

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

-against-

EDDY ALEXANDRE and
EMINIFX, INC.,

Defendants.

22 Civ. 3822 (VEC)

**REPLY IN FURTHER SUPPORT OF THE RECEIVER’S MOTION FOR ENTRY OF
AN ORDER APPROVING (I) THE RECEIVER’S DISTRIBUTION PLAN; (II) THE
DETERMINATION OF ALLOWED USER CLAIMS; (III) NOTICE OF DISTRIBUTION
PLAN; AND (IV) AUTHORITY TO PURSUE CAUSES OF ACTION**

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The Receiver¹ submits this Reply in further support of his Motion [Dkts. 381-84] to approve the proposed Distribution Plan, and in response to (i) the statements of EminiFX Users in response to the Motion, as reflected in the document filed at Dkt. 390 (“User Responses”);² and (ii) the opposition to the Distribution Plan filed by Defendant Eddy Alexandre at Dkt. 394 (“Alexandre Objection”),³ and respectfully states as follows.

PRELIMINARY STATEMENT

The primary purpose of the Receiver’s proposed Distribution Plan is to establish the framework for distributing the bulk of the EminiFX receivership estate to the tens of thousands of people who invested in EminiFX (*i.e.*, Users) as fairly, efficiently, and promptly as possible. The hundreds of User Responses submitted to the Receiver raise concerns that go directly to the fairness, efficiency, and timing of distributions. While the Receiver understands those concerns, he will explain in this Reply how the proposed Distribution Plan will expedite distributions to EminiFX Users, and treats fairly and reasonably the largest possible number of EminiFX Users while complying with all applicable law. Alexandre also filed his Objection, which largely consists of generalized complaints about the underlying action and material that appears to be more responsive to the CFTC’s motion for summary judgment filed on September 23 [Dkt. 395], as well as inappropriate ad hominem attacks. Nevertheless, to the extent that the Alexandre Objection

¹ Capitalized terms used but not defined herein have the meaning given in the memorandum of law in support of the Motion. [Dkt. 382.]

² *Notice of Filing of EminiFX User Responses to Receiver’s Motion for Entry of an Order Approving (i) the Receiver’s Distribution Plan; (ii) the Determination of Allowed [User] Claims; (iii) Notice of Distribution Plan; and (iv) Authority to Pursue Causes of Action* [Dkt. 390].

³ *Amended Motion in Opposition to the Receiver’s Proposed Distribution Plan* [Dkt. 394]. On September 26, 2024, the CFTC filed a Reply Memorandum of Law in Support of Distribution Plan [Dkt. 398]. Although not dispositive, in regulatory receivership cases, New York federal courts have afforded “substantial weight” to the applicable government agency’s support of a distribution plan. *See S.E.C. v. Amerindo Inv. Advisors Inc.*, No. 05-cv-5231 (RJS), 2016 WL 10821985, at *3 (S.D.N.Y. May 20, 2016); *S.E.C. v. McGinn, Smith & Co.*, 1:10-cv-457 (GLS/CFH), 2016 WL 6459795, at *2 (N.D.N.Y. Oct. 31, 2016).

raises specific concerns about the proposed Distribution Plan, the Receiver will address and respond to those concerns.

A number of Users raised concerns about the proposed use of the Rising Tide distribution method, as opposed to the Net Investment method. Alexandre similarly proposes using the Net Investment method, although the substance of his objection appears to confuse the need for multiple distributions (which would occur under either method) with how distributions are calculated for those Users who received pre-Receivership withdrawals paid from the single pool of commingled User funds. The central tradeoff in whether to make *pro rata* distributions using Rising Tide or Net Investment is whether to treat withdrawals as offsetting deposits instead of as pre-Receivership distributions, at the expense of a lower recovery percentage for Users who did not have any withdrawals. The Receiver's proposed Rising Tide method will result a *higher percentage return* to a larger number of investors than a Net Investment method, because most investors did not make withdrawals. For those investors that did make withdrawals pre-Receivership, those withdrawals will simply count against the distribution that they may otherwise be entitled to receive. The Receiver continues to believe, and respectfully submits to this Court, that the Rising Tide method is the fairest method given the circumstances of this Receivership.

