

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

In re: HOLOCAUST VICTIM ASSETS : LITIGATION :	Master Docket No. CV-96-4849
_____ :	(ERK) (MDG)
JACOB FRIEDMAN, et. al., : Plaintiffs :	
against : UNION BANK OF SWITZERLAND, : et. al. Defendants :	Civ. Act. No. CV 96 5161
_____ :	
GIZELLA WEISSHAUS, et. al. : Plaintiffs :	
against : UNION BANK OF SWITZERLAND, : et. al. Defendants :	Civ. Act. No. CV 96-4849
_____ :	
WORLD COUNCIL OF ORTHODOX : JEWISH COMMUNITIES, INC. : et. al. Plaintiffs :	
against : UNION BANK OF SWITZERLAND, : et. al. Defendants :	Civ. Act. No. 97-0461
_____ :	

SUBMISSION OF LEAD SETTLEMENT COUNSEL IN
SUPPORT OF THE SPECIAL MASTER'S PROPOSED PLAN
OF ALLOCATION AND DISTRIBUTION OF SETTLEMENT
PROCEEDS

In my capacity as court-appointed Lead Settlement Counsel, I make this submission: (a) in support of the Special Master's Proposed Plan of Allocation and Distribution of the Settlement Proceeds; (b) in response to the defendants' submission commenting on the Special Master's Plan; and (c) in response to certain objections to the Special Master's Plan lodged by interested parties.

1. Pursuant to a procedure that was overwhelmingly approved by the members of the settlement classes and by the Court, Judah Gribetz, Esq., as court-appointed Special Master, was given responsibility for proposing a plan for the allocation and distribution of the \$1.25 billion settlement proceeds herein among the five settlement classes. Performance of that difficult task required the Special Master to (a) conduct a painstaking inquiry into the factual and legal underpinnings of each settlement class in order to permit the Special Master to propose an equitable inter-class allocation of the settlement proceeds based on a reasoned assessment of the relative strength of the legal and factual claims asserted by each of the five plaintiff classes; and (b) marshal the available data needed to develop fair intra-class plans for the orderly distribution of the allocated funds within each of the five settlement classes. The Court's March 31, 1999 order appointing the Special Master states at page 3 that "[t]he Special Master shall make findings of fact and conclusions of law with respect to the factors that are to be considered in determining eligibility and valuing a claim under the Plan of Allocation and Distribution." Thus, the suggestion in defendants' submission, dated October 17, 2000, that much of the factual discussion in the Special Master's report is "unnecessary" seems clearly wrong. Without a painstaking review of the underlying law and facts, the Special Master would have no basis on

which to premise a legally acceptable plan of allocation, nor would the Court have a basis on which to evaluate the Special Master's recommendations.

2. The Special Master's "findings of fact" are the result of intense research by a court-appointed Special Master who, over a period of more than one year, engaged in an extraordinary effort to develop a factual basis for a legally and morally just allocation formula. The evidentiary weight of such findings in other proceedings is not an issue for consideration at this time. But it cannot be doubted that the findings are necessary, indeed crucial to the work of the Special Master in this case.

3. The decision to utilize a Special Master to propose a plan of allocation and distribution was motivated by a desire to spare Holocaust survivors from being forced into an adversarial relationship that would have required them to squabble over a settlement fund that, while substantial, is necessarily insufficient to do full justice to all members of each plaintiff class. It was hoped that a neutral Special Master, acting with the guidance of the affected community, could conduct a serious inquiry into the facts and law, and propose a plan of allocation and distribution that would do non-adversarial justice to the claims of all class members.¹ In carrying out his assigned task, the Special Master utilized the relative strength of the legal and factual claims asserted against Swiss entities by the five plaintiff classes as the principal allocation criterion. Reliance on any other allocation criteria would have been inappropriate, since the settlement fund is not an unrestricted charity to be used to compensate victims of Nazi oppression in accordance with principles of abstract justice, but a settlement fund arising out of a

¹After receiving a careful description of the process, the class overwhelmingly ratified the use of a Special Master as an alternative to adversary proceedings involving the five classes.

lawsuit designed to compensate only those victims of Nazi oppression whose injuries were either caused by, or exacerbated by, the alleged behavior of Swiss entities.

4. The Special Master was remarkably successful in inviting and obtaining the guidance of interested members of the community. He conferred widely with an extraordinary array of persons who expressed a desire to provide advice or guidance on the fairest way to allocate the settlement proceeds. The openness and transparency of his deliberations adds immeasurably to the moral and legal persuasiveness of his proposed plan of allocation.

5. Unfortunately, it proved more difficult for the Special Master to obtain the facts needed to inform his deliberations. Neither the defendants, the relevant agencies of the Swiss government, nor private Swiss entities initially cooperated with the Special Master's requests for information needed to fulfill his mandate. It was repeatedly necessary for counsel and the Court to negotiate and cajole in order to obtain access to basic information needed to carry out the Special Master's mandate. Despite the obstacles placed in his path, however, the Special Master was ultimately successful, often with the assistance of the Court and counsel, in assembling the information needed to make a reasoned judgment concerning inter-class allocation, and intra-class distribution. While reasonable people may differ over the precise contours of the Special Master's plan, and while additional allocation decisions may be necessary in the future, I recommend adoption of the Special Master's Proposed Plan in its entirety as a careful, judicious, and completely fair blueprint for the allocation and distribution of the settlement proceeds.

