

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION**

In re SANCTUARY BELIZE LITIGATION

No: 18-cv-3309-PJM

**FEDERAL TRADE COMMISSION’S OPPOSITION TO RECEIVER’S MOTIONS FOR
ACCESS TO CERTAIN SETTLEMENT FUNDS, DE 1457, AND TO PAY
PROFESSIONAL FEES, DE 1456**

Although the Receiver would like access to the Atlantic International Bank Ltd. (“AIBL”) settlement proceeds (“AIBL funds”) to pay its fees, the FTC’s settlement with AIBL, DE 607 (“AIBL Order”), prohibits this. The FTC won these funds for consumers and the AIBL Order does not permit them to be used to pay the Receiver’s fees. To strike a necessary balance between paying the Receiver and preserving receivership estate cash, the FTC recommends that the Court “holdback” the current fee request until after the Receiver sells the land in Belize. This preserves the Receiver’s ability to seek these fees later while freeing up cash to pay necessary, immediate expenses. To assist the Receiver the FTC also has three proposals to increase the assets available to pay necessary expenses and, potentially, some amount of professional fees: (1) confirm that the Receiver may access the interest that is earned on the AIBL funds to pay its fees and expenses; (2) permit the Receiver to borrow against the AIBL funds for ongoing fees and expenses—subject to an unqualified obligation to repay those amounts to the estate; and (3) as part of the upcoming survey of consumers, charge those consumers who choose to own lots in Sanctuary Belize a fee for the maintenance of that land.

I. The receivership has been challenging and expensive.

Starting in late 2018, the original receiver, Robb Evans & Associates LLC (“REA”), took control of a sprawling network of businesses, various pieces of personal and business real estate in California, and significant land assets in Belize. When it took over the businesses, REA both managed multiple physical premises in the United States and undertook a detailed historical and financial review of the businesses. *See, e.g.*, DE 219 (report detailing its findings in the initial months of the receivership and providing detailed accounting statements). In doing so, REA generated significant assets for the receivership estate by identifying and selling all the United States-based real estate and liquidating certain receivership legal claims, with the last significant action being the sale of the 104 Kings Place property, which the successor receiver, Marc-Philip Ferzan, carried over the finish line, resulting in several million dollars for the estate in late 2021. *See, e.g.*, DE 1321 (order approving sale).

From October 31, 2018, until October 26, 2021 (approximately three years), REA billed and was paid a not insignificant \$2.7 million (around \$75,000 per month) for these services. *See* DE 400, 562, 722, 955, 1077, 1271, & 1326. During this same time frame, REA’s lawyers received approximately \$1.6 million and REA reported gross cash expenses (not net of revenue) of more than \$7.5 million. *Id.* Most of the cash expenses related to managing the land in Belize.

After the untimely passing of REA’s principals, and on the FTC’s recommendation, the Court appointed Marc-Philip Ferzan as the successor Receiver, effective October 26, 2021. DE 1305. Since that time, Mr. Ferzan and his team at Ankura have worked to get up to speed on the estate, prepared for consumer redress and ultimate liquidation of the remaining estate assets, and

have implemented portions of the consumer redress process, while continuing to manage the land in Belize.¹

Mr. Ferzan's fees have been significant. Mr. Ferzan and his firm, Ankura, have been paid approximately \$3.7 million for the first 15 months following his appointment and are currently seeking approval for another \$275,000 for five more months. This amounts to roughly \$200,000 per month in fees. *See* DE 1457-3 at 19.² Much of these fees were incurred during the claims application process, with Mr. Ferzan and Ankura billing somewhat more than \$2 million between July 2022 and January 31, 2023, as they prepared for and completed the bulk of the claims application process. *See* DE 1379 and 1413. For context, assuming three quarters of those fees during that time related to the claims application process and assuming 2,000 claims applications, this suggests that soliciting and processing each application cost \$750. Like REA, Mr. Ferzan has also reported and sought payment for approximately \$1 million in lawyer's fees and paid approximately \$4 million in land management expenses to cover the first 20 months of his successor-receivership. *See* DE 1335, 1343, 1366, 1379, 1413, and 1456.

Combined, the Receiver has reported that professional fees and cash expenses since inception are approximately \$21 million. DE 1457-3 at 19. In comparison, the receivership estate has, since inception, marshalled approximately \$22 million, not including the \$23 million in AIBL funds that the FTC obtained, which are preserved by order for consumers. *Id.* This has left the Receiver with \$1,394,963 in cash on hand, without assuming its professional fees have been approved and paid. *See* DE 1457-3 at 19; DE 1457-1 at 4.