Users have also raised concerns about the treatment of internal transfers. While the Receiver is sympathetic to those concerns and their earnest belief that actual funds were being transferred on the EminiFX system, the reality is that internal transfers were book entries that did not represent the transfer of actual funds. Rather, and likely unbeknownst to both transferor and transferee, internal transfers consisted of a mix of deposits, ROI, and bonuses that is not practical or cost-efficient to disentangle, and would ultimately require adding thousands of withdrawal transactions to Users' accounts to avoid double counting (*i.e.*, if the Receiver is to credit an internal

transfer, he must have a corresponding debit to the transferor's account). Alexandre's complaint adds a baseless ad hominem criticism that appears designed to frighten EminiFX investors into thinking that the reason for disregarding internal transfers is for the Receiver to keep the funds [Dkt. 394, at 6], but the treatment of internal transfers will have no bearing on the total amount of funds distributed to investors as Class 3 and 3A Claimants.

Further, although some Users objected to the use of a convenience class (Class 3A) to make a single distribution to investors who deposited less than \$1,000, those Users will still be subject to the Rising Tide method. While such Users make up a substantial portion of the investor class by number, they make up a small percentage by amount. Making a single distribution to Class 3A Users will not materially impact the percentage paid to Class 3 Users over time, and will reduce the cost to the estate of making large numbers of small distributions in the future.

In addition to the foregoing concerns about the equities of the proposed Distribution Plan, some of the User responses, as well as the Alexandre Objection, raise concerns about the payment of taxes. The proposed Distribution Plan must, and the Receiver respectfully submits that it does, comply with all applicable law. That includes the Federal Priority Statute, 31 U.S.C. § 3713, which requires the payment of taxes *before* distributions to other claimants such as investors. The proposed Distribution Plan takes advantage of an exception to that rule, confirmed by the Second Circuit in the *Credit Bancorp* case, that distributions made to investors may be made before taxes are finalized so long as appropriate amounts are reserved. Moreover, Alexandre's characterization of EminiFX investments not as deposits, but rather as the purchase of digital asset packages, further underscores the tax issues arising from the pre-receivership structure of EminiFX, which the Receiver has been working to resolve.

The Alexandre Objection also argues that EminiFX was not a Ponzi scheme, but does not explain how the 5.00% to 9.99% *weekly* returns were supported by actual investing activity, whether the investor funds were commingled, or whether withdrawals to prior investors were paid using contributions from new investors. Alexandre’s letter to Judge Cronan in advance of his criminal sentencing expressly stated “I also used the term ‘ROI’ in some materials, but the weekly figures I provided were not based on investment returns.” [Dkt. 397-2, at 54.] The Receiver’s request for a Ponzi finding is supported by the objective facts set forth in his affidavit in support of the Motion [Dkt. 383] and an extensive analysis of the underlying flows of funds, none of which is based on the subjective intent of Alexandre.

At bottom, the central question before the Court is whether the Receiver’s proposed Distribution Plan treats fairly and reasonably the largest possible number of EminiFX investors, recognizing that “when funds are limited, hard choices must be made.” *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. S.E.C.*, 467 F.3d 73, 84 (2d Cir. 2006) (internal quotation marks omitted); *see also S.E.C. v. Wang*, 944 F.2d 80, 81 (2d Cir. 1991); *CCWB Asset Investments, LLC v. Milligan*, 112 F.4th 171, 178 (4th Cir. 2024) (quoting *WorldCom*). For the reasons set forth in the Motion and this Reply, the Receiver’s proposed Distribution Plan complies with applicable law, treats investors fairly and reasonably, and aims to maximize the recovery to investors based on actual value provided to EminiFX. The Receiver respectfully submits that this Court should approve his proposed Distribution Plan.

RESPONSES TO RECEIVER’S PROPOSED PLAN

The Receiver served the Distribution Plan on all EminiFX Users via email, and created a special page on the Receivership website with a link to the proposed Distribution Plan and a plain

English explanation of the proposed Distribution Plan.⁴ The Receiver also provided Users with the ability to submit anonymous responses to the proposed Distribution Plan, and 307 such comments were submitted, and filed with the Court by the Receiver. [Dkt. 390.] Many of Users' commonly raised concerns speak to the Distribution Plan's equities, especially with respect to the following provisions:

1. The calculation of User Claims without regard to Internal Transfers;
2. The use of the Rising Tide distribution method;
3. The treatment of certain User Claims in a Convenience Class; and
4. The payment of taxes at the Receivership level in addition to any individual taxes incurred at the User level.

