

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.

**MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT
WITH DEFENDANT TIMOTHY HARTMANN**

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") respectfully submits this Motion for Approval of Settlement Agreement with Defendant Timothy Hartmann ("Defendant").

INTRODUCTION

The Receiver has determined, based upon the bank records of the Receivership Entities and records produced in discovery, that Defendant received a total of \$44,000.00 from the Receivership Entities. According to the bank records of the Receivership Entities, the funds Defendant received were derived from investors in the Receivership Entities. Based on the foregoing, 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].

Further, it is the Receiver's position that the "profits" Defendant received are subject to return to the Receivership Estate as fraudulent transfers. The Receiver named Defendant in the above-styled action as a result.

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 received pursuant to the terms of a proposed settlement agreement (the "Settlement Agreement") in which Defendant shall pay to the Receiver \$35,000.00 as follows: (i) 25,000 to the Receiver within thirty (30) days of the Court's approval of the Settlement Agreement; and (ii) the remaining \$10,000 to the Receiver in six (6) equal monthly installments of \$1,666.67, thereafter due on the fifth day of each month for the next six (6) consecutive months, with the first monthly installment payment coming sixty (60) days after the Court's approval of the Settlement Agreement.

In addition, in advance of the filing of this Motion, Hartmann represented that he made a complete and accurate production to the Receiver of: (i) the past 6 months of his personal bank statements; (ii) all emails and texts with Fred Elm, a/k/a/ Frederic Elmaleh, or any entity Mr. Hartmann knew Mr. Elm to be associated with including but not limited to the Receivership Entities and MojiLife; and (iii) all receipts for the MojiLife computers Mr. Hartmann claims to have purchased and then sold to MojiLife. Mr. Hartmann also withdrew his pending Motion for Sanctions. [D.E. 189].

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 TRANSFERS

1. The Receiver contends that from December 3, 2013 to August 25, 2014, the Elms and ETIA transferred funds in the amount of \$44,000.00 (collectively, the "Transfers") to Defendant, as follows:

- a. On or about December 3, 2013, the Elms transferred funds in the amount of \$10,000.00 via check to Defendant;
- b. On or about January 21, 2014, Elm Tree Investment Advisors (“ETIA”) transferred funds in the amount of \$4,000.00 via check to Defendant;
- c. On or about March 6, 2014, ETIA transferred funds in the amount of \$5,000.00 via check to Defendant;
- d. On or about May 9, 2014, ETIA transferred funds in the amount of \$10,000.00 via check to Defendant;
- e. On or about June 30, 2014, ETIA transferred funds in the amount of \$5,000.00 via check to Defendant; and
- f. On or about August 25, 2014, ETIA transferred funds in the amount of \$10,000.00 via check to Defendant.

The Receiver contends that the records of the Receivership Entities demonstrate that the funds Defendant received were derived from persons who invested in the Receivership Entities. Accordingly, it is the Receiver's position that the funds Defendant received are fraudulent transfers in the amount of \$44,000.00, which funds rightfully belong to the Receivership Estate.

THE PROPOSED SETTLEMENT AGREEMENT

The proposed Settlement Agreement provides in pertinent part:

- Defendant shall pay \$35,000.00 to the Receiver within the timelines described above.
- In the event Defendant fails to timely make payment pursuant to the Settlement Agreement, or if any payment made by Defendant pursuant to the terms of the Settlement Agreement is not made with good and sufficient funds, or if the information Defendant was required to produce to the Receiver prior to the filing of this Motion was inaccurate

or incomplete, 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, Defendant consents to the entry of a consent final judgment (attached to the Settlement Agreement), for the full amount of the Transfers, and agrees that such amount is due and owing to the Receiver, and agrees that he cannot contest any findings related to the final judgment or the Transfers. The Parties agree that the Receiver may unilaterally seek entry of the consent judgment, attached to the Settlement Agreement, upon default as described in this paragraph, and shall be entitled to entry of consent final judgment by filing a motion along with a supporting affidavit or declaration describing the circumstances of the default and attaching this Agreement.

- 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 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, and granting any further relief the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 11, 2018, a true and correct copy of the foregoing was served via electronic transmission on all counsel or parties of record.

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SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT (referred to herein as the "Agreement") is entered into this ____ day of ____ 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 Timothy Hartmann ("Hartmann"). The Receiver and Hartmann are collectively referred to as the "Parties."

WHEREAS, the Receiver has alleged that Hartmann received fraudulent transfers of funds in the total amount of \$44,000.00 from Receivership Entities (the "Transfers");

WHEREAS, on November 15, 2016, the Receiver filed suit against Hartmann, among others, in the United States District Court for the Southern District of Florida, in the action styled *Alonso v. Benvenuto, et al.*, Case No. 16-cv-62603 (the "Clawback Action");

WHEREAS, the Parties have agreed to settle this matter with respect to the Transfers in order to provide for a complete resolution of the Clawback Action as it pertains to Hartmann;

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 to Hartmann, which the Receiver has or may have had against Hartmann, or which Hartmann has or may have had against the Receiver.
2. **Settlement Terms.** In consideration and exchange for the settlement and releases contained herein:
 - a. Hartmann shall pay \$35,000.00 (the "Settlement Amount") to the Receiver in installments as follows:
 - (i) Hartmann shall pay \$25,000 to the Receiver within thirty (30) days of the date that this Agreement is approved by the Court;
 - (ii) Hartmann shall pay the remaining \$10,000 of the Settlement Amount to the Receiver in six (6) equal monthly installments of \$1,666.67, thereafter due on the fifth day of each month for the next six (6) consecutive months. The first monthly installment payment shall be sixty (60) days after the date that this Agreement is approved by the Court. No interest shall accrue or be charged by the Receiver upon the deferred installment payments, so long as payments are timely made in accordance with the terms of this Agreement.

