

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

GRISEL ALONSO, 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,

Case No. 16-62603-CIV-DIMITROULEAS
Proceeding Ancillary to
No. 15-CV-60082-Dimitrouleas/Snow

Plaintiff,

v.

JAMES BENVENUTO, *et al.*,

Defendants.

**JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT
WITH DEFENDANT FILOMENA CALABRIA**

Grisel Alonso, not individually but solely in her capacity as the Receiver appointed over Elm Tree Investment Advisors, LLC, Elm Tree Investment Fund, LP, Elm Tree 'e'conomy Fund, LP, and Elm Tree Motion Opportunity, LP, and Etopia LP (the "Receivership Entities") along with Defendant Filomena Calabria ("Defendant"), respectfully submit this Motion for Approval of Settlement Agreement.

INTRODUCTION

The Receiver has alleged, based upon the bank records of the Receivership Entities and records produced in discovery, that Defendant received recoverable transfers from the Receivership Entities between December 18, 2013 and October 7, 2014 (the "Transfers"). Defendant denies these allegations. It is the Receiver's position that Defendant is a "net winner" in Defendant Frederic Elm's investment scheme, as outlined in the SEC's Complaint and Emergency Motion for Temporary Restraining Order and Other Relief in *SEC v. Elm, et al.*, United States

District Court for the Southern District of Florida, Case No. 15-cv-60082 (the "SEC Action"). [*See* SEC Action at D.E. 1, D.E. 4].

In order to avoid the expense and risk of litigation, the Receiver and Defendant have agreed to resolve any and all disputes relating to the transfers of funds that Defendant is alleged to have received pursuant to the terms of a proposed settlement agreement (the "Settlement Agreement") in which Defendant will pay a total of \$10,000.00, as described below. The Receiver files this Motion because the Receivership Order requires Court approval of all proposed settlements. [SEC Action, 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"). [SEC Action, 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 [*Id.* 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 [*Id.* 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** . . .

[*Id.* 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;

[*Id.* at ¶ 24].

THE PROPOSED SETTLEMENT AGREEMENT

The terms of the proposed Settlement Agreement are as follows:

- Defendant shall pay \$10,000.00 to counsel for the Receiver within 14 days of the date of this court's order approving this settlement.
- Defendant agrees to cooperate with the Receiver in this and any other related action, including by, among other things, providing the Receiver with information and documents related to Fred Elm, Victor Elmaleh, Mercedes Elmaleh, and the Transfers. Defendant agrees to produce to the Receiver all documents in her possession, custody, or control that relate to Fred Elm, Victor Elmaleh, Mercedes Elmaleh, and the Transfers.
- In the event Defendant fails to timely make payment pursuant to the Settlement Agreement, or if the payment made by Defendant pursuant to the terms of the Settlement Agreement is not made with good and sufficient funds, the Receiver shall provide Defendant with ten (10) business days written notice of default. During this ten (10) business day period, Defendant shall have the opportunity to cure such default (the "Cure Period"). If Defendant 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 Defendant agree to mutual releases relating to the Transfers upon the Court's approval of the Settlement Agreement and the Receiver's receipt of the full Settlement Amount due under the terms of the Settlement Agreement.

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

JURISDICTION

The Receiver and Defendant request that the United States District Court for the Southern District of Florida retain jurisdiction to enforce the terms of the Settlement Agreement and decide any other issues arising from the Settlement Agreement. The Receiver and Defendant agree that 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 causes of action against Defendant. 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 there is protracted litigation.

Based on the Receiver's due diligence, the terms of the proposed Settlement Agreement 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 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 and Defendant jointly and respectfully request entry of an order approving the Settlement Agreement, and granting any further relief the Court deems just and proper.

<p>BROAD AND CASSEL LLP Attorneys for Receiver One Biscayne Tower, 21st Floor 2 S. Biscayne Boulevard Miami, FL 33131 Telephone: (305) 373-9467 Facsimile: (305) 995-6387</p> <p>By: <u>s/Daniel S. Newman</u> Daniel S. Newman, P.A. Florida Bar No. 0962767 dnewman@broadandcassel.com Christopher Cavallo, Esq. Florida Bar No. 0092305 ccavallo@broadandcassel.com</p>	<p>SIMON, SCHINDLER & SANDBERG, LLP 2650 Biscayne Blvd. Miami, FL 33137 Tel.: (305) 576-1300 Fax: (305) 576-1331</p> <p>By: <u>s/ Sherryll Martens Dunaj</u> Sherryll Martens Dunaj Florida Bar No. 136707 sdunaj@miami-law.net</p>
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 13, 2018, a true and correct copy of the foregoing was served via electronic transmission on all counsel or parties of record, including Sherryl Martens Dunaj, sdunaj@miami-law.net.