Of the Users whose claims will be treated under the proposed Distribution Plan, only approximately 1% submitted responses, and only about half of that 1% raised concerns about the Distribution Plan's provisions. [Dkt. 390, at 2.] Nevertheless, the Receiver personally reviewed each and every response submitted, and takes seriously their concerns. This Reply is intended to respond primarily to those responses concerning the proposed Distribution Plan.

Several investors also asked questions or raised concerns about the claims and distribution process. The transaction verification process that is operating in parallel to the Motion is nearly complete, and in the coming weeks the Receiver expects to file with the Court a schedule of verified and disputed transactions that will include tens of thousands of transactions that were not contested, thousands more that the Receiver was able to verify in the review process, and thousands of transactions that remain subject to a dispute. Each User's individual User Portal will be updated to contain the User's verified and disputed transactions, options to object to the Receiver's

⁴ See <https://www.eminifxreceivership.com/distribution>.

determinations, and the ability to provide payment information for a distribution. While the Court is reviewing and considering the proposed Distribution Plan, the Receiver will work in parallel to prepare the vast majority of User accounts for distribution, in order to begin making payments as soon as practicable if the Distribution Plan is approved.

In addition to the User Responses, Defendant Alexandre also filed a response to the Distribution Plan. [Dkt. 394.] The Alexandre Objection raises arguments about the use of the Rising Tide method, the treatment of internal transfers, and the Receiver's request for a Ponzi finding. This Reply responds to those concerns. Beyond that, however, the Alexandre Objection challenges the recovery and liquidation of various Receivership assets over the course of the Receivership (none of which is presently before the Court); objects to the method by which the Receiver has presented financial information (nowhere articulating how a different presentation would change what the Receiver has identified); and lodges personal attacks on the Receiver and the Court. Much of the Alexandre Objection—to the extent relevant to anything—appears to pertain more to the CFTC's motion for summary judgment. [Dkts. 395-397.]

One particular repeated misstatement in the Alexandre Objection bears special mention: that the Receiver's plan will “give \$18 million dollars [sic] to the CFTC,” [*e.g.*, Alexandre Obj., at 1, 5, 7.] This is not true. Not only did the proposed-but-rejected (by Alexandre) consent judgment subordinate the civil monetary penalty (“CMP”) to the claims of EminiFX investors, but even after that proposed consent judgment was rejected, the CFTC still agreed, and clarified in March 2024, to subordinate the CMP. [Dkt. 276.] Even though no CMP has been levied at this time, the Distribution Plan provides that any fine or penalty imposed by the CFTC will be *subordinated to User Claims*, and the Receiver's opening brief expressly stated that such claim is “not expected to receive a distribution.” [Plan, at 6, 15; MOL at 16-17.] The CFTC confirmed its

support of subordinated treatment in its Reply Memorandum of Law in Support of Distribution Plan filed on September 26, 2024. [Dkt. 398, at 1.]

ARGUMENT

I. THE RECEIVER PROPOSES A PLAN TO DISTRIBUTE FUNDS TO EMINIFX INVESTORS FAIRLY, EFFICIENTLY, AND PROMPTLY

The proposed Distribution Plan is designed to use all funds in the Receivership Estate to maximize recovery for the broadest number of claimants, including Users, while still satisfying the Receiver’s obligation to pay taxes and administrative expenses. The proposed Distribution Plan recognizes that Users are not likely to be refunded the full amount of their initial investment in EminiFX—let alone the illusory ROI and bonuses that were credited to Users. Courts have recognized that in receiverships where funds are limited, hard choices about distributions must be made. *See, e.g., CCWB Asset Investments, LLC v. Milligan*, 112 F.4th 171, 178 (4th Cir. 2024). The proposed Distribution Plan recognizes those limitations and its treatment of withdrawals using the Rising Tide method, its treatment of internal transfers, and its creation of a convenience class are all aimed at maximizing the recovery to EminiFX investors while ensuring that the “cost of individualized determinations [do not] outweigh the benefits.” *Id.*

A. Rising Tide Method

Users raised concerns with the Rising Tide distribution method employed by the proposed Distribution Plan. In many cases, these User Responses expressed a desire to instead recover “100%” of their deposits into EminiFX, rather than just a percentage; in some cases, Users also requested that they receive interest. [See User Responses, Ex. A, Cmts. 66, 69, 72, 80, 92.] Similarly, the Alexandre Objection takes issue with the Rising Tide method, arguing that a Net Investment method would be superior. [Alexandre Obj., at 7-9.]

