

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.

**THE RECEIVER'S MOTION FOR COURT
APPROVAL OF SECOND DISTRIBUTION TO HOLDERS OF APPROVED CLAIMS**

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 Motion for Court Approval of Second Distribution to Holders of Approved Claims ("Motion"). *The Receiver is authorized to state that the Securities and Exchange Commission has no objection to the relief requested.*

I. INTRODUCTION

On May 14, 2019, the Court entered an order approving, in part, the Receiver's recommendations concerning claims and request to make an interim distribution ("Approval Order"). [D.E. 218]. Pursuant to the Approval Order, the Court: (1) resolved pending objections

to the Receiver's recommendations; (2) approved "Allowed Claims" and "Modified Claims," as defined in the Receiver's filings, *e.g.* [D.E. 200]; (3) rejected the "Rejected Claims," defined in the Receiver's filings, *e.g.* [D.E. 200]; (4) determined that the "rising tide method," rather than the "net loss method," is the most equitable method for distribution of funds in this Receivership; and (5) set out an objection schedule for any objections to the Receiver's "rising tide" calculations for the distribution.

Thereafter, on June 6, 2019, the Receiver filed her amended revised distribution chart, which included the "rising tide" distribution amounts for all Approved Claims and Modified Claims. [D.E. 220; 220-1].

On August 14, 2019, the Court approved the Receiver's "rising tide" calculations, denied the only objection that was filed to the calculation, and approved the Receiver to make the first distribution. [D.E. 231].

At this time, the Receiver now seeks leave to make a second distribution to holders of Allowed Claims and Modified Claims, consistent with the rising tide calculation. *See* Proposed Distribution Chart, attached as **Exhibit A**. Given that the "rising tide" methodology has already been approved by the Court, Allowed Claims and Modified Claims have been approved by the Court, and objections have been heard, the Receiver requests an expedited notice schedule limited only to any objections to the Receiver's calculations in the Proposed Distribution Chart by holders of Allowed Claims or Modified Claims.

II. STATUS REPORT

Since the Receiver's last report to the Court, she and her retained professionals continued work related to the clawback action in the United States District Court for the Southern District of Florida, *Alonso v. Benvenuto*, Case No. 16-cv-62603 ("Clawback Litigation"). The Defendants in

that action all received funds from the Receivership Entities. Seventeen (17) of these Defendants are located in Canada, which complicated matters significantly. In connection with the Clawback Litigation, the Receiver: (1) reviewed issues relating to existing settlement agreements with various Defendants; (2) worked with her retained Canadian counsel to enforce judgments against Defendants residing in Canada; (3) analyzed the potential sale of judgments; (4) investigated other means of obtaining funds from the judgments, including garnishments; and (5) finalized settlements with the remaining Defendants in the Clawback Litigation.

To date, the Receiver has recovered approximately \$648,000 in the Clawback Litigation. Of that amount, approximately \$200,000 came from the Receiver's efforts in Canada, including entering into settlements, obtaining writs of garnishment, and seizing and selling property.

The Receiver also continued work related to her clawback action against Victor Elmaleh (Fred Elm's father), Mercedes Elmaleh (Fred Elm's mother), 1925333 Ontario Inc. d/b/a Cleartech Computing System, Engage Marketing Group Inc., and M3 Designs, Inc., in the United States District Court for the Southern District of Florida, Case No. 17-61390 ("Etopia Action"). The Defendants in that action, all of whom are located in Canada, received funds from the Receivership Entities. The Receiver obtained judgments against these Defendants and has been attempting to enforce them in Canada. To date, the Receiver has obtained writs of garnishment and a writ of seizure and sale of property as to certain property, namely Victor and Mercedes Elmaleh's residence. Unfortunately, after the writ was already filed with the local Sheriff, the subject property was foreclosed upon by mortgage holder TD Bank.

As shown by the foregoing, much of the Receiver's recent activity has taken place in Canada. The process has been slow given the foreign jurisdiction, especially considering the effects of the COVID pandemic.

III. ASSETS FOR DISTRIBUTION

The Receiver currently maintains approximately \$458,484.13 in the Receivership account, as of May 23, 2022. Because of the limited funds available to investors, there are currently not enough funds to repay Allowed Claims and Modified Claims in full. Accordingly, the Receiver proposes that holders of Approved Claims and Modified Claims receive a second distribution of funds, calculated using the “rising tide” methodology approved by the Court on August 14, 2019. *See* Ex. A, Proposed Distribution Chart.

The Receiver proposes to make this second distribution as soon as practicable, but no later than thirty (30) days after a final order is entered by the Court ruling on this Motion and objections, if any. Pursuant to this Motion, the Receiver seeks to distribute a total of \$400,000. The Receiver believes that sufficient funds (approximately \$58,000) will remain in the Receivership to cover the Receiver’s and her professionals’ remaining fees and expenses,¹ distribution-related expenses, and expenses related to the closing of the Receivership. The Receiver anticipates filing a motion to close the Receivership shortly after completion of the second distribution. Any funds remaining in the Receivership at that time will be included in a third and final distribution consistent with the same distribution percentage utilized in Exhibit A.

