UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

GRISEL ALFONSO, as Receiver for
Elm Tree Investment Advisors, LLC,
Elm Tree Investment Fund, LP,
Elm Tree 'e'Conomy Fund, LP, and
Elm Tree Motion Opportunity, LP,

Plaintiff,

v.

AEROFUND FINANCIAL, INC.,
a California corporation,

Defendants.
_____/

Civil Action No. 16-CV-60797-KMW

REPLY TO OPPOSITION TO
MOTION TO DISMISS, OR ALTERNATIVELY, TO TRANSFER VENUE

I.

LEGAL ARGUMENT

A. FREDERIC ELM IS ALLEGED BY THE RECEIVER TO BE THE ULTIMATE OWNER AND CONTROLLER FOR THE RECEIVERSHIP ENTITIES AND THUS, RECEIVER IS BOUND BY THE VENUE PROVISION.

The Receiver herein states "None of the Receivership entities are parties to the Aerofund Agreements." This statement, while technically correct, it conveniently ignores the actual facts, since "FREDERIC ELM, fka FREDERIC ELMALEH," who ***did sign the AEROFUND agreements***, as an ***individual*** [1], is the subject of the following allegations ***relating to his operation of the receivership entities*** as his alter ego:

> Instead, Elm and ETIA used a majority of the funds raised to pay back investors with Ponzi-like payments and for Elm's own personal use. Indeed, to date, Elm has misappropriated at least $2 million in investor funds to pay for a $1.75 million home, high-end home furnishings and other personal items such as automobiles, jewelry and daily living expense. Complaint for Injunctive Relief at ¶2
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> In addition, Elm lost more money trading in the funds' accounts and continues to misappropriate significant amounts of investor money, including payment for home furnishings and jewelry. Complaint for Injunctive Relief at ¶5.

[1] He also signed the agreement on behalf of Fiberforce, LLC, but there is no allegation that this relationship is the basis for binding the receivership entities.

During the relevant time period, he was the founder and managing director of ETIA and the general partner and fund manager of the Elm Tree Fund. Complaint for Injunctive Relief at ¶8.

From no later than November 2013 to the present, Defendants have raised at least $17 million from more than 50 investors through the sale of securities in the Elm Tree Funds. Elm and ETIA were engaged in the business of directly advising the funds as the value of security or as the advisability of investing in, purchasing or selling securities. Complaint for Injunctive Relief at ¶17.

Elm invested a portion of the money raised. He sent approximately $7.1 million in net transfer to a TD Ameritrade account in the name of the investment fund that he used for trading in all Elm Tree Funds. Complaint for Injunctive Relief at ¶21.

While Elm invested a portion of investor funds, he used a vast majority of the funds to repay other investors in Ponzi-like fashion and to fund his own personal expenses and the expenses of his wife, Amanda Elm, as described below. As the managing director of ETIA and the manager of the Elm Tree Funds, Elm knew all of the investor funds were not being invested or used as described in the private placement memoranda and the promissory notes, that the investments he made on behalf of the Elm Tree Funds were not returning a profit, that he was commingling investor funds across the various Elm Tree Fund accounts, that he was repaying some investors with other investors' funds and that he was misappropriating investor funds for his own personal use. Complaint for Injunctive Relief at ¶24.

Elm however withdrew and misappropriated at least $2 million for his own personal benefit and for the benefit of his wife, Amanda Elm . . . . But rather Elm used the Elm Tree Funds as his own personal piggy bank, paying everyday expense such as utility bills, gas, lawn care, pet and baby items and medical bills from fund accounts. Some of the larger misappropriations include $732,000 from ETIA and Investment Fund account to pay for a $1.75 million personal residence for Elm and Amanda Elm, almost $300,000 paid from ETIA and investment fund accounts to car dealership for luxury car in the name of Elm and Amanda Elm, over $130,000 paid from ETIA and Investment Fund accounts to pay for jewelry, and $55,000 paid from ETIA to a local religious organization. Complaint for Injunctive Relief at ¶27.

