



U.S. COMMODITY FUTURES TRADING COMMISSION

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Office of Proceedings

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In the Matter of:

GROWTH CAPITAL MANAGEMENT LLC,
Registrant.

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CFTC Docket No. SD 12-06

INITIAL DECISION ON DEFAULT

Before: Philip V. McGuire,
Commodity Futures Trading Commission

Appearances: Alison B. Wilson, Esq., Chief Trial Attorney, and
Boaz Coreen, Esq., Trial Attorney,
CFTC Division of Enforcement
Washington, D.C.

Background

By motion filed December 13, 2012, the Commission's Division of Enforcement ("Division") has moved for entry of a default judgment against Growth Capital Management LLC ("GCM"), pursuant to Commission rules 3.60(g) and 10.93, 17 C.F.R. §§ 3.60(g) and 10.93 (2012), based on the failure of GCM to answer or otherwise to appear or respond to the Notice of Intent to Revoke the Registration of Growth Capital Management LLC ("Notice"), issued by the Commission and filed by the Division on August 24, 2012. On August 27, 2012, the Commission's Office of Proceedings served the Notice on GCM at its last known address in Rockwall, Texas. On October 11, 2012 the Commission's Office of Proceedings re-served the

Notice on GCM at the Dallas, Texas address that GCM had provided the National Futures Association (“NFA”) for any communications from the Commission.¹ Thus, GCM was properly served pursuant to CFTC rule 3.50.² GCM defaulted by failing to respond to either Notice, and has not responded to the Division’s motion. Accordingly, this matter is ripe for entry of a default judgment.

As a result of its default, GCM has waived a hearing on all of the issues and is precluded from introducing evidence of mitigation and rehabilitation necessary to overcome the presumption of unfitness for registration.³ In addition, the allegations in the Notice, as supplemented by the proposed findings and conclusions in the Division’s motion, are deemed true and conclusive for purposes of finding that GCM is statutorily disqualified from registration under Section 8a(2)(C) of the Commodity Exchange Act (“Act”) as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. 110-246, Title XII (the CFTC Reauthorization Act of 2008, (“CRA”)) and by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, Title VII (the Wall Street Transparency and Accountability Act of 2010 (“Dodd-Frank Act”)), §§ 701-774 (enacted July 16, 2010), to be codified at 7 U.S.C. § 12a(2)(C). Thus, as set out below, the Division’s motion has been granted, GCM has been

¹ See Jung Affidavit and Certification, Exhibit 1, Division’s December 13th motion.

² Pursuant to CFTC rule 3.30(a), 17 C.F.R. § 3.30(a) (2012), the address of each registrant as submitted on its application for registration or as submitted on the biographical supplement shall be deemed to be the address for delivery to the registrant for any communications from the Commission, including any summons, complaint, notice and other written documents or correspondence, unless the registrant specifies another address for this purpose. CFTC rule 3.30(b), 17 C.F.R. § 3.30(b) (2012), provides that each registrant, while registered and for two years after the termination of registration, must notify the NFA of any change of address, and that failure to do so may result in an order of default in any Commission or NFA proceedings. Moreover, pursuant to CFTC rule 3.50, 17 C.F.R. § 3.50 (2012), for purposes of an action for the denial, suspension or revocation of registration, service upon a registrant will be sufficient if mailed by registered mail or certified mail return receipt requested properly addressed to the registrant at the address shown on his application or any amendment thereto, and will be complete upon mailing.

³ The presumption of unfitness for registration under Section 8a(2) of the Act rests on the common-sense inference that once an individual or firm has undertaken serious wrongdoing – as it has been amply demonstrated that GCM has done – a substantial risk exists that the individual or firm will undertake similar wrongdoing in the future. See *In re Akar*, Comm. Fut. L. Rep. ¶ 22, 297 (CFTC February 24, 1986).

found to be statutorily disqualified from registration, and GCM's registration as a CTA and CPO has been revoked.

Findings of Fact

1. Growth Capital Management LLC, is a Texas limited liability company whose listed address with the Commission is at 8235 Douglas Ave, Dallas, Texas, and whose last known address and principal place of business was 6218 New Forest Drive, Rockwall, Texas. GCM is not a financial institution, registered broker dealer (or their associated person), insurance company, bank holding company, or investment bank holding company. GCM has been registered with the Commission as a commodity trading advisor ("CTA") since September 2008, and as a commodity pool operator ("CPO") since October 2008, pursuant to Section 4m of the Act, as amended by the Dodd- Frank Act, to be codified at 7 U.S.C. § 6m.

2. On July 27, 2010, the Commission filed a civil injunctive complaint in the U.S. District Court for the Northern District of Texas against GCM and other individual defendants ("complaint").⁴ The Commission's complaint alleged, *inter alia*, that from at least June 2008 through approximately July 2010 GCM had fraudulently solicited over \$30 million from approximately ninety-three customers to open individual managed accounts and trade on-exchange commodity futures and off-exchange foreign currency ("forex") on a managed or leveraged basis pursuant to an electronic trading software program and powers of attorney granted to GCM and other defendants. The Commission further alleged that GCM and the other defendants had made material false statements to prospective customers by: one, falsely claiming that Robert Mihailovich, Sr., a principal of GCM, had expertise and a successful track record trading commodity futures and forex; two, misrepresenting and failing to disclose fully

