Section 8a(3)(N) of the Act, 7 U.S.C. § 12a(3)(N) (1994), which provides a basis by which Excellent USA's registration may be conditioned, suspended, revoked or restricted under Section 8a(4) of the Act, 7 U.S.C. § 12a(4) (1994).

VII.

By reason of the foregoing allegations, the Commission deems it necessary and appropriate, pursuant to its responsibilities under the Act, to institute public administrative proceedings to determine whether the allegations set forth in Parts I-III and V above are true and, if so, whether an appropriate order should be entered in accordance with Sections 6(c) and 6(d) of the Act, 7 U.S.C. §§ 9 and 15:

- a) Directing that Respondents cease and desist from violating the provisions of the Regulations set forth in Parts I-IV of the Complaint;
- b) Restricting, suspending or revoking Respondents' registrations;
- c) Prohibiting Respondents from trading on or subject to the rules of any registered entity and requiring all registered entities to refuse Respondents all privileges thereon; and
- d) Assessing against each Respondent a civil monetary penalty in an amount of not more than the higher of \$100,000 or triple the monetary gain to each Respondent for each violation of the Regulations occurring on or before November 27, 1996, and assessing against each Respondent a civil monetary penalty in an amount of not more than the higher of \$110,000 or triple the monetary gain to each Respondent for each violation of the Regulations occurring after November 27, 1996.

VIII.

WHEREFORE, IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the allegations set forth in Sections I-III and V above be held before an Administrative Law Judge, in accordance with the Commission's Rules of Practice under the Act (the "Commission's Rules"), 17 C.F.R. §§ 10.1 et seq., at a time and place to be set as provided by Section 10.61 of the Commission's Rules, 17 C.F.R. § 10.61, and that all post-hearing procedures shall be conducted pursuant to Sections 10.81 through 10.107 of the Commission's Rules, 17 C.F.R. §§ 10.81-10.107.

IT IS FURTHER ORDERED that each Respondent shall file an Answer to the allegations contained in this Complaint within twenty (20) days after service, pursuant to Section 10.23 of the Commission's Rules, 17 C.F.R. § 10.23, such answer must be filed with the Hearing Clerk, Office of Hearings and Appeals, Commodity Futures Trading Commission, Three Lafayette Center, 1155 21st St., N.W., Washington, D.C. 20581 and two copies of such Answer and of any documents filed in these proceedings shall be served upon Scott R. Williamson, Acting Regional Counsel, and Rosemary Hollinger, Senior Trial Attorney, Division of Enforcement, Commodity Futures Trading Commission, Suite 1600-N, 300 S. Riverside Plaza, Chicago, Illinois 60606 or upon such other counsel as may be designated by the Division. If any Respondent fails to file the required Answer, or fails to appear at a hearing after being duly served, such Respondent shall be deemed in default and the proceedings may be determined against such Respondent upon consideration of the Complaint, the allegations of which shall be deemed to be true.

IX.

Moreover, pursuant to Section 3.60 of the Regulations, 17 C.F.R. § 3.60 (2001), Registrant Excellent USA is hereby notified that a public proceeding shall be conducted in accordance with the provisions of Section 3.60 of the Regulations on the question of whether Registrant Excellent USA is subject to a statutory disqualification from registration under Section 8a(4) of the Act, as set forth in Section IV AND VI above, and if so, whether the registration of the Registrant, Excellent USA, as a futures commission merchant should be conditioned, suspended, revoked or restricted. Such proceeding shall be held before an Administrative Law Judge in accordance with Section 3.60, and all post-hearing procedures shall be conducted pursuant to Section 3.60(i)-(j).

In accordance with the provisions of Section 3.60(a)(3) of the Regulations, Registrant Excellent USA is entitled to file a response challenging the evidentiary basis of the statutory disqualification or to show cause why, notwithstanding the accuracy of the allegations, its registration should not be conditioned, suspended, revoked or restricted. Such response must be filed with the Hearing Clerk, Office of Hearings and Appeals, Commodity Futures Trading Commission, Three Lafayette Center, 1155 21st St., N.W., Washington, D.C. 20581 and served upon Scott R. Williamson, Acting Regional Counsel, and Rosemary Hollinger, Senior Trial Attorney, Division of Enforcement, Commodity Futures Trading Commission, 300 South Riverside Plaza, Suite 1600N, Chicago, Illinois 60606, within thirty (30) days after service of this Notice upon the Registrant in accordance with the provisions of Section 3.60(b) of the Regulations. If Registrant fails to file a timely response to this Notice, the allegations set forth herein shall be deemed to be true and the presiding officer may issue an Order of Default in accordance with the provisions of Section 3.60(a)(4) of the Regulations.

IT IS FURTHER ORDERED that this Complaint, Notice of Intent to Condition, Suspend, Revoke or Restrict Registration and Notice of Hearing shall be served upon each Respondent personally or by registered or certified mail, pursuant to Section 10.22 of the Commission's Rules, 17 C.F.R. § 10.22.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecutorial functions in this or any factually related proceedings will be permitted to participate or advise the decision in this matter except as a witness or counsel in a proceeding held pursuant to notice.

By the Commission.

Catherine D. Dixon
Assistant Secretary to the Commission
Commodity Futures Trading Commission

Date: August 20, 2001