

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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IN RE: :
HOLOCAUST VICTIM ASSETS :
LITIGATION :

Case No. CV 96-4849 (ERK)(MDG)
(Consolidated with CV 96-5161
and CV 97-461)

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MEMORANDUM & ORDER

This Document Relates to: All Cases
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KORMAN, Chief Judge.

By letter dated October 19, 2006, CRT Special Master Dr. Helen B. Junz has proposed an amendment to Article 28 of the Rules Governing the Claims Resolution Process (the "CRT Rules"). I had appointed Ms. Junz to serve as CRT Special Master on April 13, 2004. Since that time, she has had primary responsibility for reviewing awards and denials recommended by the CRT, including where necessary analyzing all of the underlying bank records and other documentation relevant to each claim. Prior to her appointment Dr. Junz, who is an economist, had a distinguished career as a national and international public servant. She served in senior positions at the Board of Governors of the Federal Reserve System of the United States, at the Economic Council of the President in the White House; as Deputy Assistant Secretary at the Department of the Treasury and subsequently at the International Monetary Fund. Her involvement with the analysis of Holocaust era asset questions came in 1997 when Paul Volcker asked her to produce a study of the wealth of the Jewish population in Europe at the eve of the Nazi era to provide a touchstone against which he and the Independent Committee of Eminent

Persons (“ICEP”), which he chaired, could assess the results of their audit of Swiss banks. The study was published as a book entitled, *“Where did all the money go?” Pre-Nazi Era Wealth of European Jewry* (Staempfli Publishers Ltd., Berne, 2002). Subsequently she guided the economic and financial research for the U.S. Presidential Advisory Commission on Holocaust Era Assets, served as a member of the Independent Commission of Experts Switzerland-Second World War (the Bergier Commission); advised the van Kemenade Commission (Dutch commission) on aspects of Jewish-owned wealth in the Netherlands; produced, in collaboration with her co-authors, a study for the Austrian Historical Commission and was a fellow at the Center for Advanced Holocaust Studies at the U.S. Holocaust Memorial Museum.

Until Ms. Junz’s appointment in April 2004, Michael Bradfield, an extremely capable lawyer who was General Counsel of the Federal Reserve Board and was counsel to the ICEP (Volcker) Commission, and is now in private practice focusing on international banking and finance, served as CRT Special Master and in that capacity supervised the CRT and reviewed its recommendations in connection with particular awards and denials. At my request, upon Ms. Junz’s appointment, Mr. Bradfield assumed responsibility for CRT appeals while Ms. Junz was charged with oversight of the CRT’s awards and denials.

Among the issues that have been raised with Special Master Bradfield in connection with the appeals is the continuing viability of Article 28(a)(i) of the CRT Rules, the “Swiss visa requirement.” Indeed, on March 28, 2006, Mr. Bradfield wrote to Ms. Junz, to ask for her “help to assist [him] ... to resolve appeals that turn on the application of Swiss visa requirements to Jews entering Switzerland during the period in which the Swiss visa policy was in effect.” While the letter acknowledged Ms. Junz’s special expertise in this area, Mr. Bradfield ultimately disagreed with Ms. Junz, as reflected in an exchange of correspondence that I discuss below. I

find Ms. Junz's analysis of the issue more compelling and persuasive. Indeed, in a letter dated October 3, 2006, outlining the concerns he had with Ms. Junz's response to his March 28, 2006, letter, Mr. Bradfield acknowledged that "Ms. Junz's analysis is persuasive." I annex copies of the correspondence, which I discuss in some detail below.

