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12 KRISTA FREITAG

13 UNITED STATES DISTRICT COURT
14 SOUTHERN DISTRICT OF CALIFORNIA

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16 SECURITIES AND EXCHANGE
COMMISSION,
17
Plaintiff,
18
v.
19 GINA CHAMPION-CAIN and ANI
20 DEVELOPMENT, LLC,
21
Defendants,
22 AMERICAN NATIONAL
INVESTMENTS, INC.,
23
Relief Defendant.

Case No. 3:19-cv-01628-LAB-AHG
**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
RECEIVER'S MOTION FOR
APPROVAL OF PROPOSED
ENGAGEMENT OF SPECIAL
LITIGATION COUNSEL IN
FLORIDA**
Date: April 13, 2020
Time: 11:15 a.m.
Courtroom: 14A
Judge: Hon. Larry Alan Burns

1 Krista Freitag ("Receiver"), the Court-appointed permanent receiver for
2 Defendant ANI Development, LLC, Relief Defendant American National
3 Investments, Inc., and their subsidiaries and affiliates ("Receivership Entities"),
4 submits this Memorandum of Points and Authorities in Support of her concurrently-
5 filed Motion for Approval of Proposed Engagement of Special Litigation Counsel in
6 Florida ("Motion").

7 **I. BACKGROUND FACTS**

8 In 2013, one of the affiliated Receivership Entities, Westlink Development,
9 LLC ("Westlink"), along with other co-plaintiffs, filed an action in Florida state court
10 for Pinellas County against SunTrust Bank ("SunTrust Action"). The SunTrust
11 Action arises from a multi-million dollar Ponzi scheme orchestrated by John Condo
12 (separate from the alleged Ponzi Scheme in this action) and the claims include that
13 SunTrust Bank aided and abetted Condo in perpetrating the scheme. Declaration of
14 Krista L. Freitag filed herewith ("Freitag Decl."), ¶ 2.

15 The plaintiffs originally engaged a Florida attorney, Jack Kiefner, to represent
16 them. Westlink later engaged Noonan Lance Boyer & Banach LLP ("Noonan
17 Lance") in San Diego to act as co-counsel to Mr. Kiefner for Westlink only. The
18 plaintiffs later changed counsel and hired the law firm of Genovese, Joblove &
19 Batista P.A. ("GJB") to represent them. Noonan Lance acted as co-counsel for
20 Westlink only. Freitag Decl., ¶ 3.

21 Westlink agreed with the other plaintiffs to advance the legal fees and costs
22 owed to Mr. Kiefner, and subsequently to GJB, such that Westlink was paying all of
23 legal fees and costs for counsel in Florida, as well as the fees of Noonan Lance.
24 Certain plaintiffs settled their claims and dropped out of the SunTrust Action, leaving
25 Westlink and two other plaintiffs, American Ethanol California, Inc., ("American
26 Ethanol") and Snowy Pine, LLC ("Snowy Pine"). Freitag Decl., ¶ 4.

27 Shortly after her appointment, the Receiver, through her counsel, contacted
28 Noonan Lance and GJB about the SunTrust Action. The Receiver also contacted

1 American Ethanol and Snowy Pine to discuss their intentions regarding the case and
2 their ability to contribute to the legal fees and costs. Both stated they do not have the
3 financial ability to contribute to the legal fees or costs. Freitag Decl., ¶ 5.

4 The Receiver, through counsel, then negotiated a proposed contingent fee
5 arrangement with GJB to handle the SunTrust Action moving forward. As reflected
6 in the proposed Engagement Agreement attached to the Freitag Decl. as Exhibit A,
7 GJB has agreed to handle the case for a 33.3% contingent fee, provided that Westlink
8 reimburses GJB for all out of pocket litigation costs. Freitag Decl., ¶ 6.

9 The Receiver then contacted American Ethanol and Snowy Pine to see if they
10 would agree that, (a) after payment of the proposed contingent fee, and (b) after
11 reimbursement to the receivership estate of all legal fees and costs previously paid to
12 Mr. Kiefner and GJB (including for the banking expert used) by Westlink
13 (\$570,374.73), plus all legal costs paid going forward, the remaining net recovery
14 from the SunTrust Action would be distributed to the three remaining plaintiffs
15 (Westlink, American Ethanol, and Snowy Pine). American Ethanol agreed to these
16 terms, but Snowy Pine would not. Accordingly, after further discussions with GJB
17 and American Ethanol, it was determined that the best course of action was to move
18 forward with the proposed Engagement Agreement with GJB acting as counsel for
19 Westlink and American Ethanol only. As stated in the proposed Engagement
20 Agreement, GJB will withdraw from representing Snowy Pine and Snowy Pine will
21 be required to engage other counsel. Freitag Decl., ¶ 7.

