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

In re SANCTUARY BELIZE LITIGATION	No: 18-cv-3309-PJM

REPLY IN SUPPORT OF NOTICE REGARDING REDRESS PROCESS AND REQUEST FOR STATUS CONFERENCE AND GUIDANCE FROM THE COURT

The Federal Trade Commission ("FTC") agrees that guidance from the Court is urgently needed, and a hearing should be held as soon as the Court's calendar permits. The FTC's overarching concern is consumer welfare, which will be greatly affected by both the redress process and the Receiver's fee requests. Other than September 25, 2023, the FTC can make itself available on any business day within the next three weeks. The FTC understands the Receiver also has availability the weeks of September 25, 2023, and October 2, 2023.

Consumers will be greatly affected by the content, timing, and results of the upcoming survey.[1] The FTC has reasonable concerns about potential inequities for those who may want to buy their lots through the survey process. Additionally, the FTC should be deeply involved in the survey process. The Receiver's proposed consumer survey requires these consumers to make difficult choices. They deserve clear and detailed information. Because the FTC is a consumer deception regulator with extensive expertise in identifying and thwarting inadequate disclosures and regularly operates consumer redress programs, it is specially situated to assist (or even operate parts of the process). It has already done so in proposing draft survey language to the Receiver, approximately a month ago, which comports with DE 1446. Importantly, every day the survey is not administered costs consumers thousands of dollars.

[1] *See* DE 1446 ¶¶ 4-12.

Separately, the Receiver's interest in timely payment of its fees must be balanced against consumers' justified interests in preserving and maintaining the estate. While the FTC thinks it best to delay the Receiver's fee request until after the Receiver has sold the Belizean land, the Receiver is pressing for an immediate decision. In that case, its current fee request should be denied because it has already been sufficiently compensated for the benefits it has provided to the estate.

I. The FTC and the Receiver need guidance on the redress process.

There are now two survey-related items to address: (1) the potential inequities caused by the limitations on Option 1 under the proposed survey, and (2) the FTC's oversight of the redress process. Because it appears the Receiver has not moved the consumer survey forward while these issues are being resolved, urgent resolution is needed.

A. The FTC welcomes the Court's guidance regarding Option 1 of the survey.

In its filing, the Receiver does not deny that the limitations on Option 1 may result in inequities. Although the Receiver states it considered these issues, the FTC thinks it best if the Court weigh in now that it has full information. To recap, there are consumers who may want to choose Option 1 on the forthcoming survey and buy their lot but who will not be able to because their lot is not in a government-approved subdivision or because there are competing claims to that lot. These consumers also will not be able to buy another comparable lot. Furthermore, if they cannot buy a lot through the survey process, there is a real possibility that they will not be able to buy a lot in the future from the ultimate purchaser of the Belizean land. Possible solutions include offering these consumers other, comparable lots. There are, of course, competing considerations. The Court's guidance is welcome.

The Receiver complains the FTC is asking the Court to modify the Redress Order. The FTC is not. Instead, the FTC is asking the Court to consider granting additional relief.

B. The FTC's oversight and drafting rights are important mechanisms to protect consumers.

The Receiver separately wants the Court to weigh in on the FTC's ability to draft and revise the consumer survey materials. These provisions are necessary to protect consumers. As background, the Receiver did not involve the FTC when drafting its proposed order in April. The FTC did receive a copy shortly prior to its filing and raised concerns then about fairness to consumers. The Receiver disagreed and filed the proposed order without making any changes or accommodations. The FTC then formalized some of these objections in a filing, requiring enhanced disclosures to consumers who may choose Option 2 on the survey, allowing consumers to learn what the Receiver knows about the Belizean sales market before they make their choices, and ensuring the FTC would maintain the ability to protect consumers during this process through the ability to both draft and revise consumer communications. *See* DE 1433 (the FTC seeking modifications and relief); DE 1437 (the Receiver agreeing to these modifications). The ultimate order reflects these changes, including a provision giving the FTC the ability to both draft and revise written materials related to the survey:

> The FTC shall be consulted in advance of the distribution of the Survey. **The FTC shall have the authority to** review**, provide revisions to, or draft any written materials** prior to their distribution to Consumers in connection with the Survey, including, but not limited to, any notices, risk disclosures, frequently asked questions, and the Survey itself.

DE 1446 ¶ 5 (emphasis added).[2] Indeed, it would be strange if the FTC did not have oversight in a matter it investigated and prosecuted. In the FTC's experience, giving such authority to a third-party like the Receiver would be an outlier. It is, in fact, not normal for Receivers to be involved directly in redress in FTC cases.