Article 28 sets forth "presumptions relating to claims to certain closed accounts." Special Master Junz explains that the purpose of her proposed amendment "is not to request a change in policy practice, but rather to make clear what longstanding practice has been" and to "formalize a policy that has long been in place; a policy that has been authorized by the Court in its orders adopting the CRT's recommendations to approve or deny individual awards." Specifically, Special Master Junz recommends that "Article 28 of the CRT Rules be amended to eliminate the reference to Swiss visa requirements, as Article 28(a)(i) of the CRT Rules has been found not to be appropriate and, therefore has for a long time already not been a factor in the award process." As Special Master Junz has established, the facts of the time, evidenced amply in the CRT's experience and research, are that Switzerland's imposition of additional visa requirements applying to "emigrants" in January 1939 is not germane to the issue whether an owner had control over his or her account. This is so because the management of an account did not require the physical presence of the owner in Switzerland, as the account could have been managed and closed at will from abroad or through third parties. Thus, the relevant time frame begins with the date the Reich gained control over the account owner's country of residence, whether by incorporation into the Reich, occupation or formal alliance. That is the date upon which it is appropriate to presume that the owner lost control over his/her Swiss account to the Nazi regime. It is the Nazi Regime -- as distinct from other regimes, which adopted persecution measures

preceding or parallel to, but not at the direction of the Reich -- that is relevant under the terms of the Settlement Agreement.¹

I have carefully considered the reasons laid out for retaining the Swiss visa provision, most recently explained by Special Master Bradfield in a letter of October 3, 2006, as well as those underlying Special Master Junz's amendment proposal, as set out in her letter to the Court of October 19, 2006 and her response to Special Master Bradfield of October 10, 2006. For the reasons discussed below, I concur with Special Master Junz's analysis and hereby adopt her recommendation to amend the CRT Rules.

Special Master Junz's letter to the Court of October 19, 2006 explains that the decision to include in the CRT Rules a reference to "the imposition of Swiss visa requirements on January 20, 1939" was made "at the beginning of the review process, before the CRT Special Masters and staff had the opportunity to test [the Rules] against reality." In "an effort to provide the broadest possible sweep of presumptive rules to do justice to the widely varying circumstances of thousands of claimed account owners, rules and guidelines [were] formulated that later, in the light of further consideration and experience, would need to be re-interpreted or amended."

The reconsideration of these rules and guidelines has ensured equal treatment of claimants and in many, though obviously not all, cases also has resulted in the payment of more claims and/or larger awards than would have been permissible without these revisions. Special

¹ Under the Settlement Agreement, to be a member of one of more of the five settlement classes, one must be a "Victim[] or Target[] of Nazi Persecution." A "Victim or Target of Nazi Persecution" is defined as "any individual, or other entity persecuted or targeted for persecution by the *Nazi Regime* because they were or were believed to be Jewish, Romani, Jehovah's Witness, homosexual, or physically or mentally disabled or handicapped" (italics supplied). As to "Nazi Regime," that term, while quite broad, nevertheless mandates that there be some historical connection between the perpetrator of the wrongdoing and Nazi Germany. Thus, according to the terms of the Settlement Agreement, "Nazi Regime means the National Socialist government of Germany from 1933 through 1945 and its instrumentalities, agents, and allies (including, without limitation, all other Axis countries), all occupied countries, and all other individuals or entities in any way affiliated or associated with, or acting for or on behalf or under the control or influence of, the Nazi Regime, including, without limitation, the Accused Organizations and Individuals in the Nurnberg Trial, 6 F.R.D. 69 (1946)."

Master Junz includes with her letter an Appendix that sets forth a number of examples of this continuing reexamination of the standards by which CRT claims are reviewed as assessment experience, confirmed by historical and documentary information, continually broadens the perceptions of the Special Masters and the CRT.

With respect to Article 28(a)(i), Special Master Junz explains that the imposition of additional Swiss visa requirements on “emigrants” on January 20, 1939 is not relevant to whether it may be presumed that an owner did, or did not, receive the proceeds of his or her account.² As Special Master Junz points out, “though in certain circumstances entry even for short-term stays may have been impeded at times, this does not mean that thereby access to, and full management of, assets held in Swiss banks by account owners who were Nazi persecutees was circumscribed. This was so because such management did not require the physical presence of the account owner in Switzerland These facts are borne out in the thousands of bank documents related to some of the 105,000 claims that have been filed with the CRT, as well as by continuing archival and other research.”

