

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-cv-60082- DIMITROULEAS/SNOW

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

v.

FREDERIC ELM f/k/a FREDERIC ELMALEH,
et al.,

Defendants,

and

AMANDA ELM f/k/a AMANDA ELMALEH,

Relief Defendant.

_____))
**RECEIVER'S MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT
WITH LAS OLAS CHABAD JEWISH CENTER, INC.**

Grisel Alonso, not individually, but solely in her capacity as the Court-appointed receiver ("Receiver") for Elm Tree Investment Advisors, LLC, Elm Tree Investment Fund LP, Elm Tree "e"Conomy Fund LP, and Elm Tree Motion Opportunity LP (collectively, the "Receivership Entities"), respectfully files this Motion for Approval of Settlement Agreement with Las Olas Chabad Jewish Center, Inc. ("Las Olas Chabad").

The Securities and Exchange Commission does not object to the relief sought herein.

INTRODUCTION

The Receiver has determined, based upon the bank records of the Receivership Entities and records produced in discovery, that Las Olas Chabad received a total of \$63,200.00 from Elm Tree Investment Advisors, LLC ("ETIALLC"), a Receivership Entity, and Defendant Frederic Elm and Relief Defendant Amanda Elm (collectively, the "Elms") from July 2, 2014

through December 8, 2014. According to the bank records of the Receivership Entities, the funds Las Olas Chabad received were derived from investors in the Elm Tree Funds.

It is the Receiver's position that the funds received by Las Olas Chabad are subject to return to the Receivership Estate as a fraudulent transfer. The Receiver made a demand on Las Olas Chabad for return of \$63,200.00 that it received from ETIALLC and the Elms. Las Olas Chabad denies that the funds constitute fraudulent transfers. In addition, Las Olas Chabad has produced financial information to the Receiver supporting its inability to return the \$63,200.00 in funds, which the Receiver deemed sufficient to establish Las Olas Chabad's financial position.

In order to avoid the expense and risk of litigation, the Receiver and Las Olas Chabad have agreed to resolve any and all disputes relating to the transfers of funds that Las Olas Chabad received pursuant to the terms of a proposed settlement agreement (the "Settlement Agreement") in which Las Olas Chabad will pay a total of \$12,500.00 to the Receiver in installment payments, with \$5,000.00 to be paid within five (5) days of the Court's approval of the Settlement Agreement and the remaining \$7,500.00 to be paid within six months of the Court's approval of the Settlement Agreement. The Receiver files this Motion because the Receivership Order requires Court approval of all proposed settlements. [D.E. 13 at ¶ 6].

THE RECEIVERSHIP ORDER

On January 16, 2015, the Court entered an order appointing Ms. Alonso as the Receiver (the "Receivership Order"). [D.E. 13]. The Receivership Order provides, among other things, that the assets and property of the Receivership Entities, whatsoever and wherever located, are to be placed in the Receiver's control [D.E. 13 at ¶ 1] and the Receiver has sole title to the assets and property, including but not limited to all books, papers, codes, records, data, bank accounts, savings accounts, securities, supplies, equipment, and other real property [D.E. 13 at ¶¶ 1, 17].

The Receivership Order also gives the Receiver power to:

Defend, compromise or settle legal actions, including the instant proceeding in which ETIA and the Elm Tree Funds or the Receiver are a party, commenced either prior to or subsequent to this Order, **with authorization of this Court . . .**

[D.E. 13 at ¶ 6] (emphasis added).

The Receivership Order further provides:

In the event the Receiver discovers that funds of persons who have invested in the Elm Tree Funds have been transferred to other persons or entities, the Receiver shall apply to this Court for an Order giving the Receiver possession of such funds and, if the Receiver deems it advisable, extending this receivership over any person or entity holding such investor funds;

[D.E. 13 at ¶ 24].

