

Court File No.

CV-18-00602615-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**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**

Plaintiff

and

VICTOR ELMALEH and MERCEDES ELMALEH

Defendants



STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL

FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$1,500 for costs, within the time for serving and filing your statement of defence you may move to have this proceeding dismissed by the Court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400 for costs and have the costs assessed by the Court.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date Aug. 1/2018

Issued by 
Local Registrar

Address of court office: Superior Court of Justice
393 University Avenue, 10th Floor
Toronto ON M5G 1E6

TO: Victor Elmaleh
59 McCabe Crescent
Thornhill, ON L4J 2S6

AND TO: Mercedes Elmaleh
59 McCabe Crescent
Thornhill, ON L4J 2S6

CLAIM

1. Grisel Alonso acts in her capacity as 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, LP and claims against Defendants, Victor Elmaleh and Mercedes Elmaleh (the “Elmalehs”), jointly and severally for:

- (a) Recognition and enforcement of a judgment (“U.S. Judgment”) granted against the Elmalehs on 13 June 2018, in the United States District Court for the Southern District of Florida, Fort Lauderdale Division (“U.S. District Court”) for US\$2,302,551.88 payable in Canadian dollars under s. 121 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (b) Post-judgment interest at 5.72% per annum, the rate ordered in the U.S. Judgment;
- (c) Costs of this action, plus all applicable taxes; and
- (d) Such further and other relief as to this Honourable Court may seem just.

PARTIES

2. The Receiver was appointed by the U.S. District Court to act on behalf of Elm Tree Investment Advisors, LLC (“ETIA”), Elm Tree Investment Fund, LP (“ETIF”), Elm Tree ‘e’Conomy Fund, LP (“EETF”), and Elm Tree Motion Opportunity, LP, (“ETMO”) (ETIA, ETIF, EETF, and ETMO are collectively the “Receivership Entities”). The Receivership Order was issued on 16 January 2015 by U.S. District Judge William P. Dimitrouleas

following a motion by the United States Securities and Exchange Commission. On motion by the Receiver, a further order was issued on 10 February 2017, expanding the Receivership to include Etopia, LP ("Etopia"), which is now one of the "Receivership Entities".

3. The Receiver is the Director of Receivership and Fiduciary Services at Michael Moecker & Associates, Inc. located at 1883 Marina Mile Boulevard, Suite 106, Fort Lauderdale, Florida.

4. The Elmalehs reside in Thornhill, Ontario.

RECOGNITION AND ENFORCEMENT OF U.S. JUDGMENT

5. On 12 July 2017, the Receiver filed a Complaint ("Complaint") against the Elmalehs, 1925333 Ontario Inc., d/b/a Cleartech Computing Systems ("CCS"), Engage Marketing Group Inc. ("Engage"), and M3 Designs, LP ("M3") in the U.S. District Court relating to their participation in, and receipt of funds from, an illegal Ponzi scheme. The Complaint included allegations that:

- (a) Frederic Elm f/k/a Frederic Elmaleh ("Elm") and the Receivership Entities engaged in a fraudulent Ponzi scheme through the offer and sale of fraudulent investments and securities to investors;
- (b) Elm was the ultimate owner of the Receivership Entities, which were used to perpetrate the scheme and funnel investor money to himself and his family members;

- (c) The scheme raised more than \$17 million from more than 50 investors through the sale of securities in ETIF, ETEF, ETMO, and Etopia (the “Elm Tree Funds”);
- (d) Investors sent funds to Elm for investment into the Elm Tree Funds, but the funds did not generate a profit;
- (e) A small portion of funds provided by investors were actually invested, while the vast majority of funds were actually used to repay other investors and fund personal expenses for Elm and his family;
- (f) Like all Ponzi pyramid schemes, the money provided to “winners” came out of investments made by “losers”, rather than from legitimate business profits;
- (g) The majority of investors in the Elm Tree Funds: received no distributions from the purported trading or investment profits; received a distribution less than the amount invested; and suffered net losses;
- (h) In late September or early October 2014, when the Securities and Exchange Commission was investigating the fraudulent Ponzi scheme, Etopia was established by Elm and Victor Elmaleh (and perhaps others) to continue receiving funds from investors in furtherance of the fraudulent scheme;
- (i) Etopia received millions of dollars between 15 October 2014 and 4 February 2015 in new investment funds before those funds were ultimately

transferred into other companies beneficially owned by the Elmalehs, namely CCS, Engage, and M3 ("Elmaleh Entities");