Special Master Junz’s October 10, 2006 letter, in which she responds specifically to Special Master Bradfield’s letter of October 3, 2006, explains in detail the various means by which, prior to the date upon which the account owner’s country was occupied by or allied with Nazi Germany, the owner could have accessed his or her account.

First, the account owner, unless a resident of the Reich, could have traveled to Switzerland under restrictions that were not notably different from those already in effect prior to the imposition of additional visa requirements on January 20, 1939. Although Special Master

² An “emigrant” was defined as a foreigner “who under pressure of political or economic circumstances has left, or is forced to leave, his residence abroad, and cannot, or does not want to, return there.”, Unabhängige Expertenkommission Schweiz-Zweiter Weltkrieg, *Die Schweiz und die Flüchtlinge*, Study No. 17, Chronos, Zurich 2001, p. 141.

Bradfield's October 3, 2006 letter refers to the Swiss targeting of Jewish refugees, as Special Master Junz notes in her October 10, 2006 letter:

The very sad fact of the Swiss treatment of refugees, which often consigned them to the death camps in the period after Nazi Germany overran Europe, is of course well documented, and [Special Master Bradfield] cite[s] one of these sources with respect to the record between 1940 and 1945. But the discussion here concerns the extent to which it was possible for account owners outside the Reich and Italy (for which dates on which account holders may be deemed to have lost control over the assets in their accounts, absent evidence to the contrary, precede January 20, 1939) to manage their accounts between January 20, 1939 and the date their country was occupied by the Reich or allied itself to the Reich and how this ability or otherwise fits into the confines of the Settlement Agreement. The point here is that, though entry restrictions had been tightened, the travel status of East and South-Eastern European Jews remained unaltered – that is general visa requirements had been applied to them for many years.

Second, an account owner unable or unwilling physically to enter Switzerland could have accessed his/her account by other means. Special Master Junz notes in her October 10, 2006 letter that “there is ... considerable evidence of couriers being used, especially from Eastern European countries. For example, in Hungary after the imposition of exchange controls, the Fascist press continually complained about the country being robbed by Jews moving their assets abroad and court records show that the majority of convictions for offenses against the currency restrictions concerned Jews. Thus, in February 1939 a court reported that one Jenő Schwartz had managed to travel abroad 188 times between 1934 and 1938 and personally smuggled assets worth 2 million pengő out of Hungary before he was caught.³ And there are many more such examples.” In any event, “most people used more sophisticated means to furnish and then manage their accounts from a distance, so that physical presence was not necessary and difficulty of entry does not come into play.” Thus, “the broad flows of funds into Switzerland, and then in many cases again from Switzerland to other destinations, were managed not by courier...but by mail,

³ Bosnyak Zoltan, *Magyarország elzsidósodása*, (The Judaisation of Hungary), Budapest 1938; and *A zsidókérdés*, (The Jewish Question), Budapest, 1940 (cited in Special Master Junz's letter of October 10, 2006).

telephone, wire, letter and through third persons; in addition many of the ways we are familiar with from today's circumvention of exchange restrictions and evasion of taxes, such as over/under invoicing, etc. were also used."

Although Special Master Bradfield's October 3, 2006 letter indicates that it is implausible to presume that owners would have closed their accounts only to subject the funds to expropriation under the anti-Semitic practices of many Eastern European nations prior to their alliance with or occupation by Nazi Germany, Special Master Junz's October 10, 2006 letter explains that the funds likely were not repatriated, but sent abroad to safe havens:

