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21 KRISTA FREITAG

22 UNITED STATES DISTRICT COURT
23 SOUTHERN DISTRICT OF CALIFORNIA

24 SECURITIES AND EXCHANGE
25 COMMISSION,

26 Plaintiff,

27 v.

28 GINA CHAMPION-CAIN and ANI
DEVELOPMENT, LLC,

Defendants,

AMERICAN NATIONAL
INVESTMENTS, INC.,

Relief Defendant.

Case No. 3:19-cv-01628-LAB-AHG

**DECLARATION OF KRISTA L.
FREITAG 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 I, Krista L. Freitag, declare:

2 1. I am the Court-appointed permanent receiver for Defendant ANI
3 Development, LLC, Relief Defendant American National Investments, Inc., and their
4 subsidiaries and affiliates ("Receivership Entities"). I make this declaration in
5 support of my Motion for Approval of Proposed Engagement of Special Litigation
6 Counsel in Florida ("Motion"). I have personal knowledge of the facts stated herein,
7 and if called upon to do so, I could and would personally and competently testify to
8 them.

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

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

21 4. Westlink agreed with the other plaintiffs to advance the legal fees and
22 costs owed to Mr. Kiefner, and subsequently to GJB, such that Westlink was paying
23 the 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").

27 5. Shortly after my appointment, through my counsel, I contacted Noonan
28 Lance and GJB about the SunTrust Action. I also contacted American Ethanol and

1 Snowy Pine to discuss their intentions regarding the case and their ability to
2 contribute to the legal fees and costs. Both stated they do not have the financial
3 ability to contribute to the legal fees or costs.

4 6. Through counsel, I 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 hereto as Exhibit A, GJB has
7 agreed to handle the case for a 33.3% contingent fee, provided that Westlink
8 reimburses GJB for all out-of-pocket litigation costs.

9 7. I then contacted American Ethanol and Snowy Pine to see if they would
10 agree that, (a) after payment of the proposed contingent fee, and (b) after
11 reimbursement to the receivership estate for 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 out of pocket costs paid going forward, the remaining net
14 recovery from the SunTrust Action would be distributed to the three remaining
15 plaintiffs (Westlink, American Ethanol, and Snowy Pine). American Ethanol agreed
16 to these terms, but Snowy Pine would not. Accordingly, after further discussions
17 with GJB and American Ethanol, it was determined that the best course of action was
18 to move forward with the proposed Engagement Agreement with GJB acting as
19 counsel for Westlink and American Ethanol only. As stated in the proposed
20 Engagement Agreement, GJB will withdraw from representing Snowy Pine and
21 Snowy Pine will be required to engage other counsel.

22 8. 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.

3 9. In terms of the prospective recovery from the SunTrust Action,
4 Westlink and American Ethanol combined have asserted damages of \$7.3 million
5 and have also sought an award of punitive damages. In terms of the anticipated out-
6 of-pocket costs for the remainder of the case, GJB has provided an estimate,
7 including the costs associated with the banking expert who has already worked on
8 the case.¹ The estimate is approximately \$139,000 for pretrial costs and
9 approximately \$103,000 for trial costs, for a total estimate of approximately
10 \$242,000.

11 10. Based on my discussions about the SunTrust Action with Noonan Lance
12 and GJB, both directly and through counsel, I believe the claims against SunTrust
13 Bank are very strong and the prospects for recovery support moving forward with the
14 proposed Engagement Agreement, including the agreement to advance the out-of-
15 pocket costs to litigate the case. The proposed contingent fee structure substantially
16 reduces the overall risks of the case to the receivership estate and demonstrates GJB's
17 belief in the strength of the claims against SunTrust Bank.


18 11. I believe GJB will prosecute the SunTrust Action in a skilled,
19 aggressive, and professional manner. The firm's existing knowledge of the facts and
20 legal issues involved in the case will be very valuable in moving the case forward
21 promptly and efficiently. Therefore, I believe the proposed Engagement Agreement
22 with GJB is in the best interests of the receivership estate and will assist me in
23 generating the maximum net recovery on Westlink and American Ethanol's claims in
24 the SunTrust Action.

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27
28 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 my appointment.

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

6 I declare under penalty of perjury under the laws of the United States of
7 America that the foregoing is true and correct.

8 Executed this 4th day of March 2020, at Los Angeles, California.

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10 KRISTA L. FRENTAG

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EXHIBIT INDEX

EXHIBIT NO.	DESCRIPTION	PAGE NO.
Exhibit A	Engagement and Joint Litigation Agreement	7

EXHIBIT A

EXHIBIT A

ENGAGEMENT AND JOINT LITIGATION AGREEMENT

THIS AGREEMENT, by and among American Ethanol California, Inc. (“American Ethanol”) and Westlink Development Company, LLC (the “Parties”), through its Court-appointed Receiver, Krista Freitag, and Genovese, Joblove & Battista, P.A. (“GJB”), counsel to the Parties, will memorialize the terms and conditions of the Parties’ engagement of GJB in connection with *American Ethanol California, Inc. v. SunTrust Bank*, Case No. 13-008139-CI (Fla. 6th Cir. Ct.) (the “SunTrust Litigation”), and the terms of the Parties’ joint prosecution of the Litigation.