THE TRANSFERS

During the period of July 2, 2014 through December 8, 2014 (the "Time Period"), Las Olas Chabad received the following transfers of funds from ETIALLC, a Receivership Entity, and the Elms: (1) \$55,000.00 from ETIALLC on July 2, 2014; (2) \$400.00 from the Elms on July 4, 2014; (3) \$4,800.00 from the Elms on September 20, 2014; and (4) \$3,000.00 from the Elms on December 8, 2014 (collectively, the "Transfers"). Therefore, Las Olas Chabad received a total of \$63,200.00 from ETIALLC and the Elms during the Time Period. The records of the Receivership Entities demonstrate that the funds Las Olas Chabad received were derived from persons who invested in the Elm Tree Funds. Accordingly, it is the Receiver's position that Las Olas Chabad received fraudulent transfers in the amount of \$63,200.00 which funds rightfully belong to the Receivership Estate.

THE PROPOSED SETTLEMENT AGREEMENT

The terms of the proposed Settlement Agreement are as follows:

- Las Olas Chabad shall pay \$5,000.00 to the Receiver within five (5) days of the date that the Settlement Agreement is approved by the Court;
- Las Olas Chabad shall pay the remaining \$7,500.00 of the Settlement Amount to the Receiver within six (6) months of the date that the Settlement Agreement is approved by the Court.
- In the event Las Olas Chabad fails to timely make payments pursuant to the Settlement Amount, or if any payment made by Las Olas Chabad pursuant to the terms of the Settlement Agreement is not made with good and sufficient funds, the Receiver shall provide Las Olas Chabad with ten (10) business days written notice of default. During this ten (10) business day period, Las Olas Chabad shall have the opportunity to cure such default (the "Cure Period"). If Las Olas Chabad fails to cure the default within the Cure Period, then the Receiver may pursue all appropriate amounts owed to the Receivership Estate without any limitation.
- The Receiver and Las Olas Chabad agree to mutual releases relating to the Transfers upon the Court's approval of the Settlement Agreement and the Receiver's receipt of Las Olas Chabad's final payment of clear and sufficient funds under the terms of the Settlement Agreement.

A copy of the proposed Settlement Agreement is attached as **Exhibit "A"**.

JURISDICTION

The United States District Court for the Southern District of Florida will retain jurisdiction to enforce the terms of the Settlement Agreement and decide any other issues arising

from the Settlement Agreement. In the event an enforcement action or any other litigation arises from the Settlement Agreement, the prevailing party in that action will be entitled to an award of its attorneys' fees and costs.

BEST INTERESTS OF THE RECEIVERSHIP ESTATE

The Receiver respectfully submits that the Court should approve the proposed Settlement Agreement because it is in the best interest of the Receivership Estate. The process of reaching the proposed settlement was fair, well-informed, and well-advised by the Receiver's retained professionals.

The ultimate inquiry in assessing a proposed receivership settlement is whether "the proposed settlement is fair." *Sterling v. Stewart*, 158 F. 3d 1199, 1203 (11th Cir. 1998); see *In re Consol. Pinnacle West Sec. Litig./Resolution Trust Corp.-Merabank Litig.*, 51 F. 3d 194, 196-97 (9th Cir. 1995) ("We see no reason to upset the court's conclusion that the settlement process and result were fair."). Determining the fairness of [a] settlement is left to the sound discretion of the trial court." *Sterling*, 158 F. 3d at 1202 (11th Cir. 1998). In determining fairness, the Court should examine the following broad array of factors: (1) the likelihood of success on the merits; (2) the range of possible discovery; (3) the point on or below the range of discovery at which settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved. *Sterling*, 158 F. 3d at 1204. See also *SEC v. Princeton Economic Int'l*, 2002 WL 206990, *2 (S.D.N.Y. 2002) (receivership court should consider "various factors including, inter alia: (1) the probable validity of the claim; (2) the apparent difficulties attending its enforcement through the courts; (3) the collectability of the

judgment thereafter; (4) the delay and expenses of the litigation to be incurred; and (5) the amount involved in the compromise”).

For example, the District Court in *Gordon v. Dadante* “analyze[d] the settlement as a whole, under the totality of the circumstances.” 2008 U.S. Dist. LEXIS 32281, *39, 48 (N.D. Ohio April 18, 2008). The Sixth Circuit affirmed, finding that the district court had fulfilled its responsibilities by engaging in an “independent analysis of the settlement,” as “the district court had extensive knowledge of the claims involved in the case, the valuation of those claims, and the nature of the settlement,” and thus “had more than sufficient information to assess the fairness of the settlement proposed.” 2009 U.S. App. LEXIS 15517 at **16, 23. As the district court noted in a later approval proceeding, “the courts must recognize that plans relating to settlement of a receivership are inherently imperfect, “because no proposal can be [perfect],” and the “task at hand, however, is to do justice to the extent possible.” *Gordon v. Dadante*, 2010 U.S. Dist. LEXIS 1979, *13-14 (N.D. Ohio Jan. 11, 2010).

