UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

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 RESPONSE IN OPPOSITION TO THE OBJECTION FILED BY JOSE AND MIREILLE ROFFE

The Court-appointed receiver, Grisel Alonso (the "Receiver"), not individually, but solely in her capacity as Receiver for Elm Tree Investment Advisors, LLC ("ETIA"); Elm Tree Investment Fund, LP ("ETIF"); Elm Tree 'e'Conomy Fund, LP ("ETEF"); Elm Tree Motion Opportunity, LP ("ETMO"); and Etopia LP ("Etopia") (collectively, the "Receivership Entities"), respectfully submits this Response in Opposition to the Objection Filed by Jose and Mireille Roffe [D.E. 202].

I. SUMMARY

The claim submitted by Jose and Mireille Roffe (the "Roffes") is identified as "Claim 8" in the Receiver's Motion for Court Approval regarding claims (the "Motion"), filed on February 4, 2019. [D.E. 200.] The books and records of the Receivership indicate that the Roffes invested

a total of $99,835.00 with Receivership Entities, and received in return transfers in the amount of $102,998.67 from Receivership Entities. As such, according to the books and records of the Receivership, the Roffes are "net winners" in the amount of $3,163.67, as explained in the Motion. [D.E. 200, 6-7.] For this reason, the Receiver sued the Roffes, among others, in the clawback action styled *Alonso v. Benvenuto, et al.*, Case No. 16-62603 in the U.S. District Court for the Southern District of Florida (the "Clawback Action"). In addition, the Receiver rejected the Roffes' claim. *Id.*

The Roffes objected to the Motion and the Receiver's recommendation that the Court deny the Roffes' claim. [D.E. 202.] The Roffes' primary contentions are: (1) the Receiver's calculation that the Roffes are "net winners" does not give credit to the Roffes for a $50,000 investment made "with Elm Tree Investments Advisers LLC (ETIA), namely . . . the Emerging Growth Fund (EGF) paid on March 4, 2013," [D.E. 202, ¶ 4]; (2) the Receiver's exclusion of Fiberforce/Emerging Growth Fund ("EGF") from the Receivership is unfair, [*Id.*, ¶ 5]; and (3) the Roffes' settlement with the Receiver in the Clawback Action, and the release of claims given by the Roffes in connection with that settlement, should not prevent the Court from addressing the Roffes' objection on the merits, [*Id.* at Appx. A.]

As explained in detail below, the Roffes' objection should be overruled. First, the $50,000 investment made by the Roffes in March 2013 was made before the November 2013 cut off suggested by the SEC in its Complaint. [D.E. 1, ¶¶ 1, 17.] In addition, the Roffes made their March 2013 investment with a non-Receivership entity that was not a named Defendant in the SEC's Complaint or one of the entities placed in Receivership. [D.E. 1, ¶ 1; D.E. 13, p. 1.] Second, the Receiver and her retained professionals analyzed whether to move to expand the Receivership over Fiberforce/EGF, and ultimately made the decision that expansion was not in

the best interests of the Receivership Estate. Third, the Roffes' settlement agreement with the Receiver in the Clawback Action included a release of claims, including the claim argued for by the Roffes in their objection. [Clawback D.E. 139-1, ¶ 6(b).] Fourth, the Roffes' settlement agreement specifically allowed for the Receiver to consider the terms of that settlement when analyzing any claim submitted by the Roffes, and acknowledged the Receiver's sole discretion to determine whether to deny the Roffes' claim. [Clawback D.E. 139-1, ¶ 5.]

II. STANDARD

Affirming the plan proposed by the Receiver is within the equitable discretion of this Court. *See S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) ("The district court has broad powers and wide discretion to determine relief in an equity receivership."). However, this Court must defer to the SEC's judgment and may give weight to the Receiver's judgment regarding distribution. *See S.E.C. v. Byers*, 637 F. Supp. 2d 166, 174 (S.D.N.Y. 2009) ("The SEC's judgment is entitled to deference from this Court. In addition, the Receiver fully supports the Plan, and the Court may give weight to the Receiver's judgment.") (citations omitted).

Here, the SEC reviewed the Motion and other filings related to the Receiver's determinations with respect to the Roffes' claim and the general treatment of investments in non-Receivership Entities, including Fiberforce/EGF. The SEC authorized the Receiver to state that it had no objection to the Receiver's recommendations. As such, the Receiver suggests that this Court should give weight to the fact that the SEC is not objecting to her recommendations.

III. DISCUSSION

The Roffes' claim should be rejected, and their objection overruled, because they are "net winners" according to the Receivership's books and records, and they released their claims against the Receivership Estate in the Clawback Action.

A. The Roffes Are "Net Winners"

The Receiver correctly determined based on the Receivership's books and records that the Roffes are "net winners" that do not have a claim against the Receivership. As discussed in numerous filings in the Clawback Action:

- On or about January 10, 2014, the Roffes transferred funds in the amount of **$99,835.00** to ETEF.
- During the period from July 18, 2014 to October 8, 2014, ETIA transferred funds in the amount of **$102,998.67** to the Roffes as follows: (1) on July 18, 2014, ETIA transferred funds in the amount of $44,498.67 via check to the Roffes; (2) on July 22, 2014, ETIA transferred funds in the amount of $8,500.00 via check to the Roffes; and (3) on October 8, 2014, ETIA transferred funds in the amount of $50,000.00 via check to the Roffes.
- As such, the Roffes are "net winners," having received from the Receivership Entities **$3,163.67** more than they invested in the Receivership Entities.