A. Proposals Concerning the Deposited Assets Class

6. The perception underlying the Special Master's first recommendation - that plaintiffs' demand for the return of funds deposited in Swiss banks prior and during the Holocaust is the

strongest legal and factual claim asserted by the plaintiffs - seems clearly correct. As a legal matter, plaintiffs' demand for the return of deposited assets, and their assertion that Swiss banks held Holocaust-era deposits, not merely as bailees, but as constructive trustees subject to substantial affirmative duties as fiduciaries posed a formidable legal challenge. As a factual matter, the findings of the Volcker Report that, despite the destruction of all records relating to more than two million Swiss accounts opened during the relevant period, and the destruction of substantial aspects of the records relating to the remaining four million accounts opened during the relevant period, 54,000 accounts have been identified as "possibly or probably" owned by a victim of the Holocaust,² validates the fundamental allegations in plaintiffs' complaint seeking the return of assets deposited on the eve of and during the Holocaust. The Court has explicitly recognized as much in its July 26, 2000 (corrected August 2, 2000) memorandum and order granting final approval of the Settlement Agreement, observing at page 23 that the "report of the Volcker Committee...provided legal and moral legitimacy to the claims asserted here on behalf of members of the Deposited Assets Class."

7. The suggestion in defendants' submission dated October 17, 2000 that it was erroneous for the Special Master to have noted the massive destruction of Swiss bank records covering the relevant period is, frankly, incomprehensible. There is no question that all records relating to over two million Holocaust-era accounts have been destroyed. There is also no doubt

²Defendants complain that the figure should be reduced to 46,000 to reflect a more accurate assessment of the accounts made by defendants. Since the defendants have adamantly refused to permit the Volcker Commission to pass on their so-called "technical corrections," they can hardly complain when observers cite the Volcker Commission numbers as the only neutral assessment. If defendants wish to establish a lower number, they need only submit their alterations to the Volcker Commission for verification, a step they have refused to undertake.

that the records relating to the remaining four million are, at best, fragmentary, with as much as 90% of the transactional records destroyed. Indeed, the Court at page 26 of its Final Approval Order noted that the Volcker Report described the destruction of Swiss bank records as having created “an unfillable gap...that can now never be known or analyzed for their relationship to victims of Nazi persecution” In fact, defendants’ submission appears more concerned with the public relations issue of whether it can be proved that the records were destroyed in bad faith, than with whether they were destroyed at all. In citing language in paragraph 41 of the Volcker Report noting that evidence of “systemic” destruction was lacking, defendants conveniently ignore the damning language in the paragraph castigating Swiss banks for failure to meet their responsibilities to the owners of the deposited assets, and noting numerous instances of improper refusal to provide information to potential claimants. The full text of paragraph 41 provides:

There is...confirmed evidence of questionable and deceitful actions by some individual banks in the handling of accounts of victims, including withholding of information from Holocaust victims or their heirs about their accounts, inappropriate closing of accounts, failure to keep adequate records, many cases of insensitivity to the efforts of victims to claim dormant or closed accounts, and a general lack of diligence - even active resistance - in response to earlier inquiries about dormant accounts.³

8. Given the recognition by the Special Master of the particularly powerful nature of the deposited assets claims, the Special Master’s conservative recommendation that \$800 million of the settlement fund be set aside for the payment of deposited assets claims to make certain that such claims may be paid in full is fully justified. Unfortunately, given the destruction of such a huge percentage of the relevant records, it may not be possible to identify and return more than a

³Specific instances of bank misconduct are described in Annex 5 of the Volcker Report.

fraction of the deposited assets. Accordingly, it is possible that a significant percentage of the \$800 million will not be claimed, and will be subject to re-allocation in the future. But it is certainly defensible to identify the effort to return all Holocaust-era deposits to their rightful owners as the settlement's highest priority, and to reserve assets clearly adequate to the task.

9. In order to carry out the effort to identify and return the Holocaust-era deposits identified in the Volcker Report, the Special Master recommends continued utilization of the CRT, an entity established by the Volcker Commission in cooperation with the Swiss Bankers Association to determine certain earlier claims to Swiss bank accounts. Paul Volcker has generously agreed to continue to oversee this phase of the CRT's work, which will consist of processing claims by members of the Deposited Assets Class, matching them against the available records of the defendant banks in accordance with a negotiated protocol, ensuring that defendants cooperate in good faith, and determining the amounts payable to claimants. In addition, the settlement fund, in cooperation with the CRT, will take independent steps to canvass available sources of information in European archives to determine whether additional information exists concerning Swiss bank accounts.

10. Given the massive destruction of records and the passage of 55 years, it may not be possible to match all the Holocaust-era Swiss bank accounts with their current owners. It is, however, clearly correct to make a maximum effort to do so. If, after making such a maximum effort, it proves impossible to return all of the deposited assets to their true owners, the Special Master notes that the undistributed portion of the \$800 million allocated to the Deposited Assets Class will be available for re-allocation by the Court to members of the other four plaintiff classes. If and when such a re-allocation occurs, it should be pursuant to a process as open and

as transparent as the process engaged in by the Special Master.