¹ They also completed one piece of ancillary litigation resulting in some income for the estate. *See* DE 1428.

² Although the FTC has never opposed these fees, it has had several discussions with the Receiver regarding the magnitude of these fees and ways to reduce fees moving forward.

Depending mostly on the costs of managing the land in Belize, the Receiver's cash expenses typically fall between \$150,000 to \$200,000 per month. *See, e.g.*, DE 1457-3 at 19 (approximately \$160,000 per month); DE 1413-3 at 19 (approximately \$180,000 per month). The remaining cash would cover approximately 7 to 9 months of expenses, sufficient to continue paying the Receiver's cash expenses through 2023. The FTC also has proposals to increase the availability of cash to extend this period long enough to permit the Receiver to sell the Belizean land assets and, potentially, to pay the Receiver's professional fees as well.

II. The Court is bound by the terms of the AIBL Order but has discretion when considering the Receiver's fee application.

When deciding how to resolve these interlocking motions, there are two different standards. The Court is bound to apply the AIBL Order as written. *United States v Armour & Co.*, 402 U.S. 673, 682 (1971) (“[T]he scope of a consent decree must be discerned within its four corners. . . .”). In contrast, the Court has broad discretion to approve, deny, reduce, or delay payment of the Receiver's professional fees, balancing the various competing interests of the Receiver himself, the needs of the estate, and the victimized consumers.

When faced with a fee application, whether and how much to award “is entrusted to the discretion of the district court.” *SEC v. Merrill*, 18-cv-2844 RDB, 2019 WL 4916164, *2 (D. Md. Oct. 4, 2019) (quoting *CFTC v. Am. Metals Exch. Corp.*, 991 F.2d 71, 79 (3d Cir. 1993)); *see also SEC v. Byers*, No. 08-cv-7104(DC), 2014 WL 7336454, *5 (S.D.N.Y. Dec. 23, 2014) (collecting cases). The Court can choose to authorize interim fee applications, like this one, if delaying payment would “impose economic hardships on professionals rendering services to the estate.” *SEC v. Small Bus. Cap. Corp.*, No. 12-cv-3237 EJD, 2013 WL 2146605, *2 (N.D. Cal. May 15, 2013). In weighing whether to grant applications, the Court can consider a variety of factors, including the size of the estate, the estate's ability to afford the expenses, the economy of

a receiver's administration, the amount of time expended, and the value added to the estate. *Id.*; *Merrill*, 2019 WL 4916164 at *2; *SEC v. W.L. Moody & Co., Bankers*, 374 F. Supp. 465, 481 (S.D. Tex. 1974) (the size of the estate and its ability to afford the expenses and fees "must be given considerable weight"); *see also Finn v. Childs Co.*, 181 F.2d 431, 435-36 (2d Cir. 1950) ("[T]he total aggregate of fees must bear some reasonable relation to the estate's value."). The Court may even prioritize consumer victim interests over a receiver's when considering a fee application. *See, e.g., SEC v. Stinson*, No. 10-cv-3130, 2015 WL 115495, *3-4 (E.D. Pa. Jan 8, 2015) (rejecting fee application that would have paid the entire estate to receiver and instead paying the receiver only half of its fees and awarding the rest to the victims).

The Court's discretion includes limiting awards to "moderate compensation." *See, e.g., Byers*, 2014 WL 7336454 at *6 (noting long line of cases holding receivers and attorneys "should be awarded only moderate compensation" and payment should "avoid even the appearance of a windfall") (quoting *In re New York Investors, Inc.*, 79 F.2d 182, 185 (2d Cir. 1935), and *SEC v. Goren*, 272 F. Supp. 2d 202, 206 (E.D.N.Y. 2003)). This is true "particularly [] when the receivership estate will not recover sufficient assets to pay full restitution to the victims of the fraud or misconduct alleged in the complaint." *FTC v. Worldwide Info Svcs.*, 14-cv-8-orl-28DAB, 2014 WL 12611353, *2 (M.D. Fla. April 24, 2014). The Court need not review each fee entry but can, instead, make "percentage cuts as a practical means of trimming fat from a fee application." *Small Bus. Cap.*, 2013 WL 2146605 at *2 (quoting *SEC v. Byers*, 590 F. Supp. 2d 637, 648 (S.D.N.Y. 2008)).

