

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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.

ORDER ON RECEIVER'S RECOMMENDATIONS AND OBJECTIONS

THIS CAUSE is before the Court upon the Receiver's February 4, 2019 Recommendations concerning claims and a distribution of the Receivership funds, *see* [DE 200], the Objections, *see* [DE's 202, 203], and the responses thereto, *see* [DE's 206, 207, 208, 209]. The Court has considered the Recommendations, the Objections, and the responses, and is otherwise fully advised in the premises. The Court held a hearing on the Recommendations and the Objections on May 9, 2019.

For the reasons set forth below, the Court **APPROVES IN PART AND OVERRULES IN PART** the Receiver's Recommendations as to the approval of claims, the rejection of claims, and the proposed method of distribution of the funds recovered by the Receiver for investors defrauded in Defendant Frederic Elm's Ponzi scheme. Specifically, the Court approves the Receiver's Recommendations as to the approval of claims and the rejection of claims, and

overrules the Receiver's Recommendations as to the proposed method of distribution of the funds recovered by the Receiver

Claimant No. 8, Jose and Mireille Roffe, filed an Objection to Receiver's Proposed Distribution Method. *See* [DE 202]. Claimant Jose Roffe also appeared telephonically at the May 9, 2019 hearing in support of the Objection. The Receiver recommends that Claim No. 8 be rejected because, according to the Receivership's books, records, and calculations, the Roffes are "net winners," and they released their claims against the Receivership Estate in the Clawback action. *See* [DE 209]. The merits of the Roffe's objections rest primarily on whether the Receivership should give the Roffes credit for a \$50,000 investment that they made in March 2013 with a non-Receivership entity, Fiberforce/Emerging Growth Fund ("EGF"), prior to the November 2013 cut-off suggested by the SEC's Complaint. *See* [DE 1] at ¶¶ 1, 17. The Court notes that the SEC believes that the Receiver's calculations as to the Roffes are correct. Upon careful consideration, the Court determines that it should not consider the Roffes \$50,000 March 2013 investment. Fiberforce/EGF is not part of the Receivership. To move the timeline now from November 2013 to March 2013 -- a time that predates the SEC's allegations in the underlying case upon which the Receiver was appointed -- is improper, outside of the scope of the Receivership, and would only delay the distributions and cause more hardship on investors. Accordingly, Claimant No. 8's Objection to Receiver's Proposed Distribution Method, *see* [DE 202], shall be overruled.¹

¹ The Court takes no position as to whether the Roffes could still pursue a fraud claim as to their \$50,000 March 2013 investment with Fiberforce/EGF, apart from this SEC action and the Receivership.

Claimant No. 9 filed an Objection to Receiver's Proposed Distribution Method. *See* [DE 203]. Claimant No. 9 also appeared through counsel at the May 9, 2019 hearing in support of his Objection. Claimant No. 9 argues that the Receiver's proposed distribution method, the net loss method whereby a receiver distributes funds to claimants *pro rata* based on the net remaining loss that each claimant is owned by the receivership entity, is not the most equitable way to distribute the Receivership funds in this case. Rather, Claimant No. 9 asserts that the most equitable distribution method under the circumstances here is the rising tide method, whereby claimants who received part of their investment back from the receivership entities do not participate in a receiver's distributions until other investors, who recovered none or little of their investments, are brought up to a commensurate recovery level. Claimant No. 9 contends that, under the circumstances of this case, where Fred Elm defrauded investors of their funds, commingled funds, and used new investors' money to make Ponzi payments to old investors, the rising tide method is the most fair and equitable method for distributing funds to investors.

Here, the Court has carefully weighed the equities regarding the net loss or the rising tide method of distribution of the approximately \$1.8 million in recovered funds to the Claimants defrauded by Elm's Ponzi scheme. In determining which methodology is most fair and reasonable in this case, the Court concurs in the sentiment that "[a]n equitable plan is not necessarily a plan that everyone will like." *S.E.C. v. Byers*, 637 F. Supp. 2d 166, 168 (S.D.N.Y. 2009), *aff'd sub nom.* *S.E.C. v. Malek*, 397 F. App'x 711 (2d Cir. 2010), and *aff'd sub nom.* *S.E.C. v. Orgel*, 407 F. App'x 504 (2d Cir. 2010).

The Court notes that counsel for the SEC stated at the May 9, 2019 hearing that the SEC defers to the recommendation of the Receiver unless it is unreasonable and it is not unreasonable here; however, the SEC also stated that it would support a decision by the Court to use the rising

tide method of distribution in this case. The Court gives the required deference to the SEC's judgment as well as to the Receiver's proposal. *See Byers*, 637 F. Supp 2d at 175.