B. Proposals Concerning the Slave Labor I Class

11. The Special Master's second fundamental recommendation - that up to \$1,000 per person be allocated for distribution to members of the Slave Labor I Class who are to be identified pursuant to the claims process that has been established by the German Foundation "Remembrance, Responsibility and the Future" - is also clearly correct. The German Foundation, with assets of 10 billion DM, was created in response to litigation in American courts in order to provide compensation to certain victims of the Holocaust, including slave laborers. I serve as one of the American nominees to the German Foundation's Board of Trustees. Pursuant to the Foundation's charter, persons who were forced to perform slave labor for German corporations in concentration camp surroundings are entitled to a payment of up to DM 15,000 from the German Foundation. To minimize administrative difficulties and expenses, the Special Master has proposed that two of the "partner organizations" under the German Foundation - the Conference on Jewish Material Claims Against Germany, Inc. and the International Organization for Migration - are to identify persons falling within the definition of the Slave Labor I Class who qualify for a Foundation payment, and to provide that information to the Swiss settlement fund. The Swiss settlement will then supplement the payments to qualifying Slave Labor I Class members by up to \$1,000 per person. Initial estimates made by partner organizations under the German Foundation suggest that up to 200,000 persons may qualify for Slave Labor I payments in accordance with the terms of the settlement agreement herein.

12. The presumption established by the Special Master that all German corporations that utilized slave labor are likely to have deposited the revenues or proceeds of that labor with, or

transacted such revenues or proceeds through, Swiss Releasees seems justified by the overwhelming evidence of massive German-Swiss financial relationships throughout the Second World War, discussed in detail in the Special Master's Proposal. Thus, compensation to Slave Labor I Class members is justified because it can be presumed that the proceeds or revenues of their labor were, in fact, deposited in , or transacted through Swiss entities, whether or not those entities had knowledge that those funds were derived from the use of slave labor.

13. In an ironic about-face, defendants applaud the Special Master's finding that it may be difficult to link a particular Swiss bank with knowing participation in slave labor activities. Apparently, in defendants' view, the Special Master is authorized to find facts in the banks' favor, but is forbidden to make findings with which they disagree. Defendants seem to suggest that because the Special Master did not find that Swiss entities necessarily knew that funds deposited in or transacted through them were derived from slave labor, there is no persuasive evidence for the legal presumption that all German slave labor-using entities are likely to have deposited revenues or proceeds of that labor with, or transacted it through, Swiss entities. These are, however, clearly two separate issues. According to the Settlement Agreement, the Slave Labor I Class consists of defined "Victims or Targets of Nazi Persecution" who performed slave labor for an entity that "actually or allegedly deposited revenues or proceeds of the labor, or transacted such revenues or proceeds through, Releasees...."(Settlement Agreement, section 8.2(c)). The Settlement Agreement does not require that Releasees have had knowledge that the revenues or proceeds were derived from slave labor. The fact that the Special Master did not find that Swiss banks necessarily profited knowingly from dealings with companies in Nazi territories that used slave labor does not diminish the validity of the legal presumption, based on the Special

Master's extensive historical research and examination of lists of frozen German assets in Switzerland, that all German entities that used slave labor are likely to have deposited the revenues or proceeds of that labor with, or transacted such revenues through, Swiss Releasees.

14. Defendants do recognize, and correctly so, that the legal presumption established by the Special Master serves primarily to simplify the administration of the class. As the Court noted in its Final Approval Order at page 39, this “presumption...simplif[ies] the administration of Slave Labor Class I by making it unnecessary for each claimant to prove a link between the German company for which slave labor was performed and a Swiss bank.” The presumption is designed to relieve the elderly members of this class of the burden of demonstrating which entity enslaved them, and how that entity channeled revenues or proceeds of their slave labor through a Swiss entity. The presumption, thus, justifies a payment to every member of the Slave Labor I Class from the Swiss settlement fund without additional effort on their part.

15. Given the prospect of additional payments to slave laborers from the German Foundation, and the difficult factual and legal nature of proving a legally enforceable slave labor claim against a particular Swiss bank, the modest sum initially allocated to each member of the Slave Labor I Class by the Special Master seems clearly appropriate. If it proves impossible to distribute the full sum set aside for deposited assets, additional funds may become available for distribution to the Slave Labor I Class in the future.

C. Proposals Concerning the Refugee Class

16. The Special Master made extraordinary efforts to obtain information concerning the size and characteristics of the Refugee Class, which consists of members of the victim groups who were denied entry into or expelled from Switzerland, or mistreated after entry, during the

Second World War because of membership in a victim group. His efforts at ascertaining the true scope of the Refugee Class often met with determined resistance from Swiss authorities. Despite extraordinary efforts by the Special Master, it has not been possible to obtain factual information concerning more than a fraction of the number of excluded persons. Given the difficulty of developing more precise criteria without the cooperation of Swiss authorities, the Special Master's proposal of payment of up to \$500 to persons mistreated after admission and a payment of up to \$2,500 to persons denied entry (who generally suffered a far worse fate) seems thoughtful and correct. Analysis of the initial 600,000 questionnaires received by the settlement fund indicates that approximately 17,000 persons will claim payments based on denial of entry or expulsion, and approximately 3,000 persons will claim payments based on post-entry mistreatment.

