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12 KRISTA FREITAG

13 UNITED STATES DISTRICT COURT
14 SOUTHERN DISTRICT OF CALIFORNIA

15
16 SECURITIES AND EXCHANGE
COMMISSION,

17 Plaintiff,

18 v.

19 GINA CHAMPION-CAIN and ANI
20 DEVELOPMENT, LLC,

21 Defendants,

22 AMERICAN NATIONAL
23 INVESTMENTS, INC.,

24 Relief Defendant.
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Case No. 3:19-cv-01628-LAB-AHG

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR APPROVAL OF
SETTLEMENT OF PENDING
LITIGATION IN FLORIDA**

Date: January 18, 2022
Time: 11:30 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 Settlement of Pending Litigation in Florida ("Motion").

6 The Receiver previously sought and obtained authority from the Court to
7 engage special counsel in Florida on a contingent fee basis to represent one of the
8 receivership entities, Westlink Development Company, LLC ("Westlink"), in an
9 ongoing case against SunTrust Bank (nka Truist Bank) that had been filed in Florida
10 in 2013. The litigation then proceeded with the Court-approved special counsel
11 acting as counsel for Westlink and one other plaintiff in the case. The Receiver now
12 requests approval of a settlement of the litigation.

13 **I. BACKGROUND FACTS**

14 In 2013, Westlink, along with other co-plaintiffs, filed an action in Florida
15 state court for Pinellas County against SunTrust Bank ("SunTrust Action"). The
16 SunTrust Action arises from a multi-million dollar fraud orchestrated by John Condo
17 (separate from the alleged Ponzi Scheme in this action). Condo tricked developers
18 who needed financing, including Westlink, into making \$300,000 "refundable
19 deposits" to Condo's SunTrust accounts, held in the name of corporate entities. The
20 deposit was supposed to give Westlink access to financing from Condo's investment
21 group. Condo claimed that the deposit would be held to cover his expenses and
22 would be refunded if the financing did not close through no fault of Westlink. In
23 reality, Condo had no ability to provide the promised funding, and he stole the
24 deposits. Condo later was indicted by federal prosecutors for fraud and pled guilty.
25 The claims in the SunTrust Action include that SunTrust aided and abetted Condo in
26 perpetrating the scheme. Declaration of Krista L. Freitag filed herewith ("Freitag
27 Decl."), ¶ 2.

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

7 Prior to the receivership, Westlink agreed with the other plaintiffs to advance
8 the legal fees and costs owed to Mr. Kiefner, and subsequently to GJB, such that
9 Westlink was paying all of legal fees and costs for counsel in Florida, as well as the
10 fees of Noonan Lance. Certain plaintiffs settled their claims and dropped out of the
11 SunTrust Action, leaving Westlink and two other plaintiffs, American Ethanol
12 California, Inc., ("American Ethanol") and Snowy Pine, LLC ("Snowy Pine").
13 Freitag Decl., ¶ 4.

14 Shortly after her appointment, the Receiver, through her counsel, contacted
15 Noonan Lance and GJB about the SunTrust Action. The Receiver also contacted
16 American Ethanol and Snowy Pine to discuss their intentions regarding the case and
17 their ability to contribute to the legal fees and costs. Both stated they do not have the
18 financial ability to contribute to the legal fees or costs. Freitag Decl., ¶ 5.

19 The Receiver, through counsel, then negotiated a proposed contingent fee
20 arrangement with GJB to handle the SunTrust Action moving forward. GJB agreed
21 to handle the case for a 33.3% contingent fee, provided that Westlink reimburses
22 GJB for all out of pocket litigation costs. Freitag Decl., ¶ 6.

23 The Receiver then contacted American Ethanol and Snowy Pine to see if they
24 would agree that, (a) after payment of the proposed contingent fee, and (b) after
25 reimbursement to the receivership estate of all legal fees and costs previously paid to
26 Mr. Kiefner and GJB (including for the banking expert used) by Westlink
27 (\$570,374.73), plus all legal costs paid going forward, the remaining net recovery
28 from the SunTrust Action would be distributed to the three remaining plaintiffs

1 (Westlink, American Ethanol, and Snowy Pine). American Ethanol agreed to these
2 terms, but Snowy Pine would not. Accordingly, once the Court approved the
3 engagement, GJB withdrew from representing Snowy Pine and Snowy Pine promptly
4 settled their claims against SunTrust Bank. Freitag Decl., ¶ 7.

5 In terms of the prospective recovery from the SunTrust Action, Westlink and
6 American Ethanol combined asserted direct damages of \$600,000 (the combined
7 amount they deposited with SunTrust that was then taken by Condo) and
8 approximately \$6.7 million in consequential damages and prejudgment interest. The
9 claim for direct damages (\$600,000), including prejudgment interest on that amount,
10 totals just over \$1 million. Freitag Decl., ¶ 8.