22 In addition to the contingent fee and reimbursement of costs to the
23 receivership estate discussed above, the proposed Engagement Agreement provides
24 for an allocation of the prospective net recovery from the SunTrust Action (after
25 payment of the contingent fee and reimbursement of costs to the receivership estate).
26 Specifically, the net recovery is to be allocated 70% to Westlink and 30% to
27 American Ethanol. While GJB is bearing the risk regarding attorney fees, this
28 allocation reflects the fact that Westlink, *i.e.* the receivership estate, is advancing the

1 funds for out of pocket costs and therefore bearing the risk regarding out of pocket
2 costs to litigate the SunTrust Action moving forward. Freitag Decl., ¶ 8.

3 In terms of the prospective recovery from the SunTrust Action, Westlink and
4 American Ethanol combined have asserted damages of \$7.3 million and have also
5 sought an award of punitive damages. In terms of the anticipated out-of-pocket costs
6 for the remainder of the case, GJB has provided an estimate, including the costs
7 associated with the banking expert who has already worked on the case.¹ The
8 estimate is approximately \$139,000 for pretrial costs and approximately \$103,000 for
9 trial costs, for a total estimate of approximately \$242,000. Freitag Decl., ¶ 9.

10 **II. DISCUSSION**

11 "The power of a district court to impose a receivership or grant other forms of
12 ancillary relief does not in the first instance depend on a statutory grant of power
13 from the securities laws. Rather, the authority derives from the inherent power of a
14 court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369 (9th
15 Cir. 1980). The "primary purpose of equity receiverships is to promote orderly and
16 efficient administration of the estate by the district court for the benefit of creditors."
17 *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir 1986).

18 As the appointment of a receiver is authorized by the broad equitable powers
19 of the court, any distribution of assets must also be done equitably and fairly. *See*
20 *SEC v. Elliot*, 953 F.2d 1560, 1569 (11th Cir. 1992). District courts have the broad
21 power of a court of equity to determine the appropriate action in the administration
22 and supervision of an equity receivership. *See SEC v. Capital Consultants, LLC*, 397
23 F.3d 733, 738 (9th Cir. 2005). The Ninth Circuit explained:

24 A district court's power to supervise an equity receivership
25 and to determine the appropriate action to be taken in the
26 administration of the receivership is extremely broad. The
27 district court has broad powers and wide discretion to
28 determine the appropriate relief in an equity receivership.

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¹ Much of the analysis necessary for the banking expert to complete her report has
already been done. The banking expert had been paid a total of approximately
\$102,000 prior to the Receiver's appointment.

1 The basis for this broad deference to the district court's
2 supervisory role in equity receiverships arises out of the
3 fact that most receiverships involve multiple parties and
4 complex transactions. A district court's decision
5 concerning the supervision of an equitable receivership is
6 reviewed for abuse of discretion.

7 *Id.* (citations omitted); *see also CFTC v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1115
8 (9th Cir. 1999) ("This court affords 'broad deference' to the court's supervisory role,
9 and 'we generally uphold reasonable procedures instituted by the district court that
10 serve th[e] purpose' of orderly and efficient administration of the receivership for the
11 benefit of creditors."). Accordingly, the Court has broad equitable powers and
12 discretion in the administration of the receivership estate.

13 Here, the Receiver believes, based on her discussions about the SunTrust
14 Action with Noonan Lance and GJB, both directly and through counsel, that the
15 claims against SunTrust Bank are very strong and the prospects for recovery support
16 moving forward with the proposed Engagement Agreement, including the agreement
17 to advance the out-of-pocket costs to litigate the case. The proposed contingent fee
18 structure substantially reduces the overall risks of the case to the receivership estate
19 and demonstrates GJB's belief in the strength of the claims against SunTrust Bank.
20 Freitag Decl., ¶ 10.

21 GJB is a highly regarded firm that focuses on complex business, commercial,
22 real estate, securities, white-collar, and other types of litigation. Its attorneys also
23 represent debtors, trustees, committees, secured and unsecured creditors, and
24 receivers in bankruptcy, insolvency and workout engagements. The firm has offices
25 in Miami, Fort Lauderdale, Fort Myers, and Tampa.

26 The Receiver believes GJB will prosecute the SunTrust Action in a skilled,
27 aggressive, and professional manner. The firm's existing knowledge of the facts and
28 legal issues involved in the case will be very valuable in moving the case forward
promptly and efficiently. Therefore, the Receiver believes the proposed Engagement
Agreement with GJB is in the best interests of the receivership estate and will assist

1 the Receiver in generating the maximum net recovery on Westlink and American
2 Ethanol's claims in the SunTrust Action. Freitag Decl., ¶ 11.

3 The Receiver does not believe it is necessary or cost-effective to have two law
4 firms representing Westlink in the SunTrust Action. Accordingly, she has not asked
5 Noonan Lance to perform any legal work on the case and does not plan to do so.
6 Once the engagement of GJB as special counsel is approved, GJB will substitute in
7 as counsel of record for Westlink in the SunTrust Action. Freitag Decl., ¶ 12.

8 **III. CONCLUSION**

9 For the foregoing reasons, the Receiver requests an order approving the
10 proposed engagement of GJB as special litigation counsel for the SunTrust Action.

11
12 Dated: March 4, 2020

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14 By: s/Edward G. Fates

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