17. Payments to members of the Refugee Class at the modest level recommended by the Special Master are justified by the vulnerability of Refugee Class claims to a sovereign immunity defense. The moral value of the claims of refugees is enormous. Unfortunately, the legal value of such moral claims is much lower because, under existing law, formidable obstacles exist to the imposition of liability on a foreign sovereign arising out of immigration decisions.

D. Proposals Relating to the Looted Assets Class

18. The Special Master correctly determined that, under existing conditions, it would be impossible to provide individualized administration of the Looted Assets Class, since there are literally hundreds of thousands of surviving Nazi "Victims or Targets" and literally millions of heirs who may justly claim membership in the Looted Assets Class, but who cannot demonstrate that their property was taken by or transacted through a specific Swiss entity, knowingly or

otherwise. Unlike the Slave Labor I Class, where historical research has demonstrated that it was overwhelmingly probable that all German entities using slave labor had close banking relationships with Switzerland, making it almost certain that virtually all proceeds of slave labor passed through Swiss Releasees, it is impossible to determine with certainty the percentage of looted assets that passed through Swiss banks. Historical records indicate that the percentage was substantial, thus justifying some recovery by the Looted Assets Class, but the records do not support a presumption that all looted assets did so. Accordingly, the Special Master recommends that the Court recognize that: (a) substantial quantities of looted assets were, in fact, transacted through Swiss banks, rendering it appropriate for victims of looting to share in the settlement fund; but (b) that it is necessary to administer the Looted Assets Class on a cy pres basis because of the impossibility of achieving individualized administration.

19. In considering the correctness of the Special Master's determination concerning the Looted Assets Class, it is important to recall that this is not a case against the primary Nazi looters, who would, of course, be liable for all looted assets. Rather, it is a claim against Swiss financial institutions concerning the extent to which looted assets were disposed of through Swiss banks. While history makes it clear that Swiss banks played a significant role in connection with the disposal of substantial looted assets making some recovery appropriate in connection with the Looted Assets Class, it is impossible to assert that all looted assets passed through a Swiss Releasee. Moreover, it is impossible to determine many years after the fact whose looted property passed through a Swiss Releasee, and whose property was disposed of by other means. Accordingly, since it is impossible to adopt a presumption similar to the Slave Labor I presumption that all proceeds of slave labor passed through a Swiss Releasee, and since

it is impossible to ascertain on an individualized basis whose looted property actually passed through a Swiss Releasee, only two courses were open to the Special Master - recommending a flat payment to each person whose property was looted; or recommending cy pres administration of the fund. While the flat payment approach would have been rational, it would have entailed massive administrative costs, including the identification of the literally millions of class members who suffered looting and their heirs. Moreover, given the enormous number of persons who suffered looting, the actual amounts available for distribution to class members would have been nominal, even if significant sums were re-allocated from Deposited Assets, Refugee, and Slave Labor Class members. Accordingly, the Special Master's decision to recommend cy pres administration of the Looted Assets Class appears both reasonable and just.

20. In determining the most appropriate means of cy pres administration, the Special Master conducted an exhaustive investigation into past efforts at compensation and indemnification in order to determine whether categories of needy Holocaust victims who would qualify for membership in the Looted Assets Class had been omitted. The Special Master's investigation identified a category of victims living behind the old Iron Curtain - the so-called "double victims" of both Hitler and Stalin - who are in desperate need, whose assets had been looted by the Nazis, but who have been largely omitted from previous efforts at compensation. His recommendation that \$90 million be allocated in the form of food and medicine immediately for the relief of extremely poor Jewish survivors most of whom are so-called "double victims" residing in Eastern Europe, with \$10 million similarly allocated for the immediate assistance of extremely poor members of the other victim groups is both legally and morally correct. The modest total of \$100 million reflects the tenuous nature of the underlying factual and legal claims

of individual Looted Assets Class members, and may be substantially increased in the future if funds initially allocated to the Deposited Assets Class are re-allocated at the close of the deposited assets claim period. If it proves impossible to distribute the entire \$800 million set aside for the Deposited Assets Class, significant additional funds may become available for the relief of these victims.

21. The wisdom and fairness of adopting a cy pres approach to the Looted Assets Class is reinforced by the recent establishment of the German Foundation “Remembrance, Responsibility and the Future,” which has allocated significant sums for the payment of documented looted assets claims involving bank accounts, insurance policies and personal property. Thus, persons with significant documented claims of looting by the Nazis will have an opportunity for substantial compensation from the German Foundation, enabling the Swiss looted assets fund to concentrate on those extremely poor, elderly victims who cannot produce documentation of a demonstrable Swiss connection to their looted assets, who have been omitted from virtually all past compensation programs, and who are currently in great need.