The Receiver recommends that any distribution under this plan that goes unclaimed after sixty (60) days following the date of distribution be deemed forfeited, and such distribution, together with all interest earned thereon, become part of the reserve for the final distribution.

¹ Including the fees and costs sought in the Receiver’s Tenth Interim Application for Allowance and Payment of Fees, also filed on June 2, 2022.

IV. PROPOSED OBJECTION PROCEDURE FOR DISPUTED CLAIMS

All holders of Allowed and Modified Claims have submitted to the exclusive jurisdiction of this Court for the purpose of resolving their claims, and therefore all necessary procedures and discovery can be set and conducted by this Court. *Alexander v. Hillman*, 296 U.S. 222, 238-239 (1935).

The Receiver proposes that sufficient notice will be provided to holders of Allowed and Modified Claims by emailing to them, when possible (using the most recent contact information available to the Receiver), a copy of this Motion, the Proposed Distribution Chart (Ex. A), the proposed the applicable claim number, the proposed Order, and a written notice stating that deadlines for objections will be set by the Court.

The Receiver further proposes to publish this Motion, the Proposed Distribution Chart (Ex. A), the proposed Order, and the same written notice (without the identifying information) on the Receivership website at www.elmtreereceivership.com.

In light of the foregoing notice to holders of Allowed and Modified Claims, the Receiver recommends that the Court adopt the following objection procedure (“Objection Procedure”):

First, the Receiver recommends that within 5 days of the entry of the Court’s order approving the Objection Procedure—if approved—she will serve that order on all holders of Allowed and Modified Claims by emailing it to them, when possible (using the most recent contact information available to the Receiver). Thereafter, holders of Allowed and Modified Claims shall have thirty (30) days from the service date to respond in writing to the Motion. Holders of Allowed and Modified Claims shall file their objections with the Court and send their objections to the Receiver at her office, Grisel Alonso, Receiver, Grisel Alonso and Associates, LLC, 2525 Ponce de Leon Blvd., Suite 300, Coral Gables, FL 33134, **to be received** no later than thirty (30) days

from the service date of the Court's order approving the Objection Procedure. The Receiver recommends that holders of Approved and Modified Claims send their objections to the Receiver by email, if possible, to Grisel@Alonso-Receivers.com. If objections are sent by regular mail, holders of Allowed and Modified Claims must request proof of delivery and/or return receipt. The Receiver proposes that any holder of an Allowed or Modified Claim who does not object within the time frame provided irrevocably waives his or her right to file an objection.

Second, the Receiver proposes that the Court order her to submit responses to timely-filed objections within twenty (20) days from the final due date for objections.

Third, the Receiver recommends that the Court, to the extent necessary, set a hearing date to resolve objections and rule on the Motion. The Receiver recommends that the hearing be set for a date as soon as possible after the Receiver's response to objections is due, if the Court determines a hearing is necessary.

V. SUPPORT FOR RECEIVER'S RECOMMENDATIONS

This Court's power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad. *SEC v. Hardy*, 803 F. 2d 1034, 1037 (9th Cir. 1986). "[I]t is a recognized principle of law that the district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership." *Id.*, citing *SEC v. Lincoln Thrift Ass'n*, 577 F. 2d 600, 606 (9th Cir. 1978) and *SEC v. Safety Fin. Serv., Inc.*, 674 F. 2d 368, 373 (5th Cir. 1982) (a court overseeing a receivership is accorded "wide discretionary powers" in light of "the concern for orderly administration").

Allowing investors and creditors an opportunity to object to this Motion provides sufficient due process. The use of summary proceedings in equity receiverships, as opposed to plenary proceeding, is within the jurisdictional authority of the federal district courts. *SEC v. Elliot*, 953 F.

2d 1560, 1566 (11th Cir. 1992); *Hardy*, 803 F. 2d at 1040. “A summary proceeding reduces the time necessary to settle disputes, decreases litigation costs, and prevents further dissipation of receivership assets.” *Elliot*, 953 F. 2d at 1566 (citation omitted). Summary proceedings may be used to allow, disallow and subordinate claims of creditors. *Hardy*, 803 F. 2d at 1040. “[A] district court does not generally abuse its discretion if its summary procedures permit parties to present evidence when facts are in dispute and to make arguments regarding those facts.” *Elliot*, 953 F.2d 1567.

There is no question that, as party to these summary proceedings, the Receiver may make recommendations to the Court in connection with distributions, and the Court may adjudicate objections. By filing their claims with the Receiver, holders of Allowed and Modified Claims have submitted themselves to the jurisdiction of this Court for decision on the Receiver’s recommendations. *Alexander v. Hillman*, 296 U.S. 222, 238 (1935).