Elm also continues to dissipate investor proceeds in the Elm Tree Funds. He recently wrote a cashier's check for almost $30,000 for high-end furniture. He also continues to trade heavily in the TD Ameritrade brokerage account, and recently lost over $300,000. Complaint for Injunctive Relief at ¶31.

Contrary to the assertion of the Receiver, Florida courts have uniformly enforced contract terms,

including forum selection clauses, against non-signatories. See, e.g., World Vacation Travel, S.A. v. Brooker, 799 So.2d 410, 412 (Fla. 3d DCA 2001) (forum selection clause against non-signatory proper where the claims are directly out of the agreement and the commercial relationship of the parties); Tuttle's Design–Build, Inc. v. Florida Fancy, Inc., 604 So.2d 873, 873–74 (Fla. 2d DCA 1992) (recognizing that a reasonable forum selection clause would be enforced against a non-signatory). This is particularly true where, as here, there exists a close relationship between the non-signatory and signatory and the interests of the non-signatory are derivative of the interests of the signatory. See, e.g., XR Co. v. Block & Balestri, P.C., 44 F.Supp.2d 1296, 1299 (S.D.Fla.1999) (enforcing forum selection clause against sole shareholder of contracting corporation where the shareholder's interests in the contract were derivative of the contracting party and the contract inured to the non-signatory's benefit); see also, Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285, 1300 (11th Cir.1998). Specifically, ***under an alter-ego like analysis***, cases have enforced non-signatories being bound by a forum selection clause. In Deloitte & Touche v. Gencor Indus., Inc., 929 So.2d 678, 683 (Fla. 5th DCA 2006), the court enforced a forum selection clause against a non-signatory to the contract, because "there exists a close relationship between the non-signatory and signatory and the interests of the non-signatory are derivative of the interests of the signatory." Likewise, in Citigroup Inc. v. Caputo, 957 So.2d 98, 102 (Fla. 4th DCA 2007), we permitted a non-signatory to a contract to enforce a forum selection clause, because the non-signatory was integrally related to the party.

Again, Receiver, ***herself, has alleged*** in the allegations ***of this Complaint*** that "Elm was the ultimate owner of the Receivership Entities and had the ability or ultimate right to control their operations." Complaint at ¶3. If this court was to accept the allegation as true, then the Receiver is bound by the express and unequivocal venue provision in the Agreement for Purchase of Accounts and Settlement Agreement. As the Court held is a factually similar case, "Where the interests of a non-party are "completely derivative of," that is, "directly related to, if not predicated upon" those of a contracting party, the non-party is bound by the contract's forum selection clause. Id. In this case, it is undisputed that Koeppel is the sole and controlling shareholder of XR Co. and that the

acquisition of Ocean by XR Co. would inure to his personal benefit. Therefore, even if Koeppel did not sign the letter agreement, he is still bound by the forum selection clause contained in the agreement." XR Co. v. Block & Balestri, P.C. (S.D. Fla. 1999) 44 F.Supp.2d 1296, 1301

For Receiver to allege, ***generally***, that ELM was the controlling actor for all the receivership entities, but then take the contrary position, ***solely for the purpose of this Motion***, that ELM's contractual obligations are not binding on the "receivership entities" he operated as his alter ego, is creative legerdemain. The Court has previously specifically rejected this tactic: **"**Thus, it appears that Koeppel invokes his relationship to XR Co. both as a sword (for purposes of asserting his malpractice claim), and as a shield (for purposes of avoiding the forum selection clause)." XR Co. v. Block & Balestri, P.C. (S.D. Fla. 1999) 44 F.Supp.2d 1296, 1301.

