

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U.S. COMMODITY FUTURES TRADING COMMISSION,)
)
Plaintiff,)
) CASE NO. 3:10-CV-1473-B
v.)
)
)
GROWTH CAPITAL MANAGEMENT LLC, ROBERT MIHAJOVICH, SR. AND ROBERT MIHAJOVICH, JR.,) JUDGE JANE J. BOYLE
)
Defendants.)
)
)
)

ORDER GRANTING
PERMANENT INJUNCTION, CIVIL
PENALTIES AND OTHER EQUITABLE RELIEF AGAINST DEFENDANTS ROBERT
MIHAJOVICH, SR. AND GROWTH CAPITAL MANAGEMENT LLC

This matter is before the Court on Plaintiff U.S. Commodity Futures Trading Commission's ("CFTC" or "Commission") Motion for Monetary Sanctions and Other Equitable Remedies Against Defendants Mihailovich, Sr. ("Mihailovich, Sr.") and Growth Capital Management LLC ("GCM"), (collectively "Defendants"). On January 17, 2012, the CFTC served Mihailovich, Sr. with the foregoing motion via U. S. Mail sent to the Federal Correctional Institution in Seagoville, Texas. See Docket Entry ("D.E.") #174. For the reasons stated below and good cause appearing, it is hereby ORDERED that Defendants Mihailovich, Sr. and GCM

shall be subject to a permanent injunction, shall pay restitution, disgorge ill-gotten gains, and pay a civil monetary penalty as set forth below.

**I.
SUMMARY**

On July 27, 2010, the CFTC filed a complaint and accompanying documents against three defendants, GCM, Mihailovich, Sr., and Robert Mihailovich, Jr. (“Mihailovich, Jr.”). Plaintiff CFTC has alleged that GCM and Mihailovich, Sr. fraudulently solicited over \$30 million from approximately 93 customers to open individual managed accounts and trade on-exchange commodity futures and off-exchange foreign currency (“forex”) on a managed or leveraged basis. Docket Entry “D.E.” # 1. Additionally, Plaintiff CFTC has alleged that: Mihailovich Jr. made false statements and omissions in GCM’s required regulatory filings to the National Futures Association (“NFA”); Mihailovich, Sr. operated improperly as an unregistered Associated Person (“AP”) and Commodity Trading Advisor (“CTA”); and, GCM allowed Sr. to remain improperly affiliated with GCM even though he had failed to register with the NFA. *Id.*

By the above described well-pleaded allegations, Defendant Mihailovich, Sr. violated Sections 4b(a)(1)(A) and (C), 4b(a)(2)(A) and (C), and 4O(1), of the Commodity Exchange Act (“Act”), as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act of 2008 (“CRA”)), §§ 13101-13204, 122 Stat. 1651 (enacted June 18, 2008), and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”), Pub. L. No. 111-203, Title VII (the Wall Street Transparency and Accountability Act of 2010), §§ 701-774, 124 Stat. 1376 (enacted July 21, 2010), to be codified at 7 U.S.C. §§ 1 *et seq.*, and the Commission Regulations (“Regulations”) promulgated thereunder, 17 C.F.R. § 1.1 *et seq.* (2011). In soliciting prospective GCM managed account

customers for commodity futures trading, or supervising the solicitation activities of others, Mihailovich, Sr. was required to be registered as an AP of GCM. Mihailovich, Sr. was not registered as an AP of GCM in violation of Section 4k(3) of the Act. In advising and directing the trading of GCM customers' individual commodity futures trading accounts for compensation prior to and after the formation of GCM, Mihailovich, Sr. acted as a CTA without being registered as required in violation of Section 4m(1) of the Act. Finally, Mihailovich, Sr. is liable for the violations of GCM as he is a controlling person of GCM and knowingly induced GCM's behavior and failed to act in good faith.¹

Initially, all three of the Defendants were represented by counsel. However, counsel for the Defendants filed a motion to withdraw from representation and the Court granted these motions on January 6, 2011. Docket Entry ("D.E.") # 58. In the wake of that withdrawal, the Court ordered corporate Defendant GCM to obtain representation. D.E. # 59. GCM failed to obtain counsel by the ordered date, and accordingly, on March 15, 2011, the Court entered default judgment against GCM, but did not address monetary sanctions or equitable remedies. D.E. # 67.