As an initial matter, it is not the case, as the Alexandre Objection appears to suggest, that application of a Net Investment distribution method would mean that “all members can get their money back.” [Alexandre Obj. at 7.] Net Investment, like Rising Tide, is a method of *pro rata* distribution, meaning that recovery is equivalent to a set percentage of the funds available for distribution. A *pro rata* methodology—whether it be Rising Tide or Net Investment—is the only distribution method that could be reasonably and practicably employed. EminiFX operated as a Ponzi scheme, where all funds were commingled and Users’ purported earnings far eclipsed the value of EminiFX’s actual assets [See Dkt. 382, at 7]. As a result, it would be impracticable, if not impossible, to trace Users’ deposited funds, and impossible to return “100%” of all Users’ purported investment as reflected in their EminiFX accounts. Because of these difficulties, present here and inherent in Ponzi and similar schemes, the Second Circuit has concluded that *pro rata* distributions are appropriately employed. See *S.E.C. v. Credit Bancorp, Ltd.*, 290 F.3d 80, 89 (2d Cir. 2002). A *pro rata* distribution is likewise appropriate here.

The key difference between the two most common *pro rata* distribution methods is how the distribution percentages are calculated and how pre-Receivership withdrawals are treated. Under the Net Investment method, User Claims would be fixed by subtracting their total withdrawals from their total deposits, and Users would receive a percentage of that amount equivalent to the portion of the overall claimant pool their claim represents. By contrast, under the Rising Tide method, User Claims are calculated by applying a percentage to the total amount of deposits to arrive at the distribution amount that the User is entitled to receive. If a User received a pre-Receivership withdrawal, those pre-Receivership withdrawals are treated as a prior distribution and deducted from the amount that the User will receive. This method is designed to bring distributions (including pre-Receivership withdrawals) up to a comparable level. In other

words, the goal in setting the Rising Tide Percentage is to make the total of withdrawals plus distributions as even as possible for Users who deposited the same amount.

In selecting between the Rising Tide and Net Investment *pro rata* methods, the Receiver determined that Rising Tide is the more equitable approach, in no small part because it would result in generally higher recoveries for most Users. Under the Rising Tide methodology, Users who made no withdrawals—which makes up the majority of Users—will receive a greater distribution as compared to the Net Investment method. [See Dkt. 382, at 35.] Users who *did* make withdrawals (and therefore had access to those funds prior to and throughout the receivership) could receive, after subsequent distributions, distributions in the aggregate that are far closer to their original investment amount than they might receive under a Net Investment method. By contrast, the number of Users who will receive nothing as a result of pre-Receivership withdrawals, is minimal. [*Id.*]

B. Convenience Class

Under the Distribution Plan, the Receiver proposes to create a separate “convenience class” for those Users who deposited \$1,000 or less, under which they will get a one-time distribution that is higher than the initial Rising Tide Percentage but may be lower than the Final Rising Tide Percentage, to avoid as many distributions under \$50 as possible. [See Plan, at 17.] Certain Users objected to this procedure. [See, e.g., User Responses, Ex. A, Cmt. 11.]

The use of the convenience class is an appropriate exercise of the Receiver’s judgement, and should be approved. The Receiver must act in the best interest of the Receivership estate. See *Citibank, N.A. v. Nyland (CF8) Ltd.*, 839 F.2d 93, 98 (2d Cir. 1988) (stating that the Receiver owes a fiduciary duty to investors, creditors, and the receivership estate). Employing a convenience class will avoid additional distribution costs for thousands of *de minimis* distributions, and will

allow as much as 35% of the Users to achieve finality quicker. [Castleman Aff. ¶ 89.]⁵ Because the proposed Distribution Plan gives Class 3A Users a larger initial percentage, but no future distributions, and saves future distributions costs, the Receiver respectfully submits that including a convenience class is in the best interest of the estate.

C. Internal Transfers

Under the Distribution Plan, Users' Claims do not include credit for "transfers" made between Users within the EminiFX system. As explained in the Motion [*see* Dkt. 382, at 6, 36-37], Users were able to "transfer" some or all of their EminiFX account balances to other Users. Effecting a transfer would decrease a User's total EminiFX balance, which might have consisted of some combination of actual deposits, ROI, and bonuses—but in any event was just a book entry on the EminiFX system that treated ROI and bonuses as equivalent to actual funds. While a transfer might reflect movement of actual funds deposited, it might just as likely entail a transfer of false profits [*id.*]⁵—without either involved User's knowledge. The Receiver determined that tracing funds to determine which, if any, transfers should be credited would promote neither efficiency nor equity, and therefore seeks to exclude these transfers from User's Claims, instead crediting only actual deposits of funds into EminiFX.