⁴ *CFTC v. Growth Capital Management LLC, Robert Mihailovich, Sr., and Robert Mihailovich, Jr.*, Case No. 3:10-cv-1473-B (N.D. TX July 2010)

the risk of loss in trading commodity futures and forex; three, falsely claiming that GCM and Robert Mihailovich, Sr. never had a losing trade, when in fact GCM, through Robert Mihailovich Sr., had lost approximately \$2.2 million dollars trading in forex and S&P e-mini futures while accumulating \$388,000 in performance and management fees between the months of June 2008 and November 2009; four, falsely claiming that only a certain percentage of a customer's account would be at risk at any one time; five, misrepresenting that the trading being performed by the electronic trading system would be transparent to the customers at all times; and six, misrepresenting and failing to disclose Robert Mihailovich, Sr.'s prior criminal conviction for mail fraud and his related prison time. According to the complaint, the fraudulent acts of GCM and its agents and principals were in violation of Sections 4b(a)(1)(A) and (C), and 4b(a)(2)(A) and (C), of the Act, as amended by the CRA, to be codified at 7 U.S.C. §§ 6b(a)(1) (A) and (C) and 6b(a)(2)(A) and(C); and Section 4o(1) of the Act, 7 U.S.C. § 6o(1) (2006).

3. The Commission also alleged that GCM, through Robert Mihailovich, Jr., in required filings with the Commission, through the NFA, had failed to disclose that Robert Mihailovich, Sr., an unregistered individual, was a principal of GCM, and thereby GCM, aided and abetted by Robert Mihailovich, Jr., had filed false reports to the Commission in violation of Sections 6(c) and 9(a)(3) of the Act, 7 U.S.C. §§ 9(c) and 13(a)(3) (2006), and Commission rule 3.10(a)(2), 17 C.F.R. § 3.10(a)(2) (2010).

4. Finally, the Commission alleged that in soliciting prospective GCM managed account customers for commodity futures trading, or supervising the solicitation activities of others, Robert Mihailovich, Sr. was required to be registered as an associated person of GCM, but that GCM permitted Robert Mihailovich, Sr. to engage in activities which required him to be so

registered while GCM knew or should have known that Robert Mihailovich, Sr. was not so registered, and thus GCM had violated Section 4k(3) of the Act, 7 U.S.C. § 6k(3) (2006).

5. On June 26, 2011, pursuant to a previous order holding GCM in default judgment, the Honorable Jane J. Boyle of the U.S. District Court for the Northern District of Texas, Dallas Division ("Court") entered a permanent injunction against GCM. The permanent injunction enjoined GCM from further violations of Sections 4b(a)(1)(A) and (C), and 4b(a)(2)(A) and (C) of the Act, as amended by the CRA, to be codified at 7 U.S.C. §§ 6b(a)(1)(A) and (C), and 6b(a)(2)(A) and (C); and Sections 4o(1), 4k(3), and 4m(1) of the Act, 7 U.S.C. §§ 6(o)(1), 6k(3), and 6m(1) (2006). The Court also permanently enjoined GCM from: trading on or subject to the rules of a registered entity; entering into any transactions involving commodity futures, options on commodity futures, commodity options and/or forex contracts for which it has a direct or indirect interest; soliciting, receiving or accepting customer funds in connection with the purchase or sale of futures contracts or options on future contracts; engaging, controlling, or directing the trading of commodity futures or options on futures for or on behalf of any other person or entity; applying for or claiming exemption from registration with the Commission in any capacity; and from engaging in any activity requiring such registration or exemption from registration, except as provided for in Commission rule 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2011). Finally, the Court also ordered GCM to pay \$3,475,112 in restitution, to disgorge \$398,006 in ill-gotten gains, and to pay a \$5,440,000 civil monetary penalty.

Conclusions of Law

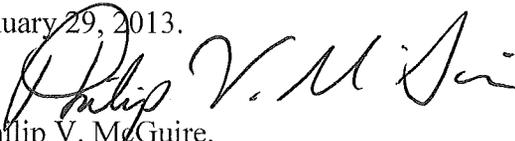
Section 8a(2)(C) of the Act, as amended by the CRA and the Dodd-Frank Act, to be codified at 7 U.S.C. § 12a(2)(C), in relevant part, authorizes the Commission to revoke the registration of any person "if such person is permanently or temporarily enjoined by order,

judgment, or decree of any court of competent jurisdiction . . . including an order entered pursuant to an agreement of settlement to which the Commission ... is a party, from ... (i) acting as a futures commission merchant, introducing broker, floor broker, floor trader, commodity trading advisor, commodity pool operator, [or] associated person of any registrant under this Act ... or (ii) engaging in or continuing any activity when such activity involves ... fraud" Cause exists for statutory disqualification of GCM pursuant to Section 8a(2)(C) of the Act, because the United States District Court for the Northern District of Texas (the "Court") is a court of competent jurisdiction, and by order dated June 26, 2012, the Court entered an Order of Permanent Injunction and other relief against GCM ("Order".) Among other things, this Order permanently enjoined GCM from registering with the Commission or acting as a principal or agent of a registrant, and from committing any further fraud in violation of the Commodity Exchange Act. The Order therefore demonstrates that GCM is unfit to act as a Commission registrant, and constitutes a valid basis for revoking GCM's registration pursuant to Section 8a(2)(C) of the Act.

ORDER

Growth Capital Management LLC is statutorily disqualified from registration under Section 8a(2)(C) of the Act, and is unfit for registration. Accordingly, the Division's motion for entry of a default judgment is hereby granted, and the registration of Growth Capital Management LLC is hereby revoked.

Dated January 29, 2013.


Phillip V. McGuire,
Judgment Officer