[A] prominent reason for closure would have been to move the funds to destinations considered safer than Switzerland and/or destinations the account owners hoped to be able to flee to themselves. Thus main destinations would have been the United States, the United Kingdom and Palestine. For example, Hug and Perrenoud note in their discussion of Swiss compensation agreements with East Bloc countries that "Other documents show that Romanian Jews entrusted their assets to Swiss banks, especially when moving abroad or for transferring them to Israel [sic]."⁴ We have many such examples in the claims resolution experience. One such is *in re Accounts of Henryk Ruziewicz and Zofja Ruziewicz*, where Account Owner Zofja Ruziewicz' accounts at the Swiss bank were closed by written order in April 1939 and the assets, including US \$8,350.00 in gold coins, transferred to the *Chase National Bank* in London. A second example, involving a transfer of funds to Palestine is *in re Accounts of Wilhelm Weinberger and Leonora Weinbergerova*. Here Account Owner Weinbergerova, who lived in Vienna, held a significant number of gold coins in a custody account at the Swiss bank. On January 10, 1939 the account was closed with an unspecified number of coins transferred to *Barclays Bank*, Haifa, Palestine and the remainder to an account at the Zurich headquarters of the bank. Account Owner Weinbergerova emigrated to Palestine in 1939.

Finally, as Special Master Junz's letter explains, "the fact that an account owner might have been able to dispose of the proceeds of his/her account(s) before his country fell under the power or direct influence of the Reich in no way indicates that he did not in the end perish in the Holocaust." In fact, there are many examples where account owners moved their assets to

⁴ Peter Hug and Marc Perrenoud, *In der Schweiz liegende Vermögenswerte von Nazi-Opfern und Entschädigungsabkommen mit Oststaaten*, Bundesarchiv Dossier 4, Bern 13 December 1996/January 1997, p. 144 (cited in Special Master Junz's letter of October 10, 2006).

safety, but were never able to gain safety themselves. Thus, an account owner's ultimately tragic fate once his/her country fell under the sway of the Reich does not mean that he or she could not have accessed the account before that time.

The purpose of Article 28 is to provide the CRT with general guidelines to help streamline the processing of claims, particularly where crucial documentation has been destroyed. Specifically, Article 28 is intended to offer guidance to the CRT in analyzing claims to accounts for which enough documentation remains to show that the account existed during the Holocaust era, but the documents that would demonstrate whether the owner received the proceeds have been destroyed. I already have explained that under these circumstances, and *absent other evidence to the contrary* -- a proviso also included in Article 28 -- it is appropriate to draw an adverse inference in favor of the claimant, who should not be held responsible for the banks' destruction of documentation. *In re Holocaust Victim Assets Lit.*, 319 F. Supp. 2d 301 (E.D.N.Y. 2004). As Article 28 makes clear, one important element in determining whether the adverse inference applies or, instead, whether there is evidence to the contrary, is the date upon which the account was closed. Thus, to date, Article 28(a) has indicated that two different time frames are relevant to this analysis: (1) whether the account was closed after Switzerland's January 20, 1939 imposition of additional visa requirements; (2) whether the account was closed after the account owner's country of residence was occupied by Nazi Germany.⁵ Each element of Article 28(a) was intended to support an inference that, absent evidence to the contrary, the account owner could not have received the proceeds of an account if it was closed on or after the earlier of either the "visa date" or the occupation/alliance date.

⁵ The latter provision has been interpreted to include both the date of occupation by or incorporation into the Reich, and the date of alliance with the Reich. This is being made explicit in the amendment below.

For all the reasons cited above, and for the other reasons set forth by Special Master Junz, Article 28(a)(i) is not reflective of its purpose, and I have approved numerous Certified Awards and Certified Denials in recognition of that fact.