E. Proposals In Connection With the Slave Labor II Class

22. The Special Master’s initial effort to obtain information concerning the Slave Labor II Class, consisting of all persons forced to perform slave labor for Swiss companies during WWII, was conspicuously unsuccessful. Apparently, Swiss companies that had employed slave labor wished to obtain releases without acknowledging that they had used slave labor, and without providing the Special Master with the identities of wartime slave laborers needed to administer the class. Only after the Court announced that Swiss companies that failed to provide the necessary information would not obtain releases did certain Swiss companies come forward with

the necessary information. Based on such belated cooperation, the Special Master now estimates that membership in the Slave Labor II Class will consist of several thousand persons. His recommendation that the relatively few members of the Slave Labor II Class be treated identically to Slave Labor I Class members - qualifying them for a payment of up to \$1,000 each - seems clearly correct. The Special Master has requested the International Organization for Migration in Geneva to help to identify, and to oversee the distribution of funds to, members of the Slave Labor II Class

23. Finally, defendants' continued assertion that defendants and non-party defendants are entitled to releases even if they fail to cooperate with the administration of the settlement agreement is indefensible. Thus far, it has not been necessary to withhold a release for non-cooperation. The defendant banks have pledged full cooperation. I anticipate that they will cooperate with Paul Volcker and the CRT in carrying out a fair and efficient claims process in accordance with the ground rules carefully negotiated between the parties. Non-party banks have also pledged cooperation. I anticipate that they too will cooperate fully with Mr. Volcker and the CRT in accordance with the negotiated ground rules. The Court was forced to threaten the withholding of releases in order to obtain the cooperation of Swiss entities in the administration of the Slave Labor II Class. That cooperation has now been promised, at least by certain entities that identified themselves to the Special Master. I anticipate that such cooperation will continue. Thus, at the present time, it is unnecessary to posture over what might happen if cooperation in the administration of the settlement is not forthcoming. If needed cooperation is not forthcoming, plaintiffs will continue to oppose the issuance of a release to any non-cooperating entity.

24. Finally, on behalf of the settlement classes, and plaintiffs' counsel, I offer heartfelt thanks and appreciation to Mr. Gribetz and his devoted staff, especially Shari C. Reig, Ted Poretz and Alyson M. Weiss, for the successful completion of a task that enables the swift and fair distribution of the settlement fund, while respecting the dignity and individuality of every survivor.

25. Several interested persons have lodged objections to aspects of the Special Master's Proposed Plan. I will attempt to respond to each objection in random order.

Objections Lodged by the Republic of Poland

26. The Ministry of Foreign Affairs of the Republic of Poland poses two objections. First, Poland argues that the Foundation for Polish-German Reconciliation, a "partner organization" of the German Foundation for Remembrance, Responsibility and the Future, should be used as the vehicle to distribute funds to the members of the Slave Labor II Class who reside in Poland. However, the objection appears to misunderstand the fact that information concerning Slave Labor II Class membership is being obtained directly from those Swiss companies that employed slave labor during the Second World War and the International Organization for Migration. Moreover, distributions to both the Slave Labor I and the Slave Labor II Classes are contemplated as direct payments from the Swiss settlement fund to qualifying victims, rendering it unnecessary to pass Swiss settlement funds through the Polish (or the German) Foundation. The identities of qualifying Slave Labor I Class recipients are being assembled by the German Foundation. Accordingly, as to Slave Labor I victims residing in Poland, the Polish-German Reconciliation Foundation will doubtless play an important role, along with the Conference on Jewish Material Claims Against Germany, in identifying qualifying members of the Slave Labor

I Class residing in Poland. Information concerning Slave Labor II Class members is being assembled directly from the relevant Swiss employers and through the efforts of the International Organization for Migration.

27. Second, Poland argues that the additional payment to Slave Labor I Class members should be allocated broadly to all slave and forced laborers in accordance with the allocation plan governing the German Foundation, which benefits a wider category of persons than does the Swiss settlement. In support of its position, Poland cites a letter from Deputy Secretary Eizenstat to representatives of Central and Eastern European States, dated March 23, 2000. As a participant in the negotiations that led to the creation of the German Foundation, however, I repeatedly explained to representatives of Central and Eastern European countries that, as a matter of American law, any payments from the Swiss settlement fund to slave laborers for German entities must be paid only to persons who fall within the Slave Labor I Class definition. Nothing in the Berlin Agreement, or any related document suggests otherwise. To the extent that qualifying members of the Slave Labor I Class reside in Poland, they will receive payments from the Swiss settlement fund. But no payments Slave Labor I payments may be made to persons who reside in Poland, but who do not qualify as a defined “Target or Victim” of Nazi oppression within the meaning of the Swiss settlement agreement. The United States Court of Appeals for the Second Circuit has explicitly upheld the decision of counsel to confine membership in the Slave Labor I Class to precisely defined targets of Nazi persecution drawn from the Nuremberg Race Laws. See In re Holocaust Victim Assets Litigation, Docket No. 00-7045 (September 21, 2000).