- (j) The Elmaleh Entities are alter egos of the Elmalehs;
- (k) The funds transferred to the Elmaleh Entities were diverted and misappropriated from Etopia in furtherance of the fraudulent scheme, and are thus assets that the Receiver was appointed to marshal for the benefit of defrauded investors;
- (l) The Elmalehs and the Elmaleh Entities exercise dominion and control over the money transferred to them by Etopia, which represents a wrongful deprivation of the Receivership's property;
- (m) Allowing the Elmalehs and the Elmaleh Entities to keep funds transferred from Etopia would be inequitable and unjust;
- (n) Funds transferred to the Elmalehs and the Elmaleh Entities were derived from the fraudulent Ponzi scheme; and
- (o) The Receivership Entities did not receive reasonably equivalent value from the Elmalehs or Elmaleh Entities in exchange for the transfers.

6. On 22 July 2017, the Elmalehs were properly served with the Complaint.

7. After numerous extensions, Victor Elmaleh filed an Answer to the Complaint on 10 October 2017, raising a number of affirmative defences. The Answer was, however,

defective since it was filed by Victor Elmaleh, who is not an attorney, on behalf of all defendants, and was struck on 17 October 2017 by Judge Cecilia M. Altonaga.

8. Mercedes Elmaleh filed an Answer to the Complaint on 24 October 2017.

9. On 16 April 2018, Victor Elmaleh sent an email to the Receiver's U.S. counsel stating that both he and Mercedes Elmaleh were consenting to the Receiver obtaining summary judgment.

10. On 11 May 2018, the Receiver filed a motion for Summary Judgment against the Elmalehs seeking repayment of the \$1,980,224.30, plus pre-judgment interest, for the transfers made to CCS, Engage, and M3 as part of the fraudulent scheme.

11. On 13 June 2018, the U.S. District Court entered an Order for Final Judgment for US\$1,980,224.30, and US\$322,327.58 in pre-judgment interest accrued through 11 May 2018. The Elmalehs did not file a response to that Order, and the time for responding has expired.

12. The total balance due and owing by the Elmalehs is US\$2,302,551.88, which under section 121 of the *Courts of Justice Act* must be paid:

- (a) In an amount of Canadian currency sufficient to purchase US\$2,302,551.88 at a bank in Ontario listed in Schedule I to the *Bank Act* (Canada) ("bank");
and

- (b) Based upon the exchange rate applicable for Canadian dollar purchases of U.S. currency quoted by the bank at the close of business on the day before payment of the obligation is made to the Receiver.
13. To date, the Elmalehs have failed to make any payment under the U.S. Judgment.
14. The U.S. District Court is a court of competent jurisdiction and the U.S. Judgment should be recognized and enforced according to its terms.
15. The Receiver proposes that this action be tried in Toronto.

~~31 July 2018~~ AM -
AUG. 1/2018

GOWLING WLG (CANADA) LLP
Barristers & Solicitors
1 First Canadian Place
100 King Street West, Suite 1600
Toronto ON M5X 1G5

Tel: 416-862-7525
Fax: 416-862-7661

Malcolm N. Ruby (#25970G)
Tel: 416-862-4314
Fax: 416-863-3614
malcolm.ruby@gowlingwlg.com
Matthew Doak (#65867W)
Tel: 416-814-5636
Fax: 416-862-7661
matthew.doak@gowlingwlg.com

Lawyers for Plaintiff

GRISEL ALONSO, AS RECEIVER FOR ELM TREE INVESTMENT -and- VICTOR ELMALEH and MERCEDES ELMALEH
ADVISORS, LLC, ELM TREE INVESTMENT FUND, LP,
Plaintiff

CV-18-00002615-0000

Defendants
Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT TORONTO

STATEMENT OF CLAIM

GOWLING WLG (CANADA) LLP
Barristers & Solicitors
1 First Canadian Place
100 King Street West, Suite 1600
Toronto ON M5X 1G5

Malcolm N. Ruby (25970G)
malcolm.ruby@gowlingwlg.com
Tel: 416-862-4314
Matthew Doak (65867W)
matthew.doak@gowlingwlg.com
Tel: 416-814-5636

Tel: 416-862-7525
Fax: 416-862-7661

Lawyers for Plaintiff

File Number: T1007900