---

[2] The original, proposed redress plan included a very similar provision. DE 1117-1, Section V.E. ("The FTC must approve all Redress Communications.").

In contrast to the Receiver, the FTC has significant institutional experience identifying deception and drafting and revising consumer communications to ensure they are clear and understandable. At any given time, there are many redress matters at the FTC in which it is involved in consumer communications. *See* https://www.ftc.gov/enforcement/refunds. The FTC also has a team of professionals who design and create high-quality consumer communications on complex topics. https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection/our-divisions/division-consumer-business. Some of these professionals have worked and will continue to work on Sanctuary Belize-related communications.[3]

Even if the Receiver could do an equal or comparable job, time spent by the Receiver reduces the amount of redress consumers may receive, so it makes sense for the FTC to be the primary drafter of these items. To this end, the FTC has been drafting materials and soliciting responses from the Receiver.[4]

C. It is critical that the Receiver move the survey forward with greater urgency.

The FTC is very concerned by the Receiver's lack of progress and apparent refusal to work with the agency. For example, the FTC provided the Receiver with a draft survey on August 25, 2023. To date, the Receiver has not provided the FTC with specific revisions or

[3] The FTC has assisted the Receiver with its written communications related to the claims applications and the recent consumer redress checks. While the FTC assumes only the best of intentions, the Receiver's past, proposed written communications have required significant revision. Based on this experience, it will be more efficient and cost-effective if the FTC drafts the survey materials.

[4] The FTC even offered to complete the survey for the Receiver, which would further reduce the Receiver's workload and expenses. As previously reported, the Receiver rejected this offer. Importantly, to the extent the FTC hired a contractor and used settlement proceeds to do so, the contractor would be both experienced and cheaper than the Receiver. The FTC's contractors charge much less than the Receiver. Additionally, as discussed below, the estate simply cannot afford the Receiver administering the survey in light of its cash obligations. Therefore, the FTC is likely to oppose some amount of the Receiver's future fees in completing the survey.

feedback, other than a suggestion to "bifurcate" the risk disclosures from the survey selections themselves, removing the proximity of risk disclosures from the consumer's choices. Without imputing malintent, this suggestion concerned the FTC, which regularly sues malefactors for separating disclosures from claims and choices.[5] Protecting consumers by ensuring they understand the decisions they are making means the disclosures must be made through the same means as the primary claim and be difficult to miss.[6] The FTC explained this and solicited additional, specific feedback. It has received none. If the Receiver completes the survey on its own without the FTC, the survey likely will be more expensive, both financially and through potentially less effective communication.

A swift hearing is necessary. As the Receiver has reported, the estate has in recent months been spending approximately $143,000 per month managing the land in Belize. DE 1461-1 ¶ 9. So, a delay in the survey, which then delays the sale of the land, costs consumers real money.

---

[5] *See, e.g.*, *FTC v. Medlab, Inc.*, 615 F. Supp. 2d 1068, 1077 (N.D. Cal. 2009) ("Defendants' attempts to create a factual dispute in this issue are unavailing. . . . Defendants cannot inoculate themselves from the representations that appear in the body of the text by including these cautionary statements at the foot of the advertisements."); *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006) (rejecting disclosures on the back of a document, stating "[a] solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures").

[6] *See, e.g.*, *FTC v. FleetCor Tech. Inc.*, No. 19-cv-5727-AT, 2023 WL 5030099, at *1-3 (N.D. Ga. June 8, 2023) (requiring disclosures to be made clearly and conspicuously, and defining clearly and conspicuously to require that the disclosure "be made through the same means through which the communication is presented," "be difficult to miss," and, for electronic claims such as those through the internet, "be unavoidable"); *FTC v. Life Mgmt. Servs*., 350 F. Supp. 3d 1246, 1275 (M.D. Fla. 2018) (same). The FTC has published similar policy statements requiring prominent and simultaneous disclosures for more than 50 years. *See, e.g.*, https://www.ftc.gov/system/files/documents/public_statements/288851/701021tvad-pr.pdf (1970 policy statement: "The audio and video portions of the disclosure should immediately follow the specific sales representation to which they relate, and should be presented each time the representation is presented during the advertisement.").

II. The Court should hear argument about the Receiver's fee requests.

The FTC and the Receiver disagree on how and when the Receiver should be paid moving forward. This fee dispute is relevant to the Receiver's decision-making choices—such as whether it should complete the survey despite the dwindling assets of the estate—and appears, at least in part, to be a reason the Receiver has not moved forward with the survey. As a result, it is important to address these issues at any hearing or status conference. *See* DE 1462 at 4 (Receiver requesting status conference "as direction is needed before the survey is implemented").