In the Pozo v. Roadhouse Grill, Inc., 790 S. 2d 1255 (Fla. 5h DCA 2001), and Schuster v. Carnival Corp. No. 10-21879-CIV, 2011 L 541580, cases cited by Receiver, there was a clear acknowledgement by both the parties and the court that "the complaint makes clear that Roadhouse and Roadhouse North Miami, Inc., are separate and distinct legal entities," which is exactly ***opposite*** of what the Receiver, herself, is alleging between ELM and the receivership entities, in both the Complaint for Injunctive and Other Relief and this Complaint against Aerofund. Likewise, there has been no allegation that the receivership entities are somehow "third-party beneficiaries" as in the Woods v. Christensen Shipyards, Ltd., No. 04-61432-CIV, 2005 WL 5654643 (S.D. Fla Sept 23, 2005), but rather that ELM was, legally, the ***controlling actor*** for all the receivership entities.

Finally, AEROFUND agrees with Receiver's case cite quotation that "in order to bind a non-party to a forum selection clause, the party must be closely related to the dispute such that it become foreseeable that it will be bound." In fact, "[A] range of transaction participants, ***parties and non-parties***, should benefit from and be subject to forum selection clauses." (emphasis added) Lipcon v. Underwriters at Lloyd's, London 148 F.3d 1285, 1299 (11th Cir. 1998). In any other universe, where ***any kind of action*** was filed ***resulting from the issuance of checks by ELM or his alter-ego controlled entities, to AEROFUND***, it would ***surely be foreseeable*** that he would be

bound by the venue provision. So should the Receiver.

B. ALTERNATIVELY, THIS COURT SHOULD TRANSFER THIS CASE TO THE NORTHERN DISTRICT OF CALIFORNIA FOR THE CONVENIENCE OF PARTIES AND WITNESSES.

Again, assuming arguendo, that the Court finds that the venue provision of the Agreement for Purchase of Receivables is not binding, the Court should transfer it to the Northern District of California for the convenience of parties and witnesses, and in the interest of justice pursuant to 28 U.S.C. §1404(a). AEROFUND is a California Corporation with no offices or personnel in Florida. The Judgment which was the basis for the settlement agreement payments was entered in California. Nothing in the Response to Opposition filed by the Receiver makes a compelling argument to hauling AEROFUND to Florida in a fraudulent conveyance action merely for cashing payments in compliance with a Settlement Agreement entered after entry of a California Judgment. A district court may dispose of action by *forum non conveniens* dismissal when considerations of convenience, fairness, and judicial economy so warrant. Sinochem International Co. v. Malaysia International Shipping Corp., 127 S. Ct. 1184 (2007). This action is such a case.

II.

CONCLUSION

Dispute the fact the Receiver is tasked with recovering investor funds misappropriated, the Receiver has decided to force a third-party California corporation to defend a fraudulent conveyance action merely for accepting payments in settlement of a judgment against FREDERIC ELM, fka FREDERIC ELMALEH. While it is admitted that some of those funds were from checks directly from the Receivership entities rather than ELM personally, in view of the shell-game allegations of ELM and his controlled entities, attempting to make that distinction as a legal claim, is form over substance.

The forum selection clause contained in the Agreement for Purchase of Accounts is both mandatory and enforceable. AEROFUND, therefore, respectfully requests that this Court dismiss Plaintiff's Complaint under Federal Rule of Civil Procedure 12(b)(3) because she has filed her lawsuit in an improper forum. Alternatively, AEROFUND requests that this Court transfer this case to the United States District Court for the Northern District of California.

Dated: July 7, 2016

Respectfully Submitted,

/s/ *Peter H. Levitt*
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ATTORNEYS FOR DEFENDANT AEROFUND FINANCIAL, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 7, 2016, I served by ECF a true and correct copy of the foregoing Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss, or Alternatively, to Transfer Venue upon Daniel S. Newman, Esq. (dnewman@broadandcassel.com) and Amanda S. Frazier, Esq. (afrazer@broadandcassel.com), Broad and Cassel, One Biscayne Tower, 2 South Biscayne Boulevard, Suite 2100, Miami, FL 33131 .

/s/ Peter H. Levitt
Peter H. Levitt