The Receiver believes the summary proceedings proposed herein strike a proper balance between distributing the assets of the Receivership efficiently and providing all holders of Allowed and Modified Claims an opportunity to be heard regarding the distribution of those funds. Due process will be met by providing all holders of Allowed and Modified Claims with notice and an opportunity to object to this Motion.

VI. CONCLUSION

The Receiver respectfully requests that this Court enter an order: (1) preliminarily approving the Receiver’s Proposed Distribution Schedule at Ex. A, subject to objections; (2) approving the Receiver’s Proposed Objection Schedule; and (3) granting any such other relief as is just and proper. The Receiver requests that this Court enter the proposed order, attached hereto as **Exhibit B**, establishing the Objection Procedure recommended in Section IV above.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 2, 2022, 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.

Respectfully submitted,

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ELM TREE INVESTMENT ADVISORS

RISING TIDE PROPOSED FINAL DISTRIBUTION

5-3-22

Claim No.	Confirmed Deposits	Confirmed Returns	Net Investor Loss	% of Total Claims Filed	Initial Investment Return Percentage	First Interim Distribution Amt	Final Distribution Amt	Total Returns Amt Received	Total Returns Amt Received %
1	\$34,000.00	\$0.00	\$34,000.00	0.321%	0.00%	\$9,753.89	\$1,142.80	\$10,896.69	32.05%
2	\$700,000.00	\$0.00	\$700,000.00	6.603%	0.00%	\$200,815.37	\$23,525.00	\$224,340.37	32.05%
3	\$49,965.00	\$0.00	\$49,965.00	0.471%	0.00%	\$14,333.91	\$1,679.82	\$16,013.73	32.05%
4	\$49,980.00	\$0.00	\$49,980.00	0.471%	0.00%	\$14,338.22	\$1,680.33	\$16,018.55	32.05%
5	\$94,119.00	\$0.00	\$94,119.00	0.888%	0.00%	\$27,000.77	\$3,163.40	\$30,164.17	32.05%
6 & 7	\$469,256.00	\$101,200.00	\$368,056.00	3.472%	21.57%	\$33,419.74	\$15,768.00	\$150,387.74	32.05%
9	\$2,999,950.00	\$0.00	\$2,999,950.00	28.297%	0.00%	\$860,622.95	\$100,848.32	\$961,471.27	32.05%
10	\$70,000.00	\$50,000.00	\$20,000.00	0.189%	71.43%	\$0.00	\$0.00	\$50,000.00	71.43%
11	\$49,913.66	\$0.00	\$49,913.66	0.471%	0.00%	\$14,319.19	\$1,678.10	\$15,997.29	32.05%
12 & 13	\$5,750,000.00	\$1,451,443.49	\$4,298,556.51	40.545%	25.24%	\$198,111.33	\$193,258.76	\$1,842,813.58	32.05%
14	\$23,860.00	\$0.00	\$23,860.00	0.225%	0.00%	\$6,844.94	\$802.69	\$7,647.63	32.05%
15	\$479,870.00	\$14,800.21	\$465,069.79	4.387%	3.08%	\$122,864.46	\$16,126.63	\$153,791.30	32.05%
16	\$69,970.00	\$0.00	\$69,970.00	0.660%	0.00%	\$20,072.93	\$2,351.99	\$22,424.92	32.05%
17	\$199,950.00	\$0.00	\$199,950.00	1.886%	0.00%	\$57,361.48	\$6,721.32	\$64,082.80	32.05%
18	\$360,950.00	\$158,885.00	\$202,065.00	1.906%	44.02%	\$0.00	\$0.00	\$158,885.00	44.02%
19	\$48,410.00	\$0.00	\$48,410.00	0.457%	0.00%	\$13,887.82	\$1,627.57	\$15,515.39	32.05%
20	\$32,000.00	\$0.00	\$32,000.00	0.302%	0.00%	\$9,180.13	\$1,076.20	\$10,256.33	32.05%
21	\$716,965.00	\$35,850.00	\$681,115.00	6.424%	5.00%	\$169,832.27	\$24,094.02	\$229,776.29	32.05%
22	\$14,975.00	\$0.00	\$14,975.00	0.141%	0.00%	\$4,296.01	\$504.16	\$4,800.17	32.05%
23	\$81,945.00	\$25,000.00	\$56,945.00	0.537%	30.51%	\$0.00	\$1,263.45	\$26,263.45	32.05%
24	\$126,960.00	\$64,000.00	\$62,960.00	0.594%	50.41%	\$0.00	\$0.00	\$64,000.00	50.41%
25	\$79,980.00	\$0.00	\$79,980.00	0.754%	0.00%	\$22,944.59	\$2,687.44	\$25,632.03	32.05%
TOTAL	\$12,503,018.66	\$1,901,178.70	\$10,601,839.96	100.000%		\$1,800,000.00	\$400,000.00	\$4,101,178.70	