In their objection, the Roffes argue that the above calculation does not take into account a $50,000 investment they made in March 2013 (the "March 2013 Investment"). [D.E. 202, ¶¶ 4-7.] According to the Receivership's books and records, the March 2013 Investment was made *before* the November 2013 cut off suggested by the SEC's Complaint, [D.E. 1, ¶¶ 1, 17], to an entity—Fiberforce/EGF—that is *not* part of the Receivership. [D.E. 13, p. 1.] The Receiver simply cannot give the Roffes credit for an investment that was made with a non-Receivership Entity.[1] The Roffes are not the only investors impacted by frauds orchestrated by Fred Elm prior to the establishment of the Receivership Entities, but the Receiver is bound by the terms and provisions of her appointment.

[1] The fact that the Proof of Claim Form used in this case invited the submission of claims for investments made with Receivership Entities *and any related entities* does not mean that the Receiver must accept or approve all the claims submitted. It simply means the Receiver invited a broad swathe of claims for her analysis.

The Roffes' counter to the plain language of the Receivership Order—and the plain fact that Fiberforce/EGF is *not* a Receivership Entity—is to argue that the Receiver should have expanded the Receivership over Fiberforce/EGF. [D.E. 202, ¶¶ 5-7.] Without revealing privileged and work product information, the Receiver and her professionals considered moving to expand the Receivership over Fiberforce/EGF, analyzed the issues related to a proposed expansion, and determined that expansion was not warranted or in the best interests of the Receivership Estate. Challenges to expansion over Fiberforce/EGF included, without limitation: (1) lack of investor documentation and/or incomplete investor documentation; (2) difficulty in selecting an equitable and reasoned cut off point given the scope and length of the Fiberforce fraud; (3) legal and jurisdictional issues; and (4) the economic impact of expansion on the Receivership Estate. It is not appropriate or warranted for a single claimant, at this stage, to second guess the Receiver's judgment in this regard. Moreover, if the Court were to determine the Roffes are correct that the Receivership should have been expanded over Fiberforce/EFG, it would drastically and materially change the Receivership at this very late stage when the Receiver is trying to wind everything down. Very likely, it would significantly delay the wind down of the Receivership and result in a dramatic increase in costs.

B. The Roffes Released Their Claims Against The Receivership Estate

Because the Receiver properly determined that the Roffes are "net winners" pursuant to the Receivership's books and records, the Roffes were named as defendants in the Clawback Action. In that litigation, the Roffes entered into a settlement agreement with the Receiver (the "Roffe Settlement"), which was approved by the Court on June 9, 2017. [Clawback D.E. 140.] Rather than litigate the precise issues they now raise in their objection, the Roffes chose to settle the case. The Roffe Settlement provides in pertinent part:

> 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, the Roffes *release and discharge* 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 Transfer *and any and all other transactions or transfers between the Roffes and the Receivership Entities*. This is a general release of all claims made or which could have been made by the Roffes *and releases all claims of any sort arising from any transactions or transfers between the Roffes and any Receivership Entity and/or the Receiver* from the beginning of time to the date of this Agreement.

[Clawback D.E. 139-1, ¶ 6(a)] (emphasis added). Pursuant to the Roffe Settlement, the Roffes have released any and all claims against the Receivership. Assuming *arguendo* the Court were to determine that the Roffes have a valid argument regarding the March 2013 Investment, any claim related to that investment has been released in the Roffe Settlement.

The Roffe Settlement also provides:

> Nothing in this Agreement shall prevent the Roffes from submitting a claim in any Court-approved claims proceed initiated by the Receiver; however, *the Receiver does not waive and shall retain* all legal and equitable rights to oppose and/or object to any such claim *based on the terms of this Agreement or for any other proper reason*. The Roffes further acknowledge and agree that this Agreement in no way effects the *Receiver's sole discretion* in making recommendations to the Court concerning any claims process and that the Court shall be the ultimate decision-maker as to the approval or rejection of any future claims made in a Court-approved claims process.

[Clawback D.E. 139-1, ¶ 5] (emphasis added). As such, the Receiver expressly maintained her right to oppose any claim submitted by the Roffes based on the terms of the Roffe Settlement, including the release and discharge of claims included therein. Moreover, the Roffes expressly acknowledged the Receiver's "sole discretion" in making recommendations to the Court related to all claims, including their own.

In sum, the Roffes chose to settle the Clawback Action with the Receiver rather than litigate the issues they now raise in their objection at the 11th hour. Foreseeing exactly that, the Receiver required the Roffes to release their claims and included language that allowed her to deny any claim submitted by the Roffes based on the terms of the Roffe Settlement. The Roffes cannot escape their release or the Receiver's discretion by claiming inequity and second guessing the Receiver's judgment.

IV. CONCLUSION

The Receiver respectfully requests that this Court enter an Order approving the Receiver's recommendations concerning Claim 8 submitted by the Roffes, and overruling the Roffes' objection.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 8, 2019, 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.

By: *s/Daniel S. Newman*
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