In considering interim fee requests, as opposed to final requests, the Court also has discretion over the timing of any payments. Courts frequently impose "holdbacks," which are simply decisions to defer consideration of certain fees until after the receivership has been

completed to ensure that the fees paid are in fact commensurate with the results obtained and what the estate can afford. *See Small Bus. Cap. Corp.*, 2013 WL 2146605 at *3 (imposing fee holdback because “ensuring that the Receivers’ efforts benefit the investors and the receivership estate is the Court’s primary concern. . . .”); *Byers*, 2014 WL 7336454 at *6-7 (discussing fee applications and holdbacks that had been imposed in the past); *CFTC v. Nawabi*, 22-cv-717 KJM-JDP, 2023 WL 2466296, *5 (E.D. Cal. March 10, 2023) (imposing holdback “because ‘the court has a strong interest in preserving the funds . . . for the benefit of the’ victims”). This gives the Court the ability to weigh the legitimate interests the Receiver has in being paid, the need for the estate to make cash payments moving forward, and consumers’ need to be compensated.

III. The Receiver is not able to access the AIBL funds.

The FTC sued AIBL, alleging it assisted and facilitated the fraudulent telemarketing scheme at the heart of this litigation. Because AIBL was not controlled by Pukke or the other defendants, it was not included in the receivership and, as a result, was never under the Receiver’s authority. Following the preliminary injunction hearing, and after significant litigation, the FTC and AIBL reached a settlement agreement, with AIBL agreeing, among other things, to make \$23 million available for consumer redress. *See* AIBL Order, Sections II & III. Because it was contemplated that the Receiver, who was controlling significant assets as of September 2019, would distribute consumer redress, the AIBL Order specified that the cash would be sent directly to the Receiver. AIBL Order, Sections III & IV.

These funds, however, explicitly cannot be used by the Receiver: “Notwithstanding anything else herein to the contrary, **the Receiver is not permitted to use or spend the \$23,000,000 obtained through this order**; any future expenditures from that amount will be subject to further order by this Court.” Section IV.A (emphasis added). The last clause, specifying that future expenditures will be subject to future Court orders, does not modify the

prohibition on the Receiver's use of the funds or state that subsequent Court orders may contradict that prohibition. It contemplates redress, some of which the Court has already ordered. *See* AIBL Order Section III.A; DE 1446. The Receiver's contrary interpretation, that he may use these funds for its fees if he seeks an order to that effect is unreasonable because it would render the prohibition a nullity. A receiver always must seek approval to pay its fees. The Receiver's position, therefore, fails because it is neither a good fit for the plain language and because it gives no meaning to the plainly stated prohibition.

Until now, the Receiver has understood it could not access the AIBL funds, stating in its financial reports that it would need both the FTC's and the Court's approval to access these funds. *See, e.g.*, DE 1413-3 at 19 fn* ("Unless otherwise directed by the FTC and the Court, the funds may not be applied to cover administrative expenses of the Receivership estate."); DE 1335-2 at 18 fn* (same). The FTC does not consent to the Receiver using the AIBL funds to pay its fees or expenses.

Because the AIBL Order precludes the Receiver from using or spending the AIBL funds, the Court should deny the Receiver's motion. Even if the Court were inclined to grant the Receiver's motion, it does not need to grant the Receiver unfettered access to these funds moving forward. It cannot be the Receiver's expectation that it will incur more than \$13 million in fees and expenses between now and the sale of the Belizean land. Therefore, not only is it prohibited, but it also makes little sense to make the entire \$13 million available to the Receiver. Instead, even if the Court were to agree with the Receiver, contrary to the AIBL order, it would be more sensible to approve a smaller, specified amount based on a more particularized showing by the Receiver of precisely how much is needed, subject to the ability to seek additional, similar relief in the future. Alternatively, the Court could also adopt the FTC's proposal, discussed below, that

the Receiver be allowed to borrow against the AIBL funds, thus ensuring assets remain available to pay necessary expenses while simultaneously protecting the AIBL funds.

IV. The Court should exercise its discretion to “holdback” the current fee request.

The estate’s cash position and anticipated costs require the Receiver to prioritize its cash expenses over professional fees. The Court can ensure this through a variety of mechanisms, including subjecting the current request to a “holdback” to be considered after the Belizean land is sold. The FTC recommends the “holdback” strategy because it is the cleanest and simplest solution, leaving ultimate consideration of these fees to another day when the estate will hopefully have sufficient assets to pay both the Receiver and consumers. This solution balances the Receiver’s desire for payment against the estate’s urgent need for cash by permitting the Receiver to seek these fees later when the estate has more assets (presumably from the sale of the property) and, in the interim, pay necessary cash expenses. This is preferable because it is not yet known how much the land in Belize will sell for, difficult to evaluate the results the Receiver has obtained for the estate, and impossible to know how much cash the estate will ultimately have on hand to divvy amongst the Receiver and injured consumers.

