

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

BARRY A. BINGHAM

and

BINGHAM CAPITAL MANAGEMENT
CORPORATION,

Defendants.

1:05-cv-02187-(TWT)

**DEFAULT JUDGMENT AS TO DEFENDANTS BARRY A. BINGHAM
AND BINGHAM CAPITAL MANAGEMENT CORPORATION**

This matter is before the Court on plaintiff, Securities and Exchange Commission's ("Commission" or "SEC") Motion for Entry of Default Judgment against defendants Barry A. Bingham ("Bingham") and Bingham Capital Management Corporation ("Capital Management"). The Court, having reviewed the record and been otherwise advised, hereby rules on said motion and renders

final judgment in this case. The Court finds as follows:

Findings and Conclusions of Law

1. The Complaint in this matter was filed on August 23, 2005.
2. On August 24, 2005, defendants Bingham and Capital Management, through counsel, both waived personal service of the Summons and Complaint.
3. The defendants have failed to answer or otherwise respond as required by the Federal Rules of Civil Procedure. The clerk entered defaults against the defendants on March 23, 2006.
4. Entry of a judgment by default against the Defendants is appropriate. Accordingly, the factual allegations of the Complaint, except those relating to damages, are taken as true. 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, § 2688, p. 412 (2d ed. 1983); Thomson v. Wooster, 5 S. Ct. 788 (1885). In addition, plaintiff has submitted the declaration of Peter J. Diskin. The Complaint charges, and the Court finds, as follows:

- a. Bingham Growth Partners, L.P. (“Growth Partners,” “the partnership” or “the fund”), a hedge fund, was organized in August 2000 as a limited partnership.

- b. Bingham is the chief executive officer and sole shareholder of Capital Management, an unregistered investment adviser. Capital Management is

the general partner of Growth Partners and the investment adviser to the fund.

c. Bingham is a resident of Atlanta, Georgia, and is currently in the custody of the U.S. Bureau of Prisons.

d. Under the terms of the fund's partnership agreements, Capital Management was obligated to provide Growth Partners' limited partners, the investors, with accurate quarterly statements documenting the fund's performance.

e. Between August 2000 and September 2002, Bingham and Capital Management sold over \$1.8 million in limited partnership interests to at least 22 Growth Partners investors. Much of this amount was raised on the basis of Bingham's misrepresentations about the fund's past returns.

f. In April 2001, after Growth Partners suffered its first significant losses, Bingham and Capital Management began a pattern of misrepresenting the firm's performance to investors. The misrepresentations to investors continued and intensified over time as did Growth Partners' losses.

g. In the third and fourth quarters of 2001, Bingham, through Capital Management, raised approximately \$650,188 from three new Growth Partners investors and two existing investors contributing additional funds. These new investments were made on the basis of misrepresentations by Bingham and Capital Management about Growth Partners' historic returns.

h. From January through September 2002, Bingham raised another \$547,344 in Growth Partners investments, from two new investors and six existing investors contributing additional funds, all on the basis of misrepresentations by Bingham and Capital Management about Growth Partners' historic returns.

i. As a result of approximately \$1,400,000 in net market losses suffered over Growth Partners' lifetime, approximately \$293,842 in capital and alleged earnings returned to investors, and misappropriations by Bingham and Capital Management totaling approximately \$141,637, the assets of Growth Partners were virtually depleted by the fall of 2002.

j. By virtue of the foregoing conduct, and other conduct, Bingham and Capital Management engaged, directly or indirectly, and unless enjoined will engage, in acts, practices, and courses of business which constituted and will constitute violations of Section 17(a) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. § 77q(a)]; Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder [15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5]; and Sections 206(1) and 206(2) of the Investment Advisers Act of 1940 ("Advisers Act") [15 U.S.C. §§ 80b-6 (1) and (2)].

5. Bingham and Capital Management, on the basis of their fraudulent misrepresentations to Growth Partners investors about the fund's historic returns,

obtained \$1,197,532 in new investments in the fund from approximately July 1, 2002 through approximately September 10, 2002.

6. On approximately September 24, 2002, Bingham and Capital Management returned \$250,000 of the above \$1,197,532 to the Growth Partners investor who had contributed it, bringing the net total of funds obtained from Growth Partners investors over the lifetime of the fund on the basis of misrepresentations concerning historic returns to \$947,532.

7. Bingham is currently subject to a criminal restitution order with regard to two of the Growth Partners investors, which requires him to repay \$105,572 of the above \$947,532.

8. Bingham, who is thirty-seven years old, is neither an infant nor incompetent, nor is he engaged in military service with the armed services.

9. The Court does not find it necessary to conduct a hearing or order a conference prior to entering final judgment in this action or carrying its judgment to effect.

10. Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Court expressly determines that there is no just reason for delay and expressly directs that judgment be entered in this action.

11. The Commission seeks, as relief, a permanent injunction, enjoining

the defendants from violating or aiding and abetting violations of the above provisions; an order requiring the defendants to disgorge ill-gotten gains, with prejudgment interest; and an order requiring the defendants to pay civil penalties pursuant to Section 20(d) of the Securities Act [15 U.S.C. 77t(d)], Section 21(d)(3) of the Exchange Act [15 U.S.C. 78u(d)(3)], and Section 209(e) of the Advisers Act [15 U.S.C. §§ 80b-9(e)].