A number of Users, as well as Alexandre, objected to the exclusion of these transfers from the calculation of User Claims. [*See, e.g.,* User Responses, Ex. A, Cmts. 2, 3, 4, 8, 17; *see also* Alexandre Obj., at 5-7.] User Responses frequently asserted that these transfers were a primary method of depositing funds within the EminiFX system, and that it would be unfair to exclude

⁵ The additional outlay to be paid in the initial distribution by the Receiver to Class 3A investors on account of receiving their total distribution as a one-time payment is expected to be relatively modest—probably less than \$1 million—because the total deposit base for Class 3A Users is relatively small compared to the total deposit base. [*Id.*] And, in any event, without a convenience class, that relatively modest additional outlay of funds would still likely be paid to investors, just at a later date.

them from calculation of their claims. As an initial matter, the Receiver notes that some transfers have been used as secondary support in the Receiver's analysis to establish that an actual deposit of funds into EminiFX occurred, generally the result of cash currency given directly or indirectly to Alexandre.

The Receiver appreciates that, for some Users who received internal transfers, omitting transfers from their User Claims may result in a reduced Claim value than if those transfers had been included. However, the Receiver is obligated to consider the benefits and burdens to the Estate and User body as a whole, rather than the outcome for any individual User. *See Milligan*, 112 F.4th at 178 (noting that receivers "have a duty to avoid overly costly investigations, and at a certain point, the costs of such individualized determinations outweigh the benefits"). In this case, attempting to credit transfers in a principled manner would be cost prohibitive (even assuming such an analysis could be completed). While it is true that Users often relied on transfers—the Receiver identified over 45,000—the median value of these transfers was relatively low—approximately \$500. [See Dkt. 382, at 37.] Under those circumstances, the cost of attempting a User by User accounting to determine whether transfers corresponded with actual deposits of US Dollars or BTC, and making corresponding reductions from transferor accounts, risks using more Estate resources on a per-User basis than it would return.

Moreover, because the overall value of internal transfers exceeded \$77 million, crediting original deposits of funds *and* transfers would artificially inflate the User Claim pool, and dilute the funds available for User claims based on actual deposits of funds. The Receiver's entire claims process is based on actual funds into EminiFX, or out of EminiFX, and the Receiver respectfully submits that it is generally not in the best interest of the estate for the Receiver to sit in judgment of disputes between Users, who remain free to resolve disputes among themselves.

Nevertheless, where Users agreed that a deposit of actual funds into EminiFX should be credited to a particular User even if the financial statements indicated otherwise, such Users were given an option when submitting transactions to “add a member” to a transaction, reassigning all or part of an actual deposit to another User—and hundreds of Users took advantage of this feature. Users will be given a second opportunity to voluntarily transfer their Verified Deposits to other Users through the forthcoming update of the User Portal, although such voluntary transfers must be done to resolve a dispute and will only be available for a limited time so that the Receiver can fix the claims of as many investors as soon as possible in order to make a distribution by the end of the year if possible.

II. THE PROPOSED PLAN COMPLIES WITH APPLICABLE LAW

A number of User Responses raised concerns about the Receiver’s payment of taxes owed by EminiFX and the EminiFX QSF from available Receivership Assets, instead of using those funds to satisfy User Claims. [*See, e.g.*, User Responses, Ex. A., Cmts. 37, 91.] As explained in the Motion, 31 U.S.C. § 3713 affords priority to such Tax Claims, and penalizes any payment of other types of claims contrary to that priority scheme. Specifically, § 3713 provides that “[a] claim of the United States Government shall be paid first,” and that “[a] representative of a person or an estate”—here, the Receiver—“paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.” 31 U.S.C. § 3713(b).