Here, the Receiver respectfully submits that the Settlement Agreement is a fair, adequate, and reasonable resolution of the Receiver's demand to Las Olas Chabad. There is no litigation pending, and if this were to devolve into litigation, it would be time consuming, expensive, and a waste of Receivership resources. The Receiver, considering the delays and high costs of litigation, believes that the outcome for the Receivership Entities and investors will be better under the Settlement Agreement than it would be if this issue is not resolved immediately.

Based on the Receiver's due diligence, the terms of the proposed settlement are fair and reasonable, representing a sensible means of assuring a beneficial outcome for the investors.

OBJECTION PROCEDURE

As noted above, the determination of the fairness of a settlement is left to the sound discretion of the trial court. *See Sterling*, 158 F. 3d at 1202. While "the substance and amount of opposition to the settlement" is a factor for the Court's consideration pursuant to the *Sterling* test, the Receiver respectfully requests that the Court, in exercising its broad discretion, approve the Settlement Agreement with limited or no objection procedure.

It is the Receiver's position that given the amount at stake in this action, an expensive, elongated objection procedure would render the benefits of the settlement worthless to the Receivership Estate, and thus no objection procedure should be permitted.

CONCLUSION

The Receiver respectfully requests entry of an order approving the Settlement Agreement granting any further relief the Court deems just and proper.

Respectfully submitted,

BROAD AND CASSEL

Attorneys for Receiver
One Biscayne Tower, 21st Floor
2 S. Biscayne Boulevard
Miami, FL 33131
Telephone: (305) 373-9467
Facsimile: (305) 995-6387

By: /s/ Daniel S. Newman

Daniel S. Newman, P.A.
Florida Bar No. 0962767
dnewman@broadandcassel.com
Amanda Star Frazer, Esq.
Florida Bar No. 0043921
afrazer@broadandcassel.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 2, 2016, a true and correct copy of the foregoing was served via electronic transmission on all counsel or parties of record on the Service List below.

s/Daniel S. Newman
Daniel S. Newman, P.A.

SERVICE LIST

| | |
|--|---|
| Patrick R. Costello, Esq. Katharine Zoladz, Esq. costello@sec.gov zoladzK@sec.gov U.S. Securities and Exchange Commission 801 Brickell Avenue Suite 1800 Miami, FL 33131 305-982-6380 305-536-4154 (fax) <i>Counsel for U.S. Securities and Exchange Commission</i> | David R. Chase, Esq. david@davidchaselaw.com David R. Chase, P.A. 1700 East Las Olas Boulevard Suite 305 Fort Lauderdale, FL 33301 <i>Counsel for Defendant Frederic Elm and Relief Defendant Amanda Elm</i> |
| Christopher Bruno, Esq. cbruno@brunodegenhardt.com Bruno & Degenhardt 10615 Judicial Drive Suite 703 Fairfax, VA 22030 <i>Co-Counsel for Defendant Frederic Elm and Relief Defendant Amanda Elm</i> | Grisel Alonso, Esq. galonso@moecker.com Michael Moecker & Associates, Inc. 1883 Marina Mile Blvd., Suite 106 Fort Lauderdale, FL 33315 <i>Receiver</i> |

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (referred to herein as the "Agreement") is entered into this 26 day of July 2016, by and among Grisel Alonso, not individually, but solely in her capacity as the Court-appointed receiver ("Receiver") for Elm Tree Investment Advisors, LLC, Elm Tree Investment Fund LP, Elm Tree "e"conomy Fund LP, and Elm Tree Motion Opportunity LP (collectively, the "Receivership Entities"), and Las Olas Chabad Jewish Center, Inc. ("Las Olas Chabad"). The Receiver and Las Olas Chabad are collectively referred to as the "Parties."