Accordingly, I adopt Special Master Junz's proposal and hereby amend Article 28(a) of the CRT Rules to read as follows:

Article 28 Presumptions Relating to Claims to Certain Closed Accounts

In order to make an Award under Article 22 for claims to Accounts that were categorized by ICEP as "closed unknown by whom", a determination shall be made as to whether the Account Owners or their heirs received the proceeds of the Account prior to the time when the claim was submitted to the CRT. In the absence of evidence to the contrary, the CRT presumes that neither the Account Owners, nor the Beneficial Owners, nor their heirs received the proceeds of a claimed Account in cases involving one or more of the following circumstances [footnote not reproduced herein]:

- a) the Account was closed and the Account records show evidence of persecution, or the Account was closed after the date of occupation by or incorporation into the Reich or the date of alliance with the Reich of the country of residence of the Account Owner or Beneficial Owner, and before 1945 or the year in which the Swiss authorities' freeze of Accounts from the country of residence of the Account Owner or Beneficial Owner was lifted (whichever is later); [Remainder of Article 28 is unchanged].

Special Master Junz also annexes to her proposed amendment of Article 28 an appendix setting forth the "Occupation, Incorporation and Alliance dates as used by the CRT to establish deemed dates of loss of control over financial assets." The dates "are relevant to the CRT's determination of the date upon which account owners resident in and/or nationals of the affected countries, in the absence of evidence to the contrary, would be deemed to have lost control over their accounts."

Special Master Junz correctly observes that the amendment of this Article will not be detrimental to claimants, as the amendment formalizes the policy that has been in place for

several years. I agree with Special Master Junz that it was an unfortunate oversight that Article 28 was not previously amended to eliminate the reference to Swiss visa requirements. However, the continuing reference in the Rules to the visa requirements has not had a practical impact upon the claims process, and has not deleteriously affected claimants or appellants. As Special Master Junz observes in her October 19, 2006 letter:

That a claimant or his/her representatives may or may not have made reference to Article 28(a)(i) in his/her claim form or appeal is irrelevant to the CRT's careful examination of the circumstances surrounding the opening, management, and closure of the account at issue, as well as all available facts bearing upon the fate of the claimed account owner. The CRT's recommendations of awards, and Special Master Bradfield's recommendations on appeal, do not hinge upon claimants' interpretation of the CRT Rules but, rather, upon the determined effort to locate accounts and return them to their proper owners – even where claimants may not have originally asserted ownership to those accounts.

CRT claimants have been offered every opportunity to elaborate upon their claims. Where relevant data were not originally provided by the claimants or available from the bank records, the CRT has sought such information on its own initiative, ranging from direct communications with claimants and family members, to exhaustive archival research in Austria, Germany, Switzerland and elsewhere. The CRT also continues to pursue “Voluntary Assistance” from the defendant banks to obtain additional data, and in many instances has received relevant materials.

It is extremely unlikely that any claimant has modified or limited the information he or she provided to the CRT, whether initially or on appeal, because of Article 28's inclusion of a reference to Swiss visa requirements. It also is extremely unlikely that the CRT did not seek to amplify such information if it appeared to be incomplete and/or insufficient to perform the exhaustive analysis underlying any decision regarding proper closure of an account by the account owner, and thus whether or not the account is awardable under the Settlement

Agreement. Nevertheless, I have instructed the CRT to re-examine the 44 or so decisions that I have been made aware as having been issued to date in which accounts were denied because they were closed prior to the date upon which the owner's country of residence was occupied by or entered into an alliance with Nazi Germany, but on or after the imposition of additional Swiss visa requirements on "emigrants" on January 20, 1939. I have further instructed the CRT to continue to exercise special care when assessing such future cases.

Dated: Brooklyn, New York
November 29, 2006

SO ORDERED:

s/ Judge Edward R. Korman

Edward R. Korman
United States District Judge

Appendix A. Selected amendments and clarifications to the rules and guidelines used by the CRT in the claims resolution process.