During the course of discovery, Defendant Mihailovich, Sr. engaged in a pattern of willfulness and bad faith. Defendant Mihailovich, Sr. failed to attend a number of Court-ordered hearings, repeatedly failed to abide by Court Orders, failed to communicate with Plaintiff CFTC, failed to appear or respond to his scheduled deposition, and failed to respond to written discovery

¹ On March 15, 2011, this Court held that Plaintiff CFTC was to have JUDGMENT against GCM. D.E. #67. GCM's violations as charged, and as adjudged are: Sections 4k(3), 6(c) and 9(a)(3) of the Act, 7 U.S.C. §§ 4k, 6k(1), 9, 15 and 13(a)(3) (2006), and Regulation 3.10(a)(2), 17 C.F.R. § 3.10(a)(2) (2010). In addition, as with Mihailovich, Sr., GCM is adjudged with the following violations: Sections 4b(a)(1)(A) and (C) and 4b(a)(2)(A) and (C) of the Commodity Exchange Act ("Act"), to be codified at 7 U.S.C. §§ 6b(a)(2)(A) and (C), and Section 4o(1) of the Act, 7 U.S.C. 6o(1).

requests. Due to Defendant Mihailovich, Sr.'s continued flouting of Court discovery Orders, Plaintiff moved for default judgment pursuant to Fed. R. Civ. P. 37, which was denied. On October 31, 2011, the Court entered an Order to Show Cause to Defendant Mihailovich, instructing him to provide explanation as to why he had failed to comply with the Court's discovery orders and warning him that failure to show cause could result in default judgment. D.E. #141. Defendant Mihailovich, Sr. failed to reply by the deadline set in the Order to Show Cause. After the expiration of the Show Cause deadline, Plaintiff CFTC renewed its Motion for Default Judgment. On November 22, 2011, the Court entered an Order holding that Plaintiff CFTC shall have judgment from Defendant Mihailovich, Sr. D.E. # 145.

II.

STATUTORY AND EQUITABLE RELIEF ARE APPROPRIATE WHEN COURT ORDERS DEFAULT JUDGMENT

The Commission has requested that the Court enter an Order that: permanently enjoins Defendants from committing further violations of the Act and Regulations as charged and from engaging in certain commodity related activities; requires that Defendants, on a joint and several liable basis, make restitution to the customers fraudulently solicited who experienced net losses; requires that Defendants to disgorge the management fees received through GCM from fraudulently solicited customers; and impose a civil monetary penalty ("CMP") against the Defendants on a joint and several liable basis.

The Commission's request is well-received. Defendants Mihailovich, Sr. and GCM are liable for violations of the Act as detailed in Plaintiff CFTC's complaint. D.E. #1. The default judgment conclusively established their liability regardless of whether it comes within the context of a Defendant failing to answer a complaint or as a sanction. See *Leedo Cabinetry v. James Sales & Distribution, Inc.*, 157 F.3d 410, 414 (5th Cir. 1998) (holding that default judgment after

failure to answer is a judgment on the merits ending the defendant's right to challenge liability); *see also United States v. Shipco General*, 814 F.2d 1011, 1014 (5th Cir. 1987).

By defaulting, "a defendant 'admits the plaintiff's well-pleaded allegations of fact, is concluded on those facts by the judgment, and is barred from contesting on appeal the facts thus established.'" *Compass Bank v. Villarreal, et. al.*, 2011 WL 1740270 at * 6 (S.D. Tex. May 5, 2011) (slip copy), quoting *Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975) (cited in *CJC Holdings v. Wright & Lato, Inc.*, 979 F.2d 60, 66 n. 4 (5th Cir. 1992)). "This principle applies regardless of whether default is entered as a discovery sanction or for failure to defend." *Microsoft Corp. v. Computer Care Center, Inc.*, 2008 WL 4179653 (E.D.N.Y. Sept. 10, 2008) citing *Bambu Sales, Inc. v. Ozak Trading Inc.*, 58 F.3d 849, 854 (2d Cir. 1995) (holding that Rule 37 established liability). However, the Court is "obliged to limit the default judgment to the claims supported by the facts set forth in the claimant's pleading." *Compass Bank*, 2011 WL 1740270 at * 6.