The Receiver wants to access the AIBL funds,[7] despite explicit language in the AIBL Order[8] prohibiting it from doing so. The Receiver is also demanding its professional fees be paid in full, now. The best option is to deny the Receiver access to the AIBL money, because there is no choice, and defer consideration of the fee request until after the Receiver finishes its work and sells the Belizean land (which the FTC offered in its recent opposition, *see* DE 1459 at 8-10). If the fee request must be considered now, it should be denied as inequitable because the amount the Receiver and its counsel have already been paid is adequate for the work they have performed and exceeds the percentage consumers may recover.

A. The AIBL Order prohibits the Receiver from accessing the AIBL funds.

The AIBL Order does not permit the Receiver to access the AIBL funds. Payment of his fees and costs are the one item explicitly prohibited:

> **Notwithstanding anything else herein to the contrary, <u>the Receiver is not permitted to use or spend the $23,000,000</u>**

---

[7] These are the settlement proceeds paid by Atlantic International Bank Limited ("AIBL"). A little more than $13 million remain.

[8] This is the Stipulated Order for Permanent Injunction and Monetary Judgment Against Defendant Atlantic International Bank Limited, DE 607.

> **obtained through this Order**; any future expenditures from that amount will be subject to further order by this Court.

DE 607, Section IV.A (emphasis added). While the Receiver has cited other provisions that it believes may entitle it to these funds, this section explicitly supersedes any other contrary provisions. Additionally, the second half of the sentence does not by its terms modify the first.

The Receiver doubts this reading, asking why the AIBL funds are in its care if it cannot use them. That is simple: it costs the Receiver little to nothing to simply hold the funds and it can do so in an interest-bearing account. The FTC can also hold cash, but it cannot do so in interest-bearing accounts. Additionally, at the time of the AIBL settlement, the FTC and the original Receiver anticipated the Receiver would distribute funds, so it made sense for REA to hold those funds. The FTC has taken possession of smaller amounts of cash, but not in amounts where the likelihood of interest payments would make it more desirable for those amounts to be held by the Receiver. The FTC has also agreed the AIBL Order does not prohibit the Receiver from accessing this interest, which is a reason for the Receiver to maintain some of this money moving forward.

The FTC also objects to the Receiver accessing the AIBL funds on equitable grounds. As the FTC explained in its papers, a Court must consider the size of the estate and interests of competing parties, such as the victims, when deciding whether and how much to pay a Receiver. *See* DE 1459 at 4-6. Here, Mr. Ferzan and his firm, Ankura, have already been paid $3.7 million, which is in addition to the $2.85 million paid to REA (and the $2.4 million paid to Barnes & Thornburg and more than $11 million in cash expenses). DE 1456-3 at 19. This is more than adequate for the work they have already performed. *See SEC v. Byers*, No. 08-cv-7104, 2014 WL 7336454, at *7 (S.D.N.Y. Dec. 23, 2014) (accounting firm that had received $4.6 million was not entitled to an additional $735,245 because "[t]his was still a highly

profitable endeavor"). Because they have received a greater share of the proceeds than any consumer is likely to receive, it makes sense to preserve the remainder of the AIBL funds for consumers. *See SEC v. Stinson*, No. 10-cv-3130, 2015 WL 115495, at *3-4 (E.D. Pa. Jan 8, 2015) (reducing receiver's total compensation to ensure consumers receive a fair share of the proceeds).

B. The estate cannot afford to pay the Receiver's current fee request.

It would be inappropriate to pay the Receiver at this time. As the Receiver has reported in its own filings, it is struggling to maintain cash to pay necessary expenses such as maintenance of the Belizean land. Those cash expenses must be prioritized. *See, e.g.*, *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"). It would be inappropriate to pay the Receiver's fees because doing so will jeopardize the Receiver's ability to meet its cash needs, such as caring for the land in Belize, in the next six months, with no current expectation of further income. Indeed, the prior receiver, REA, recognized just this when it vowed to prioritize cash expenses over receivership fees. DE 400-1 at 17.