- On July 30, 2001, the Court adopted the recommendation of CRT Special Masters Volcker and Bradfield to permit the use of Initial Questionnaires as claim forms in the claims resolution process for Deposited Assets. The Court noted that “many Respondents erroneously understood that the IQ is a claim form and that no other claim form had to be submitted to qualify for a Deposited Asset award under the Claims Resolution Process. To correct this situation and to assure that Class Members with Deposited Assets claims are not precluded by technical procedural requirements from having fairly and timely presented claims fairly adjudicated, [r]esponses to the IQs shall be treated as timely submitted Deposited Assets Class claim forms for purposes of the Claims Resolution Process.”
- On August 15, 2001, April 8, 2003 and December 30, 2004, respectively, the Court extended the filing deadline for CRT claims to ensure that the often elderly claimants had every opportunity to participate in the CRT claims process.
- On April 25, 2003, the Court expanded upon the presumptions utilized by the CRT by adopting CRT Rules Appendix C, thus providing that the deemed date on or after which the CRT would presume that a German account owner no longer had control over his/her financial assets was January 20, 1933 (the date of Hitler’s accession).
- On October 12, 2004, the Court adopted Special Master Junz’ recommendation of to utilize presumptive values rather than those reported by Nazi victims in the 1938 Census of Jewish-owned assets if these values were lower than the CRT’s presumptive (average) values (see Article 29), recognizing the “existence of evidence that respondents to the 1938 Census tended not to declare all the assets they held and/or to undervalue declared assets in an effort to safeguard some of their wealth for the future.” The Court also adopted her recommendation to “suspend deduction of interest accruals when determining account valuation absent bank documentation showing interest actually having been credited to the account owner over the period in question.” The result of each of these amendments was to increase the amounts awarded to many claimants.
- On December 30, 2004, the Court authorized the CRT to treat as timely CRT-II claim forms “all claims previously submitted to but not treated by CRT I, ICEP, or ATAG Ernst & Young,” because as with the Initial Questionnaires, many claimants erroneously had believed that the CRT-I, ICEP and ATAG claim forms were sufficient for claiming under the Settlement Agreement.
- On January 7, 2005, the Court adopted Special Master Junz’ recommendation to increase the sums awarded to many claimants by authorizing the CRT to calculate

payments to claimants based upon presumptive values, where the account values reported in the bank records are lower than the presumptive values used by the CRT because of the body of evidence that the amounts in the banks' records could not in all cases be relied upon.

- On February 17, 2006, the Court adopted Special Master Gribetz' recommendation to issue payments to claimants with plausible but undocumented claims, in accordance with the Court's continuing effort "to compensate for the burdens imposed upon claimants due to the massive destruction of documents, and the restrictions placed upon the CRT's access to the remaining records."
- On March 22, 2006, Special Master Junz reported to the Court her recommendation to adjust upward the presumptive values currently in use by the CRT. As more fully described in her report, this recommendation was based upon her extensive study of the presumptive values currently in use as determined by the ICEP auditors (see Article 29), as compared with (1) the average values of known value accounts that have been awarded to date, and (2) the average values of known value accounts in the Account History Database (i.e., the accounts to which the CRT has access, of the some 4.1 million Holocaust-era Swiss bank accounts). The recommendation, which is pending before the Court, would result in payment to claimants – past and future – of a significant amount of additional compensation.

Appendix B. Occupation, Incorporation and Alliance dates as used by the CRT to establish deemed dates of loss of control over financial assets.

The following is a list of the dates of occupation or incorporation by the Reich and of alliance with the Reich currently employed by the CRT. The dates are relevant to the CRT's determination of the date upon which account owners resident in or nationals of the affected countries, in the absence of evidence to the contrary, would be deemed to have lost control over their accounts.

Germany:	January 30, 1933
Italy:	October 25, 1936
Austria:	March 12, 1938
Czechoslovakia/ Sudetenland:	September 30, 1938
Czechoslovakia/ Remainder:	March 15, 1939
Poland:	September 1, 1939
Denmark:	April 9, 1940
Norway:	April 9, 1940
Belgium:	May 10, 1940
France:	May 10, 1940
Luxembourg:	May 10, 1940
Netherlands:	May 10, 1940
Greece:	October 28, 1940
Hungary:	November 20, 1940
Romania:	November 20, 1940
Bulgaria:	March 1, 1941
Yugoslavia:	March 25, 1941