WHEREAS, between July 2, 2014 and December 8, 2014, Las Olas Chabad received the following transfers of funds in the total amount of \$63,200.00 from Receivership Entities and/or Defendant Frederic Elm and Relief Defendant Amanda Elm (collectively, the "Elms"): (1) \$55,000.00 from Elm Tree Investment Advisors, LLC on July 2, 2014; (2) \$400.00 from the Elms on July 4, 2014; (3) \$4,800.00 from the Elms on September 20, 2014; and (4) \$3,000.00 from the Elms on December 8, 2014 (collectively, the "Transfers");

WHEREAS, a dispute has arisen between the Receiver and Las Olas Chabad concerning the Transfers;

WHEREAS, to avoid the expense and risk of litigation, the Parties hereto are desirous of resolving all disputes relating to the Transfers;

WHEREAS, Las Olas Chabad claims a financial inability and has provided documents to the Receiver deemed sufficient to establish Las Olas Chabad's financial position;

NOW THEREFORE, in consideration of the premises and mutual promises and covenants contained herein, the Parties agree as follows:

1. **Settlement.** The Parties hereby settle and compromise all claims, disputes, and controversies between them for damages, attorneys' fees, costs, equitable relief, and/or punitive damages related to the Transfers made among the Receivership Entities, the Elms, and Las Olas Chabad, which the Receiver has or may have had against Las Olas Chabad, or which Las Olas Chabad has or may have had against the Receiver.
2. **Settlement Terms.** In consideration and exchange for the settlement and releases contained herein, Las Olas Chabad shall pay \$12,500.00 (the "Settlement Amount") to the Receiver in installments as follows:
 - a. Las Olas Chabad shall pay \$5,000.00 to the Receiver within five (5) days of the date that this Agreement is approved by the Court;
 - b. Las Olas Chabad shall pay the remaining \$7,500.00 of the Settlement Amount to the Receiver within six (6) months of the date that this Agreement is approved by the Court.

3. **Court Approval and Effective Date.** This Agreement is not effective unless and until it is approved by the United States District Court for the Southern District of Florida. The Effective Date of this Agreement is defined as the date the Court enters an order approving the Agreement, if such approval is granted.
4. **Releases.**
 - a. Upon the approval of this Agreement by the Court and upon the Receiver's receipt and clearing of good and sufficient funds constituting the payments as set forth in paragraph 2 above, in consideration of the undertakings described above, but expressly excepting the rights and obligations created by this Agreement, the Receiver, on behalf of the Receivership Entities, releases and discharges Las Olas Chabad from any and all claims, debts, liabilities, demands, obligations, costs, attorneys' fees, actions and causes of action related to the Transfers and/or any other transactions or transfers between Las Olas Chabad and the Receivership Entities, and/or the Elms.
 - b. Upon the approval of this Agreement by the Court and upon the Receiver's receipt and clearing of good and sufficient funds constituting the payments as set forth in paragraph 2 above, Las Olas Chabad releases and discharges the Receiver and the Receivership Entities from any and all claims, debts, liabilities, demands, obligations, costs, attorneys' fees, actions and causes of action related to the Transfers and/or any other transactions or transfers between Las Olas Chabad and the Receivership Entities, and/or the Elms.
5. **No Admissions.** This Agreement is expressly agreed to be in compromise of all disputes and disputed claims, and the Settlement Amount and/or the releases contained herein are not to be construed as admissions of liability, culpability, or wrongdoing on the part of the the Parties, which liability, culpability, or wrongdoing is expressly denied.
6. **Integration.** This Agreement contains the entire Agreement between the Parties, and the terms of this Agreement are contractual and not a mere recital. The Parties agree that all prior negotiations and understandings between them have been merged herein, and that this Agreement may not be modified or changed, except by a writing signed by a duly authorized representative of each party.
7. **Binding Nature.** The provisions of this Agreement shall be binding upon and inure to the benefit of the Parties hereto and their estates, heirs, legal representatives, successors and assigns. The Parties represent and acknowledge that they have had an opportunity to, and have consulted with, counsel in connection with the execution of this Agreement.
8. **Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original, and the counterparts shall together constitute one and the same agreement, notwithstanding that each party is not signatory to the original

or the same counterpart. Facsimile signatures shall be deemed as effective as original signatures.