The equities must be balanced. Even assuming the Receiver could access the AIBL funds, the Court should still deny the fee request if the only option is to consider it now. As just detailed, the Receiver has already been paid $3.7 million for less than two years' work, including $1.5 million in April. It, therefore, cannot claim "economic hardship[]," which is a prerequisite to an interim distribution. *See SEC v. Small Bus. Cap. Corp.*, No. 12-cv-3237 EJD, 2013 WL 2146605, at *2 (N.D. Cal. May 15, 2013); *SEC v. Cobalt Multifamily Investors I, Inc.*, 542 F. Supp. 2d 277, 281 (S.D.N.Y. 2008) ("[T]here is no evidence that the Receiver's need for such an award is 'sufficiently pressing' to warrant draining the limited assets of the Cobalt estate."). As discussed above, it remains true that the Receiver has been adequately compensated for the work

performed to date. *See also SEC v. Merrill*, No. 18-cv-2844 RDB, 2019 WL 4916164, at *2 (D. Md. Oct. 4, 2019) (fees must bear a relationship to "the benefit to the receivership estate"). Relatedly, because the Receiver has already received a larger proportion of its fees than consumers are likely to receive of their claims, it makes sense to limit or deny the Receiver's fees. *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."); *Stinson*, 2015 WL 115495, at *3-4 (rejecting fee application in favor of providing funds to victims).

Additionally, as the FTC detailed in its opposition to the fee request, Ankura has not done work notably more complex than REA[9] but has charged higher fees on a per month basis. DE 1459 at 2-3 (less than $80,000/month for REA and more than $200,000/month for Ankura). This may be attributable to Ankura charging higher rates for comparable work. While REA adequately evaluated the estate and responded to consumers by spreading hours amongst those charging more than $300/hr and others billing less than $150/hr, Ankura has no professionals who charge less than $200/hr and the majority of its time is billed by professionals who charge more than $300/hr. *Compare* DE 562-4 at 2 (largest number of hours completed by REA professional at $135/hr, performing research and consumer communication work) and DE 956 at 21 (same); *with* DE 1456-4 (no Ankura professional billing at less than $236/hr). Notably, Mr. Ferzan is empowered to use subcontractors who bill at lower rates if there are no such Ankura

[9] The Receiver has repeatedly touted its increased efficiency in managing the land in Belize. The FTC's review of the fee requests shows total cash expenses for REA of approximately $7.7 million, which includes the costs of managing multiple pieces of land in the United States, all of which were sold prior to Mr. Ferzan's and Ankura's term. Mr. Ferzan appears to have incurred approximately $3.9 million in cash expenses. REA was Receiver for 36 months, averaging $213,000/month while managing more assets. Mr. Ferzan has been Receiver for 20 months, averaging $195,000/month while managing fewer assets. *See* DE 400, 562, 722, 955, 1077, 1271, 1326, 1335, 1343, 1366, 1379, 1413, & 1456. Any possible benefit here must also be balanced against Mr. Ferzan's and Ankura's higher professional fees.

professionals. *See, e.g.*, DE 1117-1, Section II.L (permitting the use of subcontractors for the redress process); DE 1194, Section VII.E (generally permitting the Receiver to hire independent contractors).[10]

Finally, the FTC's objection carries extra weight, which makes sense because the FTC has significant experience in receivership matters and weighing the interests of victims. *See SEC v. Merrill*, No. 18-cv-2844 RDB, 2019 WL 4916164, at *2 (D. Md. Oct. 4, 2019) (government's objection to receivership fee request carries "great weight") (quoting *SEC v. Fifth Ave. Coach Lines, Inc.*, 364 F. Supp. 1220, 1222 (S.D.N.Y. 1973)).

III. Conclusion

It makes sense to hold a hearing or status conference to address: (1) the potential inequities for those who want to buy their lots; (2) the Receiver's attempt to remove or limit oversight over its consumer communications; (3) the Receiver's demand to access the AIBL funds; and (4) the Receiver's demand for immediate payment of its fees.

Dated: September 20, 2023

Respectfully Submitted,

/s/ Benjamin J. Theisman
Jonathan Cohen (jcohen2@ftc.gov)
Benjamin J. Theisman (btheisman@ftc.gov)
Christopher J. Erickson (cerickson@ftc.gov)
Federal Trade Commission
600 Pennsylvania Ave., N.W., CC-9528
Washington, DC 20580
202-326-2551 (Cohen); -2223 (Theisman); -3167 (Erickson)

Counsel for the Federal Trade Commission

---

[10] Although the FTC has not previously, publicly objected to the Receiver's fees, it has privately raised its concerns with the Receiver.

Certificate of Service

I hereby certify that on September 20, 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;

John B. Williams, by ECF or at jbwilliams@williamslopatto.com, counsel for Defendants;

Neil H. Koslowe, by ECF or at nkoslowe@potomaclaw.com, counsel for Defendants;

/s/ *Benjamin J. Theisman*