The Alexandre Objection underscores the pre-receivership tax issues that the Receiver is currently working through with his tax advisers. Alexandre characterizes the contributions to EminiFX not as deposits, but as the “purchase [of] a digital asset package,” and that Users “must buy a package and pay for the purchase by making a transfer using multiple payment platforms (credits) to cover their investment choice.” [Alexandre Obj., at 27.] That characterization,

combined with the general principle that funds taken by fraud or swindle are generally treated as taxable income even when the victim has a right of recoupment, *James v. United States*, 366 U.S. 213, 216-17 (1961), creates a substantial likelihood that the deposits into EminiFX will be treated as income. An open question remains as to whether such income can be offset in whole or in part by the pre-receivership withdrawals, investment losses, expenditures, and eventual transfer of EminiFX assets to the qualified settlement fund upon the establishment of the Receivership. This Motion, however, is not the vehicle for resolution of any of these issues, and the Receiver reserves all rights to argue that the pre-receivership tax liability of EminiFX should be zero. Nonetheless, because the Receiver is obligated to pay all tax liabilities of EminiFX, the Receiver will establish a conservative reserve for any reasonably possible position the IRS might take.

Against that backdrop, the question before the Court is not—as suggested by some Users and Alexandre—whether taxes must be paid, but whether there is a valid exception to § 3713(b) that would allow investors to receive an initial distribution while the tax liability remains unresolved. The Distribution Plan proposes to maintain the priority of the Tax Claims by holding an amount in reserve that is sufficient to pay any Tax Claims, and proceeding with distributions to lower priority Classes, including Classes of User Claims, as soon as the reserve is funded. Such an approach has received the approval of the Second Circuit, in a case that recognized the superiority of tax claims. *See S.E.C. v. Credit Bancorp., Ltd.*, 297 F.3d 127, 140 (2d Cir. 2002). Establishing a reserve is the only vehicle by which the Receiver can begin to make distributions to investors now. Otherwise, the Receiver would be required to wait to make distributions to investors until the tax liability issues are resolved in their entirety.

III. THE RECEIVER’S REQUEST FOR A FINDING THAT EMINIFX OPERATED AS A PONZI SCHEME IS APPROPRIATE AND SUPPORTED BY THE FACTS

As described in the Motion, that EminiFX’s operations were consistent with the key features of a Ponzi scheme is central to the Distribution Plan, informing the Receiver’s treatment of investor claims (only including actual deposits and withdrawals), the method of distribution (the use of the Rising Tide method), and his request to pursue certain affirmative claims (especially claims for fraudulent transfer from net winners). [Dkt. 382, at 1-2.] The Motion therefore seeks— notwithstanding whatever Alexandre’s subject intent may have been—a finding based upon objective criteria that EminiFX operated as a Ponzi scheme. [See *id.*, at 30-32.] In a published case decided after the Motion was filed, the Ninth Circuit analyzed in detail the requirements for establishing a Ponzi scheme in the context of a fraudulent transfer action, and found that the “two essential elements” to establish a Ponzi scheme, “(1) the funneling of money from new investors to pay old investors, and (2) no legitimate profit-making business opportunity exists for investors,” are both “objective factors.” *In re EPD Inv. Co., LLC*, --- F.4th ----, No. 22-55944, 2024 WL 3909749, at 7 (9th Cir. Aug. 23, 2024).

The Alexandre Objection disputes the basis for this finding, stating that “Mr. Alexandre have [sic] constantly rejected these allegations.” [Alexandre Obj., at 28.] While the Alexandre Objection indeed states that a number of the facts set forth in the Castleman Affidavit that support a Ponzi are “false,” it offers no contrary explanation. In fact, despite the Alexandre Objections broad, general denial, Alexandre himself submitted the Receiver’s Financial Condition Report, on which the Castleman Affidavit was based, as a part of his sentencing report in support of his position on sentencing in his parallel criminal case. *United States v. Alexandre*, No. 22 Cr. 326 (S.D.N.Y.), Dkts 86 & 86-14.