By: *s/Daniel S. Newman*
Daniel S. Newman, P.A.

SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT (referred to herein as the "Agreement") is entered into this _____ day of June 2018, by and between 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, Elm Tree Motion Opportunity LP, and Etopia L.P. (collectively, the "Receivership Entities"), and Filomena Calabria ("Defendant"). The Receiver and Defendant are collectively referred to as the "Parties."

WHEREAS, Receiver has alleged that between December 18, 2013 and October 7, 2014, Defendant received transfers of recoverable funds from Receivership Entities (the "Transfers");

WHEREAS, Defendant Calabria denies the Receiver's allegations regarding the Transfers;

WHEREAS, on November 15, 2016, the Receiver filed suit against Defendant, among others, in the United States District Court for the Southern District of Florida, Case No. 16-cv-62603, with respect to the Transfers (the "Clawback Action");

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

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 by one or more of the Receivership Entities and Defendant, which the Receiver has or may have had against Defendant, or which Defendant has or may have had against the Receiver.
2. **Settlement Terms**. In consideration and exchange for the settlement and releases contained herein Defendant shall:
 - a. Pay \$10,000.00 (the "Settlement Amount") to the Receiver by delivery of Defendant's payment check to the Receiver's counsel within 14 days of the date the Court enters its order approving the settlement.
 - b. Defendant agrees to cooperate with the Receiver in this and any other related action, including by, among other things, providing the Receiver with information and documents related to Fred Elm, Victor Elmaleh, Mercedes Elmaleh, and the Transfers. Defendant shall produce to the Receiver all documents in her possession, custody, or control that relate to Fred Elm, Victor Elmaleh, Mercedes Elmaleh, the Transfers, and any investments or loans.

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 the entire Settlement Amount 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 Defendant from any and all claims, debts, liabilities, demands, obligations, costs, attorneys' fees, actions and causes of action related to or arising from the Transfers and any and all other transactions or transfers between Defendant and the Receivership Entities, made at any time. This is a general release of all claims made or which could have been made by Receiver and releases all claims of any sort arising from any transactions or transfers between Defendant any any Receivership Entity from the beginning of time to the date of this Agreement.
 - b. Upon the approval of this Agreement by the Court and upon the Receiver's receipt and clearing of the entire Settlement Amount as set forth in paragraph 2 above, Defendant 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 or arising from the Transfers and any and all other transactions or transfers between Defendant and the Receivership Entities. This is a general release of all claims made or which could have been made by Defendant and releases all claims of any sort arising from any transactions or transfers between Defendant and any Receivership Entity and/or the Receiver from the beginning of time to the date of this Agreement.
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. The Parties submit to the jurisdiction of the United States District Court for the Southern District of Florida.
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 fees in any trial, bankruptcy and/or appellate proceedings).
14. **Default.** In the event Defendant fails to timely make payment pursuant to paragraph 2(a), the Receiver shall provide Defendant with ten (10) business days written notice of default. During this ten (10) business day period, Defendant shall have the opportunity to cure such default (the "Cure Period"). If Defendant 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 Settlement Amount set forth in paragraph 2 of this Agreement. Said written notice shall be sent by Receiver to Defendant by Federal Express to Defendant Filomena Calabria in accordance with the Notice provisions of paragraph 16, with a courtesy cc to her counsel, named in paragraph 16
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, 2 South Biscayne Boulevard, 21st Floor, Miami, Florida 33131 which shall constitute good and sufficient notice. All notices sent to Defendant shall be addressed to Filomena Calabria, 99 Rainforest Drive, Brampton, On L6R 1A3, Canada, and shall be sent via Federal Express, with proof of delivery (with a courtesy cc to Sherryll Martens Dunaj, Simon Schindler & Sandberg, 2650 Biscayne Boulevard, Miami, Florida 33137), 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:

FILOMENA CALABRIA

Date: _____