Objections Posed on Behalf of the Sinti-Roma

28. Certain individuals purporting to represent the Sinti-Roma have lodged a series of objections questioning the principles governing the allocation of settlement funds among the five classes. Assuming that the objectors are authorized to speak for the Sinti-Roma community (at least two persons purporting to speak for the Sinti-Roma community support the Special Master's Proposed Plan), the objectors urge that allocation decisions be linked to the relative loss of life of victim groups during the Holocaust. In short, the Sinti-Roma objectors argue that the relative suffering of the various victim groups should be reflected in the allocation of settlement funds. But such an approach ignores the fact that the settlement fund is not a free-floating humanitarian asset to be allocated in accordance with the principles of abstract justice. Rather, it is a settlement fund established as the result of a lawsuit, and must be allocated in accordance with the strength of the legal and factual claims of the various parties. Thus, in order to justify a proposed allocation, an individual or group must demonstrate more than intense suffering, and more than oppression at the hands of Nazis. The individual or group must demonstrate a link with Swiss entities that justifies the distribution of settlement funds. All Sinti-Roma who qualify for membership in the five settlement classes are treated equally with all other plaintiffs. If Sinti-Roma opened Swiss bank accounts, they are fully entitled to recover their funds. If Sinti-Roma worked as slave laborers, they are fully entitled to receive slave labor payments. If Sinti-Roma were excluded from Switzerland, they may recover as members of the Refugee Class. And, needy Sinti-Roma are eligible to receive an appropriate pro rata share of the funds allocated to poverty-stricken victims in connection with the Looted Assets Class.

29. Objectors claim that the 90% Jewish - 10% non-Jewish division of funds allocated for the neediest victims unfairly favors Jewish claimants. But the 90-10 figure is designed to reflect

the relative number of known Holocaust survivors (as opposed to heirs) who are members of the five groups defined as “Targets or Victims” of Nazi persecution by the settlement agreement, and not the level of suffering of each group. The 90-10 allocation is consistent with similar allocation decisions made in the aftermath of WWII (e.g. the Five Power Agreement), and with the allocation figures used by the Swiss Humanitarian Fund.

30. The objectors also challenge the decision to allocate \$800 million to the Deposited Assets Class, arguing that much of the allocation should be shifted to the Looted Assets Class because the suffering of the Looted Assets Class was greater. But the allocation decision is not intended to reflect the severity of suffering. It is intended to reflect the legal and factual strength of plaintiffs’ claims against the Swiss Releasees. While no one challenges the suffering of persons who were the targets of Nazi looting, the fact is that persons with documented bank account claims have far stronger legal and factual claims against Swiss banks than do persons who were the target of Nazi looting that may or may not have involved a Swiss financial institution. The objector’s suggestion that interest and inflation be ignored in valuing the claims of members of the Deposited Assets Class simply ignores the legal rights of holders of Swiss bank accounts to recover the full economic value of their accounts.

31. Objectors claim that it will be impossible for members of the Deposited Assets Class to prove their claims. But the Volcker Report has identified more than 46,000 accounts with a probable or possible link to Holocaust survivors. The CRT is committed to a rigorous claims process that will seek to determine whether a claimant has demonstrated ownership of an account. If, after the CRT process has run its course, assets initially allocated for Deposited Assets Class members remain undistributed, the Special Master has recommended re-allocation

by the Court to other members of the various plaintiff-classes. Thus, at the close of the CRT process, it is possible that undistributed assets will exist permitting additional payments to members of the Looted Assets Class.

32. Objectors' claim that modest payments to the Refugee and Slave Labor Classes are excessive is difficult to understand. All believe that the moral value of the slave labor and refugee claims far outstrips the ability of the settlement fund to pay.

33. Objectors' insistence that funds be paid to the Sinti-Roma as a group is subject to two fatal flaws. First, given the extreme difficulty in identifying the legitimate spokespersons for the Sinti-Roma, it is impossible to identify persons to whom the so-called group payment could be made. More importantly, the Special Master has been scrupulous in assuring that all payments from the Swiss settlement fund must go to individual survivors, or their heirs. No organization or group is receiving funds under the proposed plan. Payment to groups purporting to represent the Sinti-Roma would trigger similar demands from other groups claiming to represent other categories of victims. Even if distributions to such groups were valid under class action principle, it would constitute extremely bad policy. The entire ethos of the plan of allocation turns on recognizing Holocaust survivors as individuals, and on treating their claims as legal claims, not requests for charity.

34. Objectors final set of objections revolve around the difficulty of communicating with the Sinti-Roma community. Objectors first suggest that despite the enormous expenditure of resources, inadequate notice was given the Sinti-Roma community. They are, however, conspicuously silent about how to provide better notice. Indeed, their solution to the alleged notice problem is to ignore all efforts at individual distribution and to make payments to a self-

appointed entity that would seek to organize the Sinti-Roma community. Whatever the wisdom of such a plan as a matter of abstract social policy, it clearly exceeds the remedial authority of a Federal court. Finally, objectors argue that the Worldwide Romani Future Fund should be designated to distribute funds to individual Romani. Apart from the factional rivalry that would make it difficult to designate any Romani entity as the organ of distribution to the Romani community, the organization actually recommended by the Special Master - the International Organization for Migration in Geneva - has been explicitly endorsed by lawyers purporting to represent the Sinti-Roma community, including the lawyer for the objectors.

Objections Posed by the World Council of Orthodox Communities

35. The World Council of Orthodox Communities, Inc, one of the named-plaintiffs, object to portions of the distribution plan, suggesting several specific changes in the plan. The World Council suggests, first, that the allocation of \$800 million to the Deposited Assets Class is too high. Recognizing a duty to pay only matched deposited assets claims in full, the World Council estimates that \$400 million will be adequate to pay such claims. In any event, the World Council argues that the Deposited Assets Class should be capped at \$400 million, allowing the additional \$400 million to be immediately re-allocated to the Looted Assets Class.