At present, then, the following objective facts set forth in the Castleman Affidavit are uncontradicted: *First*, Users made substantial deposits into the EminiFX System well in excess of \$200 million. EminiFX only actively invested a fraction of the funds received, did not produce any profits or earnings, and incurred substantial losses during its short time in operation. [Castleman Aff. ¶¶ 59-71.]⁶ *Second*, the 5.00% to 9.99% weekly returns credited to EminiFX Users, without any returns less than 5.00% per week or any negative weeks, were extremely high returns that were not based on actual investing activity. [*Id.* ¶¶ 77-80.] *Third*, EminiFX Users' deposits were commingled and maintained in the same EminiFX accounts. EminiFX Users were paid withdrawals from the same accounts that received EminiFX deposits, such that the source of withdrawal payments was the cash infused by new Users. [*Id.* ¶ 75.] *Fourth*, the payment of multilevel marketing bonuses of over \$56 million during EminiFX's short time in operation represents the payment of commissions in order to perpetuate the EminiFX scheme. [*Id.* ¶ 54.] *Fifth*, over \$15 million was transferred from EminiFX to Alexandre's personal accounts. [*Id.* ¶ 74.] *Sixth*, there were no reliable financial records maintained by EminiFX, and the dashboard showed to EminiFX investors reflecting the payment of fictitious profits and large multilevel marketing bonuses did not reflect reality. [*Id.* ¶¶ 23, 25.] Taken together, these facts are sufficient to establish that EminiFX operated as a Ponzi scheme. *Gowan v. Amaranth Advisors L.L.C. (In re Dreier LLP)*, Case No. 08–15051 (SMB), Adv. Proc. No. 10–03493 (SMB), Adv. Proc. No. 10–05447(SMB), 2014 WL 47774, at *9 (Bankr. S.D.N.Y. Jan. 3, 2014); *see also EPD*, 2024 WL

⁶ Although the Alexandre Objection spends considerable time on the real estate portfolio [Dkt. 394, at 10-14], including an unsupported and fantastical projection that it would be worth \$500-\$750 million in just a year (a return of 10-15x the initial investment), the Receiver explained in his affidavit that he did test the market with the properties that had the highest premium, and no offers were received. [Castleman Aff. ¶ 65.]

3909749, at *7 (noting the various overlapping tests Courts have used to determine whether a Ponzi scheme exists).

Finally, the Receiver is not seeking a finding concerning Alexandre’s subjective intent or a finding on the underlying causes of action alleged by the CFTC. *See EPD*, 2024 WL 3909749, at *8 (“We are unaware of any court decision that has adopted an express *mens rea* requirement when defining a Ponzi scheme.”). To the extent that the Alexandre Objection could be construed as an assertion or acknowledgement that Alexandre was unaware that EminiFX operated as a Ponzi scheme, or that he believed that the facts set forth in the Castleman Affidavit and Financial Condition Report constituted legitimate business activity, Alexandre’s subjective belief about EminiFX is irrelevant to the determination. The objective and uncontested facts set forth in the Motion, the Castleman Affidavit, and the Financial Condition Report conclusively establish that EminiFX operated as a Ponzi scheme, at least for the purposes of establishing the treatment of investor claims, distribution method, and potential affirmative claims.

IV. IMPROPER MATERIAL IN THE ALEXANDRE OBJECTION

The Alexandre Objection is replete with ad hominem attacks against the Court, the Receiver, and the CFTC.⁷ Some appear to be addressed to EminiFX Users instead of the Court: “There is only one reason why the receiver and the government is attempting to call your investment a DEPOSIT so they can eat it from you.” [Dkt. 394, at 27.; *see also id.* at 25 (“This is dangerous and extremely harmful to EminiFX, Mr. Alexandre the founder, and the investors that embarked on that journey with their visionary leader.”).] The Receiver will not, at this time,

⁷ The Receiver has nevertheless taken great care to preserve Alexandre’s procedural rights, such as by recommending the Alexandre Assets procedure [Dkt. 56 ¶ 38], and by filing a qualified answer that expressly preserved all of Alexandre’s defenses and arguments [Dkt. 264].

respond to each of the false and baseless accusations lodged, as the issue before the Court on this Motion is whether to approve of the Distribution Plan for the ultimate benefit of the Users.

While the Receiver understands that wide latitude is given to incarcerated *pro se* defendants in making legal arguments, the Receiver respectfully submits that such latitude should not encompass repeated baseless and false statements that appear to have no other purpose than further misleading EminiFX Users about the nature of this action and the Receiver's duties, and would not otherwise be permitted under Federal Rules of Civil Procedures 11 and 12(f). Nevertheless, given that the Receiver is in possession of the majority of Alexandre's funds and Alexandre is presently incarcerated, the Receiver has determined that there is no practical effect of seeking an order sanctioning Alexandre at this time.

CONCLUSION

The Receiver respectfully requests that the Court overrule the Alexandre Objection and, as appropriate, any User Responses, and grant the Motion in full.

Dated: New York, New York
September 27, 2024

OTTERBOURG P.C.

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