12. The Commission has submitted evidence, specifically, the declaration of Peter J. Diskin, establishing the above described amounts of ill-gotten gains. Bingham and Capital Management obtained a net total of \$947,532 from Growth Partners investors on the basis of fraudulent misrepresentations about the fund's prior returns. However, Bingham should not twice be held liable for the \$105,572 of that amount that he has already been ordered to repay as restitution in a factually related criminal action. Thus, \$841,960, along with \$169,835 in prejudgment interest (total \$1,011,795), should be the disgorgement.

13. The Commission also requests that the Court impose civil penalties on the defendants. Section 20(d) of the Securities Act, Section 21(d)(3) of the Exchange Act and Section 209(e) of the Advisers Act provide that the Commission may seek to have a court impose civil penalties for any violations of those acts, in an amount not to exceed the greater of: (a) \$6,500 for any natural person and

\$60,000 for any other person, or (b) the gross amount of pecuniary gain for the defendant. Where fraud has occurred, the maximum penalty amounts rise to the greater of (a) \$60,000 for any natural person and \$300,000 for any other person, or (b) the gross amount of pecuniary gain for the defendant. When a defendant's violative conduct involved fraud and resulted in substantial losses to others, or significant risk of losses, a district court may impose a civil penalty in an amount not to exceed the greater of (a) \$120,000 for a natural person and \$600,000 for any other person, or (b) the gross amount of pecuniary gain for the defendant.

NOW THEREFORE, IT IS HEREBY:

I.

ORDERED that defendants Bingham and Capital Management, their agents, servants, employees, attorneys, and all persons in active concert or participation with them, in connection with the purchase or sale or in the offer or sale of securities, by use of any means or instrumentalities of interstate commerce or any means or instruments of transportation or communication in interstate commerce, or by the mails or any facility of any national securities exchange, who receive actual notice of this Final Judgment by personal service or otherwise, be, and they hereby are, permanently restrained and enjoined from, directly or indirectly:

(1) employing any device, scheme or artifice to defraud;

- (2) engaging in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person;
- (3) obtaining money or property by means of any untrue statement of a material fact, or omitting to state a material fact in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
- (4) making any untrue statement of a material fact or omitting to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading;

in violation of Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)]; Section 10(b) of the Exchange Act and Rule 10b-5 thereunder [15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5]; and Sections 206(1) and 206(2) of the Advisers Act [15 U.S.C. §§ 80b-6 (1) and (2)].

II.

IT IS FURTHER ORDERED that disgorgement as to defendants Bingham and Capital Management is set as follows:

1. Bingham shall be liable for disgorgement of \$1,011,795, representing \$841,960 of ill-gotten gains from the conduct alleged in the Complaint, plus pre-judgment interest thereon of \$169,835, computed at the

IRS rate on delinquent taxes; and

2. Capital Management shall be liable for disgorgement of \$1,011,795, representing \$841,960 of ill-gotten gains from the conduct alleged in the Complaint, plus pre-judgment interest thereon of \$169,835, computed at the IRS rate on delinquent taxes.

III.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Bingham pay a civil penalty in the amount of \$100,000, pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)], Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)], and Section 209(e) of the Advisers Act [15 U.S.C. § 80b-9(e)].

IV.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Capital Management pay a civil penalty in the amount of \$100,000, pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)], Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)], and Section 209(e) of the Advisers Act [15 U.S.C. § 80b-9(e)].

V.

Payments under this judgment shall be made to the Clerk of this Court,

together with a cover letter identifying the payor as a defendant in this action; setting forth the title and civil action number of this action and the name of this Court; and specifying that payment is made pursuant to this Final Judgment.

Defendants shall simultaneously transmit photocopies of each such payment and letter to the Commission's counsel in this action. Defendants relinquish all legal and equitable right, title, and interest in such payments, and no part of the funds shall be returned to Defendants. The Clerk shall deposit the funds into an interest bearing account with the Court Registry Investment System ("CRIS"). These funds, together with any interest and income earned thereon (collectively, the "Fund"), shall be held in the interest bearing account until further order of the Court. In accordance with 28 U.S.C. § 1914 and the guidelines set by the Director of the Administrative Office of the United States Courts, the Clerk is directed, without further order of this Court, to deduct from the income earned on the money in the Fund a fee equal to ten percent of the income earned on the Fund. Such fee shall not exceed that authorized by the Judicial Conference of the United States.

Defendants shall pay post-judgment interest on any delinquent amounts pursuant to 28 USC § 1961.

The Commission may by motion propose a plan to distribute the Fund subject to the Court's approval. Such a plan may provide that Fund shall be

distributed pursuant to the Fair Fund provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002. Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil penalties pursuant to this Judgment shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Defendants shall not, after offset or reduction of any award of compensatory damages in any Related Investor Action based on Defendants' payment of disgorgement in this action, argue that it or he is entitled to, nor shall it or he further benefit by, offset or reduction of such compensatory damages award by the amount of any part of Defendants' payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Defendants shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this Judgment. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against one or more Defendants by or on behalf of one or more investors based on substantially the same facts as alleged in the Complaint in this action.

VI.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Final Judgment.

4/21/06
Date

/s/Thomas W. Thrash
UNITED STATES DISTRICT JUDGE