36. As the thoughtful submission of the World Council recognizes, it is possible to allocate the \$800 million, and re-allocate any undistributed funds once the Deposited Assets claims process has been given an opportunity to work. The World Council argues that such an approach would take too long, depriving looted assets class members of the opportunity for recovery during their lifetimes. While reasonable persons can disagree over whether to cap the Deposited Assets Class, or to make every effort to pay it in full, and only then to re-allocate

undistributed funds, the Special Master's suggestion that every effort be made to pay the Deposited Assets Class in full because of the relative strength of the legal and factual claims of the Deposited Assets Class is a reasoned and thoughtful approach that should be accepted by the Court. If it proves impossible to demonstrate ownership of a portion of the \$800 million allocated for deposited assets, the Special Master recommends a re-allocation.

37. World Council argues that the plan for re-allocation should be determined now. But it is impossible to know the amounts available for potential re-allocation until the Deposited Assets claims process has been given an opportunity to work. When and if such re-allocation takes place, it should be pursuant to a transparent process that involves close consultation with the community.

38. World Council argues that the \$10 million allocated to fund the establishment of a definitive list of Holocaust victims is improper because it does not benefit the class. But the creation of such a definitive list would benefit the class in two important ways. First, it would act as an important memorial for those members of the plaintiff class who died before being able to seek compensation. Second, it would provide all survivors with a historical context within which to approach the Holocaust. World Council appears to believe that the only cognizable benefit is an economic one. The preservation of the memory of the Holocaust surely counts as a non-economic benefit worthy of a modest allocation.

39. Apparently motivated by ideological and religious concern, World Council objects to the decision to utilize the Joint Distribution Committee and the Claims Conference as mechanisms to distribute aid to needy Holocaust survivors. The choice of the two providers is clearly a rational one. JDC's record in successfully distributing funds to the poor is exemplary.

If supplemental institutions must be used to permit distribution to persons who cannot receive funds from JDC for religious reasons, there will be time enough to organize such a supplemental means of distribution.

40. World Council also challenges the mechanics of the plan to distribute food and medicine to needy Holocaust survivors living behind the old Iron Curtain pursuant to the Hased program, arguing that the Special Master lacks power to select a particular cy pres remedy. But that is precisely why the parties turned to a Special Master. It is, of course, true that other alternatives exist that would constitute an appropriate distribution of the settlement fund, but the problem is determining which one. It was precisely to avoid unnecessarily divisive arguments over appropriate forms of cy pres distribution, that the parties opted for a Special Master in the first place.

41. The World Council's objection to paying the funds to needy survivors over a 10 year period appears to misunderstand the nature of such a charitable commitment. When a charity commits to provide food and medicine to needy persons, it would be irresponsible to expend large sums on many person during one year only to run out of funds the next. Instead, a responsible charity "adopts" a person, and commits to provide sustained assistance in order to establish a sense of security. It does not risk making things worse by an episodic intervention that cannot be sustained. In this case, the charity will commit to providing in-kind benefits over the lifetimes of needy Holocaust victims who have suffered greatly, but who have been ignored by most compensation plans. It is, of course, possible to describe other excellent uses for the cy pres funds. But it is impossible to deny the merits of the plan recommended by the Special Master.

42. The World Council argues that a portion of an augmented Looted Assets fund should make distributions to all persons who suffered looting at the hands of the Nazis, including heirs. It is possible that if substantial funds are re-allocated to the Looted Assets Class from the unclaimed funds currently allocated to the Deposited Assets Class, and unclaimed Refugee and Slave Labor funds, that nominal individual payments will be made to persons who suffered looting at the hands of the Nazis. It is impossible to give the question the consideration it deserves, however, until we know with a greater degree of certainty whether funds will, in fact, be re-allocated, and what the size of the re-allocation will be. Moreover, even if substantial re-allocation takes place, there would be significant practical obstacles to a distribution of nominal sums to literally millions of persons merely because they, or an ancestor, claim to have suffered looting at the hands of the Nazis during WWII. Unless those substantial practical problems can be resolved, I would find it very difficult to support such a distribution of the settlement proceeds.

43. The World Council also disagrees with the Special Master's recommendation that Slave Labor I and II class members receive payments of between \$500-\$1,000, arguing that an allocation of up to \$200 million overvalues the slave labor claims. Reasonable people may differ over the precise valuation of the claims of the various class members. That is why it was deemed necessary to vest a neutral Special Master with the responsibility of valuing the claims. While the valuation suggested by the Special Master of the Slave Labor Class claims is not the only possible valuation, it is clearly a reasonable and thoughtful effort. Accordingly, it should be respected by the Court, and by the participants.

44. There is much wisdom in the World Council's submission. However, to the extent

that the submission seeks to allocate funds that have been initially allocated to other classes by the Special Master, the submission is premature. If and when funds allocated to the Deposited Assets, Refugee, or Slave Labor Classes become available for re-allocation, it will be necessary to consider many of the suggestions contained in the submission pursuant to an open and transparent process of re-allocation.