- b. Hartmann represents that he made a complete and accurate production to the Receiver prior to the filing of any motion to approve this Agreement:
 - (i) The past 6 months of his personal bank statements;
 - (ii) All emails and texts with Fred Elm, a/k/a/ Frederic Elmaleh, or any entity Mr. Hartmann knows Mr. Elm to be associated with including but not limited to the Receivership Entities and MojiLife; and
 - (iii) All receipts for the MojiLife computers he claims to have purchased and then sold to MojiLife.
- c. Hartmann withdrew his pending Motion for Sanctions [D.E. 189] prior to the filing of any motion to approve this Agreement.
- d. Upon approval of this Agreement by the Court, and upon satisfaction of the Settlement Terms set forth in 2(a)(i)&(c) above, the Receiver shall withdraw her pending Response to the Motion for Sanctions at [D.E. 193].
- 3. **Payment Information.** Payment shall be made directly to Grisel Alonso, the Receiver, at 1883 Marina Mile Blvd., Suite 106, Fort Lauderdale, FL 33315.
- 4. **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.
- 5. **Releases.**
 - a. Upon the approval of this Agreement by the Court and upon the satisfaction of the Settlement Terms listed in paragraph 2, including the Receiver's receipt and clearing of the entire Settlement Amount, 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 Hartmann 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 Hartmann 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 Hartmann and any Receivership Entity from the beginning of time to the date of this Agreement; except that nothing within this release discharges Hartmann's obligations under this Agreement.
 - b. Upon the approval of this Agreement by the Court and upon the satisfaction of the Settlement Terms listed in paragraph 2, including the Receiver's receipt and

clearing of the entire Settlement Amount, Hartmann 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 Hartmann and the Receivership Entities. This is a general release of all claims made or which could have been made by Hartmann and releases all claims of any sort arising from any transactions or transfers between Hartmann and any Receivership Entity and/or the Receiver from the beginning of time to the date of this Agreement.

6. **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.
7. **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.
8. **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.
9. **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 are effective as original signatures.
10. **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. Hartmann and the Receiver submit to the jurisdiction of the United States District Court for the Southern District of Florida.
11. **Authority.** Each signatory hereto represents that she/he has authority to execute this Agreement and to bind the party or parties on whose behalf she/he signed.
12. **Severability.** If any provision of this Agreement is determined to be invalid or unenforceable, the remainder of this Agreement shall not be affected thereby.
13. **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.

14. **Attorneys' Fees.** The Parties shall 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).
15. **Default.** In the event Hartmann fails to timely satisfy any of the Settlement Terms in paragraph 2, or it is determined that Hartmann produced incomplete or inaccurate information to the Receiver in connection with the Settlement Terms in paragraph 2, the Receiver shall provide Hartmann with ten (10) business days written notice of default. During this ten (10) business day period, Hartmann shall have the opportunity to cure such default (the "Cure Period"). If Hartmann fails to cure the default within the Cure Period, Hartmann consents to the entry of the final judgment (attached as **Exhibit A**), for the full amount of the Transfers, and agrees that such amount is due and owing to the Receiver, and agrees that he cannot contest any findings related to the final judgment or the Transfers. The Parties agree that the Receiver may unilaterally seek entry of the consent judgment, reflected in Exhibit A, upon default as described in this paragraph, and shall be entitled to entry of final judgment by filing a motion along with a supporting affidavit or declaration describing the circumstances of the default and attaching this Agreement.
16. **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.
17. **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 Hartmann shall be addressed to Lorne Berkeley, Esq., Daniels Rodriguez Berkeley Daniels & Cruz, P.A., 4000 Ponce de Leon Blvd., Suite 800, Coral Gables, Fl. 33146 LBerkeley@drbdc-law.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: _____	_____ TIMOTHY HARTMANN Date: _____
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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.

**CONSENT FINAL JUDGMENT AWARDING DAMAGES
AS TO DEFENDANT TIMOTHY HARTMANN**

THIS MATTER came before the Court upon agreement of the Parties, in connection with the Settlement Agreement dated [insert], entered into between the Receiver and Defendant Timothy Hartmann.

UPON CONSIDERATION of the Settlement Agreement, which was approved by the Court on [date] [D.E. (insert)], and being otherwise fully advised in the premises, it is ORDERED AND ADJUDGED as follows:

1. Consent Final Judgment against Timothy Hartmann is hereby **GRANTED**.
2. Consent Final Judgment is hereby entered in favor of Plaintiff Grisel Alonso, as 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 LP, 1883 Marina Mile Boulevard, Suite 106, Fort Lauderdale, FL 33315, and against Defendant Timothy Hartmann, [current address].
3. Plaintiff shall recover from Defendant the sum of \$44,000.00 in damages, and

**EXHIBIT A
TO SETTLEMENT
AGREEMENT**

[\$[date-based calculation] as pre-judgment interest, for a total of \$[44,000 plus pre-judgment interest amount], that shall bear interest at the prevailing statutory legal rate of interest, for which let execution issue forthwith.

DONE AND ORDERED in Chambers in Fort Lauderdale, Broward County, Florida this ____ day of _____, 201_.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:
Counsel of record