The Court agrees with Claimant No. 9 that under the circumstances of this case, where Elm defrauded the investors of their funds, commingled funds, and used new investors' money to make Ponzi payments to old investors, the rising tide method is the most equitable means of distributing the Receivership funds to the Claimants. "Rising tide appears to be the method most commonly used (and judicially approved) for apportioning receivership assets." *S.E.C. v. Huber*, 702 F.3d 903, 906 (7th Cir. 2012). The net loss method is inferior here because it ignores prior payments that were already made to some of the Claimants before the collapse of the scheme. In contrast, the rising tide method counts a Claimant's withdrawal of the stolen money during the scheme as part of his or her distribution. Unlike the net loss method, the rising tide method aims to provide the same proportionate recovery of invested funds to all of the fraud victims regardless of whether they recovered some funds during the scheme. Here, only approximately 19-20% of investors will not recover from the Receivership distribution under rising tide, aligning this case closely with *Huber*, in which the court approved the rising tide method where only 18 percent of the investors in the scheme would receive nothing under rising tide. *See* 702 F.3d at 907. Accordingly, Claimant No. 9's Objection to Receiver's Proposed Distribution Method, filed on behalf of Claimant No. 9, see [DE 203], shall be sustained.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The Receiver's February 4, 2019 Recommendations concerning claims and a distribution of the Receivership funds, *see* [DE 200], are **APPROVED IN PART AND REJECTED IN PART**.

2. The Objection to Receiver's Proposed Distribution Method, filed on behalf of Claimant No. 8 (Jose and Mireille Roffe), *see* [DE 202], is **OVERRULED**.
3. The Objection to Receiver's Proposed Distribution Method, filed on behalf of Claimant No. 9, *see* [DE 203], is **SUSTAINED**.
4. The Objections to Claimant No. 9's Proposed Distribution Method [DE's 206, 207] are **OVERRULED**.
5. The Receiver's Recommendations, *see* [DE 200] are **APPROVED IN PART** as follows:
 - a. The Court hereby **ALLOWS AND APPROVES** the Allowed Claims and Modified Claims listed in the Receiver's Schedule of Claims [DE 200-1] ("Exhibit A") by Claim No. in the amount reflected in Column 10 (the "Allowed Amounts").
 - b. The Court hereby **REJECTS** the Rejected Claims listed in Receiver's Schedule of Claims [DE 200-1] (by Claim No.).
6. The Receiver's Recommendations, *see* [DE 200] are **OVERRULED IN PART** as follows:
 - a. The Court hereby **REJECTS** the Receiver's Proposed 1st Distribution Amounts reflected in Column 12 of the Receiver's Schedule of Claims, which were calculated using a net loss method (also referred to in the Receiver's Schedule as the "Pro Rata Percentages").
7. The Court determines that, under the circumstances of this case, distribution of the recovered funds held in the Receivership account pursuant to the rising tide method, rather than the net loss method, is the most equitable method.

8. On or before **May 28, 2019**, the Receiver shall file with the Court and serve on each Claimant a revised distribution chart which applies the rising tide method to re-calculate the payout amounts to the approved claimants.
9. Claimants will have until **June 28, 2019** to object in writing to the Receiver's revised distribution chart. Claimants shall: (i) file their objections with the Court; and (ii) send their objections to the Receiver via email at ElmTreeInfo@Moecker.com, or by mail to the Receiver's office, care of Grisel Alonso, Receiver, Michael Moecker and Associates, 1883 Marina Mile Blvd., Suite 106, Ft. Lauderdale, FL 33315, **to be received** no later than **June 28, 2019**;
10. If objections are sent to the Receiver by regular mail, Claimants must request proof of delivery and/or return receipt;
11. If a Claimant does not object within the time frame provided, the Receiver's revised distribution chart will be deemed sustained with prejudice as to that Claimant, and the right of that Claimant to object will be deemed irrevocably waived;
12. On or before **July 12, 2019**, the Receiver shall file her responses to timely-filed objections;
13. In the event that Objections are timely filed, the Court will hold a hearing on the Objections and the responses thereto at **10:30 A.M. on Friday, August 2, 2019**, in Courtroom 205B at the U.S. Courthouse, 299 E. Broward Boulevard, Fort Lauderdale, Florida;
14. The Receiver shall serve a copy of this Order on each Claimant by electronic mail when possible, using the most recent contact information available to her, and

shall post a copy of this order on the Receivership website:

www.elmtreereceivership.com.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida,
this 14th day of May, 2019.


WILLIAM P. DIMITROULEAS
United States District Judge

Copies to:
Counsel of Record