The FTC is *not* currently, affirmatively objecting to the billing records or the Receiver’s or his lawyers’ calculation of their fees.³ Instead, the FTC is objecting to the timing of these fee requests in light of the estate’s assets. Moreover, courts tend to give “great weight” to the government’s positions on fee applications. *See Merrill*, 2019 WL 4916164 at *2 (quoting *SEC v. Fifth Ave. Coach Lines, Inc.*, 364 F. Supp. 1220, 1222 (S.D.N.Y. 1973)).

³ With one exception. The Receiver and its counsel are seeking a relatively small amount of fees for seeking fees. *See* DE 1456-4 at 8; DE 1456-5 at 4 & 16. The FTC objects to those. *See, e.g., W.L. Moody & Co., Bankers*, 374 F. Supp. at 490 (“[T]ime and effort spent and expenses incurred in proving fees are not compensable.”) (collecting cases).

Balancing the interests in favor of cash expenses in the short term is critical. While professionals such as the Receiver and his counsel typically bill for and collect fees after several months have passed, the receivership has employees in Belize who cannot wait, such as security guards and other land management positions. Failing to pay these employees and related costs will immediately affect the estate and potential consumer recoveries. Similarly, as in cases where courts have imposed holdbacks or other reduced fees, it is also true that the Receiver and his professionals have already been paid \$3.7 million and approximately \$1 million for less than two years' work, including a \$1.5 million payment in April. DE 1427; *Byers*, 2014 WL 7336454 at *7 (not only imposing holdbacks but refusing to later approve holdback amounts when professionals had already received significant payments). The Court is not, therefore, asking an unpaid officer of the court to continue laboring. Instead, they have until now been well paid and are now simply being asked to wait for satisfaction of these final, relatively small, fees. The Court could, of course, also deny the current requests, but that seems less equitable than deferring their consideration.

Not only can the Court do this, REA affirmatively sought and obtained similar relief in its first fee application in this case. The then-available receivership assets were not enough to pay its fees and costs, and so REA asked that its fees be approved but that “under no circumstances will the Receiver pay itself or its lawyers at any time if doing so would jeopardize the payment of other necessary expenses in the receivership, specifically including but not limited to all of the necessary ongoing expenses at the Reserve.”⁴ See DE 400-1 at 17. Instead, REA asked the Court to enter “an order permitting the fees and costs approved pursuant to this Motion to be

⁴ For clarity, “the Reserve” is how the Receiver referred to the Belizean land in this fee application.

paid only as funds become available and only to the extent the Receiver deems it prudent and appropriate, taking into consideration all of the cash needs of the receivership estate.” *Id.*⁵ The Court granted this relief. DE 430. While the FTC is hopeful the Receiver and its professionals will receive compensation in the future, receivers do not always get paid in full and at times front expenses while waiting to liquidate assets. *See, e.g.*, Exhibit 1, from *FTC v. Kutzner et al.*, No. 16-cv-999-DOC (C.D. Cal.), DE 520 at 17-18 (the receiver explaining it fronted \$120,885.80 in expenses while waiting years to liquidate real estate). Although the relief REA sought is similar, the FTC still thinks it better to simply holdback the current requests and defer ruling on them until there are more assets in the estate. Doing so will permit the Court to more equitably balance competing interests with better information regarding the work accomplished and the available assets.

V. The FTC has three proposals to free up cash to pay necessary Receivership costs.

Understanding the importance of paying expenses and having a competent and motivated Receiver in charge of the estate, the FTC has at least three proposals to increase the amount of cash at the Receiver’s disposal. If the Court approves these proposals, the FTC will work with the Receiver on a proposed order to implement them.

A. The Receiver may access the interest earned on the AIBL funds.

First, the FTC proposes the Court confirm the Receiver may access the interest earned on the AIBL funds, which the Receiver expects to be \$333,298.05 by January 2024. DE 1457-3 at 18 fn.1. While the AIBL Order precludes the Receiver from accessing the remainder of the \$23,000,000 it is holding, the order is silent as to interest. Nothing, therefore, prevents the Court

⁵ The Receiver has a fiduciary obligation to preserve assets for consumers. *See, e.g.*, DE 1194 at Section VII.H (“Prevent the inequitable distribution of Assets and determine, adjust, and protect the interests of consumers who have transacted business with Pukke, Baker, Chadwick, any entity that is a Receivership Asset, or the Receivership Entities.”).

from granting the Receiver access to these funds and the FTC suggests that the Court do so to free up the equivalent of approximately 2 months' worth of Belizean land management expenses.