In the present case, the Court has entered default judgment against Defendants GCM and Mihailovich, Sr. conclusively establishing their liability for the acts and omissions as detailed in Plaintiff CFTC's Complaint.² Moreover, Plaintiff CFTC has provided ample facts within its well-pleaded complaint to support all of the claims brought against the Defendants.

Because liability has been established *via* default judgment against Defendants GCM and Mihailovich, Sr., the Court may also award monetary sanctions as well as other remedies to Plaintiff CFTC. See e.g., *See Leedo*, 157 F.3d 410 at 414 (affirming award of \$171,713.49 in sanctions upon default judgment); *James v. Frame*, 6 F.3d 307, 311 (5th Cir. 1993) (affirming

² In their respective Motions to Dismiss, Defendants challenged Plaintiff CFTC's Complaint as poorly pleaded. D.E. ## 22, 25. The Court denied these Motions to Dismiss on March 11, 2011. D.E. ## 65, 66.

award of \$10.2 million default judgment entered as sanction after repeated discovery abuses). In the context of default judgment as sanction, a trial court normally may not award monetary sanctions without an evidentiary hearing. *James*, 6 F.3d at 311 (citing *United Artists Corp. v. Freeman*, 605 F.2d 854, 857 (5th Cir. 1979)). However, that rule is “subject to an exception where the amount claimed is a liquidated sum *or one capable of mathematical calculation.*” *Id.* (emphasis added).

In addition to the facts as contained in its well-pleaded Complaint, Plaintiff CFTC has provided the Court with affidavit support for the injunctive relief and monetary sanctions it seeks against Defendants Mihailovich, Sr. and GCM³ in a manner that allows the Court to verify through non-complex mathematical calculation the proposed monetary sanctions without separate hearing. See attached *Declaration of Investigator Michelle Bougas*. Accordingly, the Court has ample support in the record to determine the appropriate permanent injunctive relief, monetary sanctions, and equitable relief without need for an additional hearing.

The Court hereby issues a final order of permanent injunction, that also provides for restitution, disgorgement, a civil monetary penalty and ancillary equitable relief pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2006), as set forth herein.

**III.
ORDER**

It is **HEREBY ORDERED THAT:**

1. The Commission’s Motion for Default Judgment, Permanent Injunction, Civil Penalties and Other Equitable Relief is **GRANTED**;

³ Due to Plaintiff CFTC’s allegations that Mihailovich, Sr. was the controlling person of corporate Defendant GCM, Defendants should be jointly and severally liable for any monetary sanctions entered as judgment.

PERMANENT INJUNCTION

2. **IT IS FURTHER ORDERED THAT** Defendants GCM and Mihailovich, Sr.

are permanently restrained, enjoined and prohibited from:

- A. further violations of Sections 4b(a)(2)(A) and (C); 4b(a)(1)(A) and (C); 4o(1); 4k(3); and, 4m(1) as amended by the CRA and the Dodd-Frank Act, to be codified at 7 U.S.C. § 6;
- B. trading on or subject to the rules of any registered entity, as that term is defined in Section 1a of the Act, as amended by the CRA and the Dodd-Frank Act, to be codified at 7 U.S.C. § 1a, for their own account, for any account in which either Defendant has a direct interest or indirect interest, or for any other account for or on behalf of any other person or entity, whether by power of attorney or otherwise;
- C. entering into any transactions involving commodity futures, options on commodity futures, commodity options (as that term is defined in Regulation 32.1(b)(1), 17 C.F.R. § 32.1(b)(1) (2011)) (“commodity options”), and/or foreign currency (as described in Sections 2(c)(2)(B) and 2(c)(2)(C)(i) of the Act, as amended, to be codified at 7 U.S.C. §§ 2(c)(2)(B) and 2(c)(2)(C)(i)) (“forex contracts”) for either Defendants’ own personal account or for any account in which either Defendant has a direct or indirect interest;
- D. having any commodity futures, options on commodity futures, commodity options, and/or forex contracts traded on his behalf;
- E. controlling or directing the trading for or on behalf of any other person or entity, whether by power of attorney or otherwise, in any account involving commodity futures, options on commodity futures, commodity options, and/or forex contracts;
- F. soliciting, receiving or accepting any funds from any person for the purpose of purchasing or selling any commodity futures, options on commodity futures, commodity options, and/or forex contracts;
- G. applying for registration or claiming exemption from registration with the Commission in any capacity, and engaging in any activity requiring such registration or exemption from registration with the Commission except as

provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2011); and/or

- H. acting as a principal (as that term is defined in Regulation 3.1(a), 17 C.F.R. § 3.1(a) (2011)), agent, officer or employee of any person registered, required to be registered, or exempted from registration or with the Commission, except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2011);

RESTITUTION

3. **IT IS FURTHER ORDERED THAT** Defendants Mihailovich, Sr. and GCM are jointly and severally liable to pay restitution in the amount of \$3,475,112, plus post-judgment interest (the “Restitution Obligation”). Post-judgment interest on the Restitution Obligation shall accrue commencing on the date of the entry of this Order and shall be determined using the Treasury Bill rate prevailing on the date of the entry of this Order pursuant to 28 U.S.C. § 1961;

DISGORGEMENT

4. **IT IS FURTHER ORDERED THAT** Defendants Mihailovich, Sr. and GCM are jointly and severally liable to disgorge the ill-gotten gains received from customers (the “Disgorgement Obligations”). Defendants shall disgorge \$389,006, plus post-judgment interest. Post-judgment interest on the Disgorgement Obligations shall accrue commencing on the date of the entry of this Order and shall be determined using the Treasury Bill rate prevailing on the date of the entry of this Order pursuant to 28 U.S.C. § 1961;

CIVIL MONETARY PENALTY

5. **IT IS FURTHER ORDERED THAT** Defendants Mihailovich, Sr. and GCM are jointly and severally liable to pay a civil monetary penalty in the amount of \$5,440,000, plus post-judgment interest (“CMP Obligation”). Post-judgment interest on the CMP Obligation shall

accrue commencing on the date of the entry of this Order and shall be determined using the Treasury Bill rate prevailing on the date of the entry of this Order pursuant to 28 U.S.C. § 1961;

6. Defendants Mihailovich, Sr. and GCM shall pay their CMP Obligation by electronic funds transfer, or U.S. postal money order, certified check, bank cashier's check, or bank money order. If payment is to be made by other than electronic funds transfer, Defendants shall make payment payable to the Commodity Futures Trading Commission and deliver it the following address:

Commodity Futures Trading Commission
Division of Enforcement
Attention: Marie Bateman – AMZ-300
DOT/FAA/MMAC
6500 South MacArthur Boulevard
Oklahoma City, OK 73169
Telephone: (405) 954-6569;

7. If payment is to be made by electronic funds transfer, Defendants shall contact Marie Bateman or her successor at the above address to receive payment instructions and shall comply fully with those instructions. Defendants shall accompany the payment of the penalty with a cover letter that identifies the paying Defendant and the name and docket number of the proceeding. Defendants shall simultaneously transmit copies of the cover letter and the form of payment to: (a) Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581; and (b) Chief, Office of Cooperative Enforcement, at the same address;

**APPOINTMENT OF MONITOR AND
MATTERS RELATED TO PAYMENTS OF RESTITUTION,
DISGORGEMENT AND CIVIL MONETARY PENALTIES**

8. **IT IS FURTHER ORDERED THAT** the National Futures Association ("NFA") is appointed as Monitor to effect payment by Defendants and the distribution of restitution and

disgorged funds. The Monitor shall collect restitution and disgorgement payments from Defendants and make distributions to Defendants' customers. Because the Monitor is not being specially compensated for these services, and these services are outside the normal duties of the Monitor, it shall not be liable for any action or inaction arising from its appointment as Monitor, other than actions involving fraud.