11 On September 21, 2021, the Florida court referred the parties to non-binding
12 arbitration, which occurred on November 12, 2021. The arbitrator, using the
13 incorrect legal standard (clear and convincing evidence instead of preponderance of
14 the evidence, as discussed below) ruled in favor of Suntrust and awarded Westlink
15 and American Ethanol no recovery. Pursuant to Florida Statute 44.103, Westlink has
16 twenty days from the entry of that ruling to contest the arbitration award, or such an
17 award becomes a final order subject to entry by the Florida Circuit Court. If
18 Westlink were to object to the arbitration award, and not prevail at trial, Westlink
19 would potentially be subject to an award of costs, including arbitration costs, court
20 costs, reasonable attorney's fees, and other reasonable costs such as investigation
21 expenses and expenses for expert or other testimony which were incurred after the
22 arbitration hearing and continuing through the trial, in favor of Suntrust. Freitag
23 Decl., ¶ 9.

24 The parties recently negotiated a settlement of the litigation, subject to Court
25 approval. Under the proposed settlement, SunTrust will pay \$100,000 to fully settle
26 the claims in the Florida litigation and the agreement includes broad mutual releases
27 of claims. A true and correct copy of the settlement agreement is attached to the
28 Freitag Decl. as Exhibit A. Freitag Decl., ¶ 10.

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II. DISCUSSION

A. Settlement Approval

A federal equity receiver's power to compromise claims is subject to court approval. As noted by the Ninth Circuit Court of Appeals in *SEC v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986), "[a] district 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." With regard to settlements entered into by a federal equity receiver, the Court's supervisory role includes reviewing and approving those settlements in light of federal court policy to promote settlements before trial. *See* Fed. R. Civ. P. 16(c), Advisory Committee Notes.

Federal courts of equity may look to bankruptcy law for guidance in the administration of receivership estates. *See SEC v. Capital Consultants, LLC*, 397 F.3d 733, 745 (9th Cir. 2005); *SEC v. Am. Capital Invs., Inc.*, 98 F.3d 1133, 1140 (9th Cir. 1996); *SEC v. Basic Energy & Affiliated Res.*, 273 F.3d 657, 665 (6th Cir. 2001). A bankruptcy court may approve a compromise of claims asserted by or against the estate if the compromise is "fair and equitable." *Woodson v. Fireman's Fund Ins. Co. (In re Woodson)*, 839 F.2d 610, 620 (9th Cir. 1988). The approval of a proposed compromise negotiated by a court appointed fiduciary "is an exercise of discretion that should not be overturned except in cases of abuse leading to a result that is neither in the best interest of the estate nor fair and equitable for the creditors." *In re MGS Mktg.*, 111 B.R. 264, 266-67 (B.A.P. 9th Cir. 1990).

The Court has great latitude in approving compromises. In passing on the proposed compromise, the Court should consider the following:

- a. The probability of success in litigation;
- b. The difficulties, if any, to be encountered in the matter of collection;
- c. The complexity of the litigation involved and the expense, inconvenience, and delay necessarily attending; and

1 d. The paramount interest of the creditors and a proper deference to their
2 reasonable views in the premises.

3 *In re Woodson*, 839 F.2d at 620.

4 Here, the primary challenge for Westlink in the litigation has been establishing
5 that SunTrust had the requisite actual knowledge of Condo's wrongdoing to support
6 the aiding and abetting causes of action. Although the arbitrator used the wrong
7 standard of proof (clear and convincing evidence instead of preponderance of the
8 evidence) and there is a reasonable chance a jury could find that SunTrust did have
9 actual knowledge, the direct damage amounts plus prejudgment interest is only about
10 \$1 million. The likelihood of recovering the consequential damage amounts is
11 significantly lower than the direct damage amounts. The adverse arbitration ruling
12 also increases the risks of moving forward with the litigation because, under the
13 Florida fee shifting statute, Westlink could be ordered to pay SunTrust's attorney fees
14 for arbitration, pretrial and trial if a jury also delivers a verdict in SunTrust's favor.
15 Freitag Decl., ¶ 11.

16 For these reasons, the Receiver believes the proposed settlement is in the best
17 interest of the estate. After the contingent fee is paid to GJB, the net settlement
18 proceeds will cover all post-receivership out-of-pocket costs of the litigation, and
19 result in a small additional net recovery for the receivership estate (approximately
20 \$10,000). The co-plaintiff in the case, American Ethanol, is also in support of the
21 settlement, although it will not recover anything under the settlement. Freitag Decl.,
22 ¶ 12.

23 The Receiver's counsel has met and conferred with counsel for the Securities
24 and Exchange Commission and understands that the Securities and Exchange
25 Commission does not object to approval of the Settlement Agreement by the Court.

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III. CONCLUSION

For the foregoing reasons, the Receiver requests approval of settlement of the litigation in Florida and of the Settlement Agreement.

Dated: December 13, 2021

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

By: s/Edward G. Fates

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