B. The Court can authorize the Receiver to draw on the AIBL funds as a loan.

Second, while the AIBL Order precludes the Receiver from directly accessing the AIBL funds, the FTC proposes that the Receiver be permitted to draw on those funds as a loan. As the Receiver explains in its motion, it hopes that the sale of the Belizean land will compensate consumers for any AIBL funds it would access prior to the sale. Under the Receiver's proposal, consumers would bear the risk that the land is sold for less than the necessary amount to repay the estate. The FTC proposes that this risk be flipped: The Receiver may access these funds but will have an unqualified obligation to repay those amounts following the sale of the Belizean land, regardless of whether the sales price is sufficient to fully replenish the funds it previously drew against. If the sale were insufficient, the Receiver would be obligated to repay the estate from his (or his firm's) own funds.

In this way, the Receiver can access funds immediately and as needed, but will be required to do so cautiously, weighing its work and obligations against the consumers' rights to the same funds. While the FTC expects the Receiver will not prefer this approach, both Ankura and Mr. Ferzan's lawyers, Barnes & Thornburg, are large business concerns that should be able to weigh these risks and repay any overages if necessary. Additionally, because the obligation to repay the amounts is unqualified, this relief does not directly violate the AIBL Order's command that the AIBL funds not be used to pay the Receiver. Instead, it is the other assets of the estate, or the Receiver's, that will be used.

C. The Receiver may collect land management fees from certain consumers.

Third, the FTC proposes that those consumers who choose to own a lot be charged a reasonable fee for the maintenance of the land. As the Court is aware, the FTC and the Receiver

are preparing a survey of consumer preferences in which consumers will be given the option to complete the purchase of their lot at a significant discount. DE 1446 ¶¶ 6-7. Because these consumers are affirmatively choosing to continue to own land in the development, it makes sense that they should bear some of the cost of managing that land, costs which disproportionately benefit those who live onsite or plan to live onsite in the future. Indeed, these costs would be akin to homeowners association fees, which are very likely to be imposed by any buyer who chooses to develop the land in the future. The FTC would propose that consumers who choose to acquire their lot be obligated to make \$500 monthly payments for the maintenance of the land and that, to ensure payment, they would be required to prepay 6 months when they close on the sale of their lot. This is not a perfect solution—indeed, the FTC would prefer to not have to consider taking this step—but given the estate’s financial circumstances it is necessary to begin looking for new solutions. If the Court provides guidance in sufficient time, the FTC and the Receiver could affirmatively disclose this obligation in the survey, which would be preferable.

D. The FTC is otherwise working to reduce receivership expenses.

While not a way to affirmatively expand estate assets, the FTC is also working to assist the Receiver and take on tasks that it can perform directly or otherwise using non-estate assets. So far, the Receiver has not been receptive, but the FTC remains hopeful that the Receiver will accept this support given the estate’s current financial position. For instance, the FTC has offered to administer the forthcoming consumer survey to save the Receiver the expense of doing so. The Receiver has rejected this offer. Assuming the Receiver administers the survey, the FTC will review and likely object to certain future fees the Receiver incurs doing so.

VI. Conclusion

Because the AIBL Order does not provide a basis for relief, the Court should deny the Receiver’s request to access those funds for its fees and expenses. The FTC recommends that

the Court exercise its discretion to holdback the current fee request so that the Receiver can prioritize cash expenses. To increase the assets available, the Court can permit the Receiver to (1) access interest earned on the AIBL funds; (2) borrow against the AIBL money to pay current fees and expenses subject to an unequivocal obligation to repay those funds; and (3) charge consumers who commit to owning a lot in Sanctuary Belize a reasonable land management fee.

Dated: August 31, 2023

Respectfully Submitted,

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Certificate of Service

I hereby certify that on August 31, 2023, I caused to be served the foregoing, and all related documents, through the Court's electronic filing system ("ECF") and otherwise on the following people and entities by email at the email addresses provided:

Allison Rego and James E. Van Horn, counsel for the Receiver, by ECF or at arego@btlaw.com and jvanhorn@btlaw.com;

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/s/ Benjamin J. Theisman