Comments Filed by Disability Rights Advocates

45. Disability Rights Advocates urges that 1% of the settlement fund, \$12.5 million, be set aside as a cy pres remedy to recognize the suffering of disabled persons under the Nazi regime. The thoughtful submission notes that the disabled suffered grievously under National Socialism, and that it is particularly difficult to communicate with surviving disabled persons both because their status makes communication particularly difficult, and because their physical status made it far less likely that heirs will exist to seek redress for property claims. Counsel agrees that it is appropriate to recognize the suffering of disabled victims of Nazi persecution with a cy pres payment of \$12.5 million designed to advance the rights of the disabled. Such a payment is, however, inconsistent with the Special Master's explicit desire to make a maximum initial attempt to distribute the entire settlement fund to individuals rather than groups. Consistent with the Special Master's approach, the cy pres payment in connection with the Looted Assets Class is merely an indirect distribution of food and medicine to distinct individuals. Accordingly, it is premature to consider a cy pres distribution to any group at this time. If and when funds become available for re-allocation, I will urge that a cy pres payment of \$12.5 be authorized to recognize the suffering of disabled victims of National Socialism.

46. Remaining objections to the Special Master's Proposed Plan are lodged by persons

who object to the failure of the Special Master to have allocated funds to organizations or to individual victims of looting. The submissions are, in general, both thoughtful and heartfelt. By and large, though, they ignore the fact that the allocation plan must be keyed to the relative strength of the factual and legal claims of class members against Swiss entities. It is impossible to use the settlement fund as a general fund to redress injuries caused by Nazis, both because the fund is too small to fulfil that purpose, and because the fund is the result of a lawsuit against Swiss entities, not Nazi oppressors.

Objections Lodged by Class members Zuber, Smith and Lobet

47. Purporting to represent three members of the class, Lawrence Schonbrun, an attorney who appears widely as an objector in class action litigation, has lodged several objections to the Special Master's Plan. His first objection complains that the voluminous two volume document containing nine hundred pages was not mailed to the members of the class. He acknowledges that a 38 page summary was widely distributed to interested persons, but appears to suggest that an enormously expensive additional distribution of the two volume document was required. In fact, widespread notice of the plan was provided.

48. The next objection is to the allocation of \$800 million for the Deposited Assets Class. The objector claims to be unable to understand the derivation of the \$800 million figure. As the Special Master has explained, however, the figure is a conservative estimate of the funds needed to pay the Deposited Assets Class in full. If the lack of records makes it impossible to distribute the full \$800 million, the Special Master recommends a re-allocation pursuant to open and transparent procedures. Thus, the objectors' concern over re-allocation appears both misplaced and premature. Similarly, the objector's purported concern with administrative overhead is

unjustified. At the appropriate time, a full accounting of all administrative costs will be forthcoming. A hearing on the Special Master's Plan of Allocation and Distribution is simply not the point at which the technical details of minor administrative costs are to be considered. In any event, the parties are committed to an extremely lean administration of the fund. The CRT will function under the supervision of Paul Volcker. The Slave Labor administrative costs are virtually non-existent, since we are using the German Foundation as our administrative arm. The Looted Assets administrative costs are negligible because of the cy pres nature of the distribution. It is amusing that the objector, who appears to be more interested in harassing the participants than in constructively participating in the proceedings, simultaneously complains that administrative costs are too high, while arguing that nominal Looted Assets distributions should be made to millions of class members at astronomical administrative cost. The objector ignores the fact that merely demonstrating looting by the Nazis does not justify a payment from the settlement fund without proof of participation by a Swiss Releasee. He also ignores the fact that class members with documented claims of looting have been afforded a remedy by the German Foundation. Finally, the objector complains that insufficient information is given concerning the distribution of \$100 million to needy victims. In fact, the "Hesed" distribution program recommended by the Special Master is both well known and extremely highly regarded. If the objector desires additional information concerning the Hesed programs, I am prepared to provide him the address of the relevant institutions. The objector's concern over a timetable for payment is also trivial. The CRT is prepared to move immediately to resolve claims to deposited assets. Slave labor payments are ready for distribution as soon as the identities are made known by the German Foundation. Looted assets cy pres distribution will be made as soon as the

settlement permits a distribution. As the objector should know, no payments may be made from the fund until the completion of all appeals. Such a provision is standard.

49. Finally, the objector's demand that all classes receive separate representation has already been determined by the Court in connection with its decision approving the settlement's fairness, including the procedure for allocating and distributing the proceeds. In designing this settlement agreement, the parties were acutely aware that the worst possible course would be to pit categories of Holocaust survivors against one another at the end of their lives in an unseemly squabble over a settlement fund that, necessarily, is too small to do complete justice to all victims. Accordingly, class members were asked to endorse a scrupulously fair procedure for determining allocation and distribution that included the three principal attributes of procedural fairness - exit; loyalty; and voice. Any dissenting class member was offered the opportunity to opt out. The allocation decision was vested in a wholly neutral Special Master, Judah Gribetz, Esq., with unquestioned loyalty to all Holocaust survivors. And the process of decision was designed to assure that all interested persons had complete access to the Special Master. The class opted overwhelmingly for the non-adversarial option. Nothing in Amchem or Ortiz converts a class action involving a unique effort to provide Holocaust survivors with a modicum of justice at the end of their lives into a prison within which survivors must fight with each other over a fund that cannot do complete justice to all.

50. Accordingly, I request the Court to issue an order approving the Special Master's Proposed Plan of Distribution and Allocation.

Dated: November 20, 2000
New York, New York

Respectfully submitted,

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