

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 CLAIMANT NO. 24’S  
OBJECTION TO CLAIMANT NO. 9’S PROPOSED DISTRIBUTION METHOD**

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 Claimant No. 24’s Objection to Claimant No. 9’s Proposed Distribution Method [D.E. 222].

**I. INTRODUCTION**

Claimant No. 24 once again objects to the application of the rising tide method on the same basis as his previous objection, the thrust of which, is that he should not be penalized for reinvesting money in the commingled Elm tree funds. *Compare* [DE 207] *with* [DE 222]. Under

the rising tide method, any money Claimant No. 24 received from one of the commingled Elm Tree funds and reinvested is regarded as a payment to Claimant No. 24 that reduces his share of the recovered assets available for distribution. This Court already considered and rejected Claimant No. 24's argument when it approved the rising tide method of distribution. *See* [DE 218]. There has been no change in circumstance to warrant a different outcome at this time. Accordingly, the Receiver respectfully requests that this Court deny Claimant No. 24's objection and allow the Receiver to proceed with the distribution of funds under the rising tide method.

## **II. STANDARD**

“When it comes to fashioning a claims process and related distribution plan, no specific distribution scheme is mandated so long as the distribution is fair and equitable.” *S.E.C. v. Homeland Communications Corp.*, 2010 WL 2035326, at \*2 (S.D. Fla. May 24, 2010) (quotations omitted) (*quoting S.E.C. v. P.B. Ventures*, 1991 WL 269982, at \*2 (E.D. Pa. Dec. 11, 1991)); *see also S.E.C. v. Wealth Mgmt. LLC*, 628 F.3d 323, 332 (7th Cir. 2010) (“In supervising an equitable receivership, the primary job of the district court is to ensure that the proposed plan of distribution is fair and reasonable.”). Assets distributed in a federal receivership should be allocated to victims such that similarly situated investors are treated alike. *See e.g. S.E.C. v. Credit Bancorp, Ltd.*, 99 CIV. 11395 RWS, 2000 WL 1752979, at \*13 (S.D.N.Y. Nov. 29, 2000), *aff'd*, 290 F.3d 80 (2d Cir. 2002).

## **III. DISCUSSION**

On May 14, 2019, this Court entered an Order approving in part and overruling in part the Receiver's Recommendations concerning claims and a distribution of the Receivership funds [DE 218]. The Receiver proposed distributing funds using the net loss method whereby funds would be distributed to claimants *pro rata* based on the net remaining loss that each that each claimant is

owed by the receivership entity. *See* [DE 200]. Every claimant would receive a share of the funds to be distributed under the net loss method. Claimant No. 9 filed an Objection to the Receiver's Proposed Distribution Method. *See* [DE 203].

Claimant No. 9 argued that the most equitable distribution method would be 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. *Id.* Claimant No. 24 filed a response in opposition to Claimant No. 9's objection. *See* [DE 207]. Claimant No. 24 argued that the rising tide method would penalize him by denying proceeds from the initial distribution. *Id.* Claimant No. 24 stated that he initially invested \$65,000 in the Elm Tree funds, and his initial investment was returned in its entirety. *Id.* Claimant No. 24 further stated that subsequently reinvested \$65,000 in Etopia. *Id.*

This Court considered the arguments raised by the Receiver, Claimant No. 9, and Claimant No. 24. *See* [DE 218]. The Court carefully weighed the equities and gave the required deference to the SEC's judgment and to the Receiver's proposal. *Id.* This Court found that the rising tide method was the most equitable means of distributing funds under the circumstances of this case. *Id.* In so holding, this Court noted that Elm defrauded investors, comingled funds, and used new investors' money to make payments to old investors. *Id.* This Court found that the net loss method was inferior because it ignored prior payments already made to older investors, such as the payment to Claimant No. 24. *Id.*

This Court further held that this case was closely aligned with *S.E.C. v. Huber*, 702 F.3d 903 (7<sup>th</sup> Circ. 2012). In *Huber*, the court approved the rising tide method where only 18 percent of the investors would receive nothing under rising tide. *See* 702 F.3d at 907. This Court found

that 19 to 20 percent of investors would not recover under rising tide in the circumstances of this case.

The Receiver faithfully carried out his Court's Order approving the rising tide method. However, as explained in *Huber*, a potential downside of the rising tide method is that the method is agnostic with regard to reinvestments:

We are given pause, however, by the situation of an investor who having withdrawn some money from the Ponzi scheme then reinvests it. Suppose he had initially invested \$150,000 and then, shortly after withdrawing \$50,000, he reinvested it, thus restoring his balance to \$150,000, all of which he lost when the scheme collapsed. Under the rising tide method he would be credited with having invested \$200,000 (\$150,000 plus \$50,000) and having recouped a quarter of that amount by his withdrawal, and thus would receive a reduced share of recovered assets compared to a person who had invested \$150,000 and lost it without any interim withdrawals. We can't see why those two investors should be treated differently, as would be obvious if the withdrawal and reinvestment had occurred on successive days. In cases of withdrawal followed by reinvestment, the investor's maximum balance in the Ponzi scheme (\$150,000 in our example) should be treated as his investment; the withdrawals, having in effect been rescinded, should be ignored.

Or so it seems to us; we can't find any discussion in case law or commentary of this 'maximum balance' approach. We needn't pursue the issue. Although one of the appellants told the district court that he had withdrawn money and reinvested it continually, he has given no details and neither he nor any of the other appellants ask us to adopt the maximum-balance approach that we have just described.

*Huber*, 702 F.3d at 907-08.

Claimant No. 24 receives nothing from the initial distribution of funds under the rising tide method, because he received a payment. Claimant No. 24 argues that he should nonetheless receive a distribution, because he reinvested his money. Claimant No. 24's argument and *Huber* were considered when this Court approved the rising tide method. *See* [DE 218]. As stated by this Court in its Order approving the rising tide method, "an equitable plan is not necessarily a plan that everyone will like." *See* [DE 218] (quoting *S.E.C. v. Byers*, 637 F. Supp. 2d 166, 168

(S.D.N.Y. 2009)). Accordingly, this Court's Order regarding rising tide should stand, and the Receiver's revised plan of distribution [DE 220] should be approved.

**IV. CONCLUSION**

The Receiver respectfully requests that this Court enter an Order approving the Receiver's recommendations concerning the plan and amounts to be distributed to each investor and overruling Claimant No. 24's objection.

Respectfully submitted,

**NELSON MULLINS BROAD AND CASSEL**

Attorneys for Receiver  
One Biscayne Tower, 21<sup>st</sup> Floor  
2 S. Biscayne Boulevard  
Miami, FL 33131  
Telephone: (305) 373-9467  
Facsimile: (305) 995-6387

By: s/Daniel S. Newman  
Daniel S. Newman, P.A.  
Florida Bar No. 0962767  
dan.newman@nelsonmullins.com  
Christopher Cavallo, Esq.  
Florida Bar No. 0092305  
chris.cavallo@nelsonmullins.com

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on July 25, 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  
Daniel S. Newman, P.A.