WHEREAS:

1. American Ethanol, Snowy Pine, LLC ("Snowy Pine"), Westlink Development Company, LLC (“Westlink”) and certain other entities are parties to a certain Joint Litigation Agreement concerning the Litigation;
2. Westlink previously made payments of fees and costs on behalf of American Ethanol and Snowy Pine in the total amount of \$570,374.73 ("Prior Advances").
3. After entering into the Joint Litigation Agreement, the Receiver was appointed receiver for Westlink in *SEC v. Gina Champion-Cain et al.*, United States District Court, Southern District of California, Case No. 3:19-cv-01628-LAB-AHG (S.D. Ca.) [ECF No. 6] ("SEC Litigation");
4. The Receiver is in exclusive management and control of all property of Westlink, including the claims asserted by Westlink in the SunTrust Litigation;
5. Prior to the Receiver’s appointment, GJB was counsel of record in the SunTrust Litigation for American Ethanol and Snowy Pine, and local counsel for Westlink, and was compensated on an hourly fee basis;

6. The Parties hereto, not including Snowy Pine, wish to retain GJB as counsel of record in the SunTrust Litigation on a contingency basis going forward and GJB has agreed to be compensated on a contingency basis; and

7. As a condition precedent to this Agreement, the Receiver has or will obtained the approval of the District Court in the SEC Litigation to enter into this Agreement and the engagement of GJB on the terms set forth herein.

THEREFORE, the Parties agree as follows:

1. With respect to American Ethanol and Westlink only, this Agreement supersedes and replaces the Joint Litigation Agreement. The provisions of the Joint Litigation Agreement concerning the existence of a common interest among the plaintiffs, including Snowy Pine, and the sharing and protection of confidential information remain in full force and effect.

2. GJB will be paid 33 and 1/3 percent contingency of all gross recoveries, judgment, or settlement for the SunTrust Litigation.

3. Westlink agrees to pay the Parties' share of all actual out-of-pocket costs that are incurred in the SunTrust Litigation going forward.

4. After payment of GJB's contingency fee, any recoveries obtained by the Parties will be applied first to reimburse Westlink for the Prior Advances, and then to reimburse Westlink for costs paid for the SunTrust Litigation going forward. The remaining amount of the recovery will be divided as follows: Westlink 70% and American Ethanol 30%.

5. The Parties agree that their interests are aligned and that no conflicts of interest would interfere with GJB's common representation of the Plaintiffs in the SunTrust Litigation.

6. GJB reserves the right to withdraw from this representation if GJB concludes that a conflict of interest exists between or among the Parties and/or GJB. In the event a conflict arises

that requires GJB to withdraw as counsel for one or more of the Parties, each of the Parties hereby authorizes GJB to continue representing Westlink in the SunTrust Litigation, and any and all objections to such representation are waived.

7. The Parties agree to use their good faith effort to cooperate in the SunTrust Litigation and respond in a timely fashion to requests by each other or GJB.

8. In light of the fact that Snowy Pine has elected not to proceed as a party to this Agreement, GJB shall promptly take such steps as are necessary and appropriate to withdraw from representation of Snowy Pine in the SunTrust Litigation. It is understood that to the extent Snowy Pine continues to pursue its claims in the SunTrust Litigation, it will need to engage separate counsel and an agreement will need to be reached between the Parties and Snowy Pine regarding the sharing/splitting of litigation costs (to the extent that such costs inure to the benefit of the Parties and Snowy Pine).

9. The Parties agree that their mutual interest is best served by sharing with each other and with GJB documents, oral representations, factual material, mental impressions, memoranda, witness statements, interview reports, and other information concerning the SunTrust Litigation, including the confidences of the Parties (“Joint Litigation Materials”). The Parties agree and acknowledge:

a. Joint Litigation Materials transmitted by the Parties may contain confidential and privileged attorney-client communications, attorney work-product, and materials protected from disclosure by otherwise applicable privileges and rules of confidentiality;

b. The Parties and their counsel have exchanged, and in the future may exchange, Joint Litigation Materials in mutual understanding that such exchanges or disclosures do not, and are not intended to, diminish in any way the confidentiality of such materials;

c. Joint Litigation Materials shall be held in confidence, including in a manner consistent with the provisions of any protective order entered in the SunTrust Litigation;

d. Information provided to GJB by any of the Plaintiffs in the course of GJB's common representation of the Plaintiffs in the SunTrust Litigation will be disclosed to all of the Plaintiffs equally; and

e. Communications, including Joint Litigation Materials, exchanged among the Plaintiffs and GJB during this engagement may be disclosed in subsequent litigation between or among the Plaintiffs or GJB.

10. This Agreement is binding on the Parties executing this Agreement.

[Signature page follows]

AGREED TO BY:

GENOVESE, JOBLOVE & BATTISTA, P.A.

By: _____

Title: _____

Date: _____

AMERICAN ETHANOL CALIFORNIA, INC.

By: _____

Title: _____

Date: _____

WESTLINK DEVELOPMENT COMPANY, LLC

By: _____

Title: Court-Appointed Receiver

Date: _____