9. Defendants shall make their required restitution and disgorgement payments under this Order in the name of the "Growth Capital Management Fund" and shall send such payments by electronic funds transfer, or U.S. postal money order, certified check, bank cashier's check, or bank money order to the Office of Administration, National Futures Association, 300 South Riverside Plaza, Suite 1800, Chicago, Illinois 60606, under a cover letter that identifies the paying Defendant or Relief Defendant and the name and docket number of the proceeding. The Defendant shall simultaneously transmit copies of the cover letter and the form of payment to: (a) Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581; and (b) Chief, Office of Cooperative Enforcement, at the same address.

10. The Monitor shall oversee Defendants' Restitution and Disgorgement Obligations, and shall have the discretion to determine the manner of distribution of funds in an equitable fashion to customers or may defer distribution until such time as it may deem appropriate. In the event the amount of restitution payments and/or disgorgement payments to the Monitor are of a *de minimis* nature such that the Monitor determines that the cost of making a distribution to customers is impractical, the Monitor may, in its discretion, treat such restitution and/or disgorgement payments as civil monetary penalty payments, which the Monitor shall forward to

the Commission following the instructions for civil monetary penalties as set forth in paragraphs 5, 6 and 7 of this Order;

11. Defendants shall execute any documents necessary to release funds in any repository, bank, investment or other financial institution wherever located, in order to make partial or total payment toward his Restitution and Disgorgement Obligations;

12. To the extent that funds accrue to the U.S. Treasury as a result of the Restitution and/or Disgorgement Obligations, such funds shall be transferred to the Monitor for disbursement in accordance with the procedures set forth in paragraphs 9 and 10 of this Order;

13. All Payments by Defendants pursuant to this Order shall first be applied to satisfaction of the Restitution Obligation consistent with the authority granted the Monitor above. Restitution shall be paid in the amount allocated to each customer suffering a net loss as set forth in Declaration of Investigator Michelle Bougas, ¶¶ 30-31. After satisfaction of the Restitution Obligation, payments by Defendants pursuant to this Order shall be applied to satisfy Defendants' CMP Obligation;

14. Any acceptance by the Commission or the Monitor of partial payment from Defendant of their Restitution, Disgorgement, and/or CMP Obligations shall not be deemed a waiver of Defendants' obligations to make further payments pursuant to this Order, or a waiver of the Commission's and/or Monitor's right to seek to compel payment from Defendants of any remaining balance;

MISCELLANEOUS PROVISIONS

IT IS FURTHER ORDERED THAT:

15. Prohibition on Transfer of Funds: Defendants shall not transfer or cause others to transfer funds or other property to the custody, possession or control of any other person or entity

for the purpose of concealing such funds or property from the Court, the Plaintiff or any officer that may be appointed by the Court;

16. Notices: All notices required to be given by any provision in this Order shall be sent by certified mail, return receipt requested, as follows:

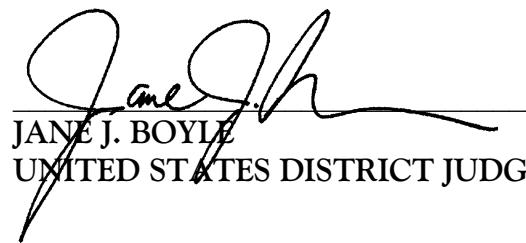
Notice to Commission: Director
Division of Enforcement
Commodity Futures Trading Commission
1155 21st Street, NW
Washington, D.C. 20581

All such notices to the Commission shall reference the name and docket number of this proceeding;

17. Invalidation: If any provision of this Order or the application of any provision or circumstance is held invalid, the remainder of this Order, and the application of the provision to any other person or circumstance, shall not be affected by the holding;

18. Continuing Jurisdiction of this Court: This Court shall retain jurisdiction of this case to assure compliance with this Order and for all other purposes related to this action.

SO ORDERED, 26th day of June, 2011.



JANE J. BOYLE
UNITED STATES DISTRICT JUDGE