9. **Disputes.** Any dispute arising out of this Agreement or its terms shall be resolved exclusively through the United States District Court for the Southern District of Florida, and Florida law shall govern.
10. **Authority.** Each of the signatories hereto represents that she/he has authority to execute this Agreement and to bind the party or parties on whose behalf she/he has signed.
11. **Severability.** If any provision of this Agreement is determined to be invalid or unenforceable, the remainder of this Agreement shall not be affected thereby.
12. **Construction.** The Parties to this Agreement have negotiated at arms' length and participated in the drafting of this Agreement and, accordingly, any claimed ambiguity shall not be presumptively resolved either in favor of or against any party hereto.
13. **Attorneys' Fees.** The Parties will bear their own expenses, costs and/or attorneys' fees, including any costs or attorneys' fees incurred in connection with the negotiation and execution of this Agreement. The Parties agree that in the event of any litigation to enforce this Agreement, the prevailing party shall be entitled to recover its reasonable attorneys' fees and costs from the non-prevailing party in any action (including but not limited to all paralegal, administrative, in any trial, bankruptcy and/or appellate proceedings).
14. **Default.** In the event Las Olas Chabad fails to timely pay the Settlement Amount in paragraph 2 above within six (6) months of the date that this Agreement is approved by the Court, and/or if any payment made by Las Olas Chabad pursuant to the terms of this Agreement is not made with good and sufficient funds, the Receiver shall provide Las Olas Chabad with ten (10) business days written notice of default. During this ten (10) business day period, Las Olas Chabad shall have the opportunity to cure such default (the "Cure Period"). If Las Olas Chabad fails to cure the default within the Cure Period, then the Receiver may pursue all appropriate amounts owed to the Receivership Estate without any limitation, based on the full amount of the Transfers of \$63,200.00 set forth above.
15. **Jurisdiction.** The Parties agree to seek an Order providing that the United States District Court for the Southern District of Florida shall retain jurisdiction to enforce the terms of this Agreement and decide any other issues arising from this Agreement. In the event no such order retaining jurisdiction over this Agreement is granted, the Parties agree that the sole venue for any action arising from the Agreement shall be in the District Court for the Southern District of Florida.

16. **Notices.** All notices to the Receiver shall be addressed to Daniel S. Newman, P.A., Broad and Cassel, One Biscayne Tower, 21st Floor, 2 South Biscayne Boulevard, Miami, Florida 33131 and via electronic mail at: dnewman@broadandcassel.com, which shall constitute good and sufficient notice. All notices sent to Las Olas Chabad shall be addressed to Jerome R. Schechter, P.A., 1995 East Oakland Park Blvd., Suite 210, Fort Lauderdale, FL 33306 and by electronic mail at: jrspa@bellsouth.net and rabbi@jewishfl.com, which shall constitute good and sufficient notice.

IN WITNESS WHEREOF, the Parties have affixed or caused to be affixed their respective signatures, effective on the day and year first written above.

GRISEL ALONSO, THE RECEIVER

By: _____
Name: Grisel Alonso
Title: Receiver
Date:


LAS OLAS CHABAD JEWISH CENTER, INC.

By: _____
Name: CHAIR SLAVATICKI
Title: AGENT
Date: 07/25/16

16. **Notices.** All notices to the Receiver shall be addressed to Daniel S. Newman, P.A., Broad and Cassel, One Biscayne Tower, 21st Floor, 2 South Biscayne Boulevard, Miami, Florida 33131 and via electronic mail at: dnewman@broadandcassel.com, which shall constitute good and sufficient notice. All notices sent to Las Olas Chabad shall be addressed to Jerome R. Schechter, P.A., 1995 East Oakland Park Blvd., Suite 210, Fort Lauderdale, FL 33306 and by electronic mail at: jrspa@bellsouth.net and rabbi@jewishfl.com, which shall constitute good and sufficient notice.

IN WITNESS WHEREOF, the Parties have affixed or caused to be affixed their respective signatures, effective on the day and year first written above.

GRISEL ALONSO, THE RECEIVER

By: 
Name: Grisel Alonso
Title: Receiver
Date: 7/25/16

LAS OLAS CHABAD JEWISH CENTER, INC.

By: _____
Name: _____
Title: _____
Date: _____