UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE

MASTER DOCKET NO. CV. 96-4849 (ERK) (MDG) (Consolidated with CV-96-5161 and CV-97-461

HOLOCAUST VICTIM ASSETS LITIGATION

MEMORANDUM OF LAW OF HOLOCAUST SURVIVORS FOUNDATION-USA, INC. IN SUPPORT OF PLAN FOR PROVIDING ASSISTANCE FOR NEEDY NAZI VICTIMS IN THE UNITED STATES

The Holocaust Survivors Foundation-USA, Inc. (HSF) submits this Memorandum of Law in Support of the Plan for Providing Assistance for Needy Nazi Victims in the United States, submitted herewith ("HSF Plan").[1] This Memorandum also addresses several of the issues raised in Mr. Burt Neuborne's previous declarations and other submissions.[2] HSF has constantly maintained that Looted Assets funds belong to *all* Survivors, and should be used to help *all* Survivors, as soon as possible. The Plan submitted to the Special Master on this day, again, proposes a system of allocation that permits an adequate sum of Looted Assets funds for Survivors and Nazi victims in need all over the world.

That has been the goal of the HSF leadership at all times herein, beginning with their withdrawal of the appeals in 2001, their submission of a viable Proposal Improved Services for Holocaust Survivors in the United States in September 2002; their acquiescence in the Court's request

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[1] Preliminarily, HSF acknowledges Mr. Neuborne's withdrawal of his opposition to HSF's standing under Article III to participate fully in these proceedings, as stated in his letter to the Court dated December 16, 2003, after HSF's submission to the Court on December 11, 2003. At this time, HSF respectfully requests an Order from the Court to the same effect to clarify the record, inasmuch as the Court's November 17, 2003 Order reflects agreement with Mr. Neuborne's prior position.

[2] HSF's December 11, 2003 response on the issue of standing indicated that the other issues raised by Mr. Neuborne would be addressed in a later filing.

that they not appeal the September 25, 2002 Order allocating $45 million in interest and tax savings; and their September 2003 Motion for Immediate Interim Allocation of Swiss Settlement Proceeds which sought an ample amount of funds for *all* Survivors in the short term, to alleviate suffering for which no restitution funds have been made available despite their abundance. Nevertheless, for some reason, the rights and interests of Looted Assets class members who live in the United States continue to be attacked, minimized, and even ridiculed. HSF respectfully urges the Court to reject the latest obstacles and attacks, and take favorable action on HSF's proposed Plan for a fair share of Looted Assets funds to be distributed for the benefit of all Survivors and Nazi victims in need.

1. With The Level of Need That Exists For Survivors Everywhere, A Pro Rata Allocation Plan is the Only Fair and Reasonable Allocation Plan Under Rule 23

The allocation of the Swiss settlement funds must satisfy Rule 23's requirement that it be "fair, reasonable, and adequate." *Staton v. Boeing Co.*, 327 F.3d 938 (9th Cir. 22003); *In re Paine Webber Limited Partnerships Litig.*, 171 F.R.D. 104 (S.D.N.Y. 1997); *In re Ikon Office Solutions, Inc., Securities Litig.*, 194 F.R.D. 166 (E.D. Penn. 2000). Moreover, in order for an allocation to meet the test of reasonableness, it must conform to *objective* standards that the members of the class, and their representatives attempting to advance their clients' interests, can ascertain and apply and that the Court of Appeals can, if necessary, review with any proper lens. *Staton*, 327 F.3d at 975.

The allocation plan previously followed does not satisfy the test of objectivity nor the test of reasonableness, because it provides Looted Assets class members who live in the United States, (or Israel or Europe) no concrete, objective guidelines. The undefined "neediness" criterion, however well-intended, is standardless. HSF's factual concerns in this regard are spelled out in Paragraphs 22-26 of the attached Plan. There has been extensive information before the Court, which

the recent UJC and New York City UJA-Federation submissions confirm, showing that thousands of Survivors and Nazi victims have Survivors in the United States have severe, unmet needs for home and health care and other emergency services. With this base level of need established, and with ample funds available to permit serious funding to begin today in all places, HSF contends that there are no objective criteria that can reasonably be applied by the Court to justify withholding settlement funds from Looted Assets members in need who live in the United States.

Therefore, the only fair and reasonable allocation formula at this stage of the case is one that recognizes that there are Looted Assets Class members in need throughout the world, and allocates the remaining funds pro rata according to each country's share of the world Survivor and Nazi victim population. Based on the population analyses and surveys and estimates from the United Jewish Communities, the State of Israel, and the JDC Brookdale Institute, as reviewed and reconciled by respected demographer Professor Ira Sheskin, HSF submits that the proper percentage for the United States is 20% (19.7%). *See* HSF Plan, Exhibit 3, at 7.

a. Cy Pres Allocations Must Benefit the Class As A Whole.

HSF's pro-rata allocation proposal is the only way the Court can satisfy the rule that allocations of settlements under the *cy pres* doctrine must benefit the class *as a whole*. As HSF has argued in prior filings, the allocations at issue do not satisfy the rule that *cy pres* allocations in class actions requires that the allocations benefit the class as a whole.[3] None of the cases cited by Mr. Neuborne at pages 27-28 of his Supplemental Declaration deviates from this principle, and none holds that a Court can discriminate among members of a class with identical injuries in the allocation of

[3] HSF adopts and incorporates herein its arguments and citations on this point from its initial Objections to the Special Master's recommendation, September 23, 2002, and its Response to the Special Master's Interim Allocation Recommendation, October 31, 2003,

settlement funds under the *cy pres* doctrine. No case allows a court to use settlement funds to assist some class members but not others based on an assessment of relative "need" or an any other basis.

For example, *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179 (2d Cir. 1987), which HSF has discussed at length in its prior filings, does not support use of *cy pres* to benefit only part of the class. As described by one District Court, the *cy pres* remedy in *Agent Orange* was a plan in which the court "approved use of portion of settlement fund to fund assistance programs for the class as a whole where distribution to individuals not feasible." *In re Matzo Food Products Litig.*, 156 F.R.D. 600 (D.N.J. 1994). The court in *Matzo Food Products* thus agrees with HSF that under *Agent Orange*, use of *cy pres* allocations in class actions requires that they benefit the class *as a whole*. It does not support use of *cy pres* funds to benefit only part of the class.

Further, *West Va. v. Chas. Pfizer & Co.*, 314 F.Supp. 179, 185 (S.D.N.Y. 1970), *aff'd* 440 F.2d 1079(2d Cir. 1970), cited by Mr. Neuborne, actually arrives at a result analogous to that advocated by HSF here, not the one urged by Mr. Neuborne. In *Chas Pfizer,* the $100 million antitrust settlement against pharmaceutical manufacturers and pharmacies was allocated among the states on a pro-rata basis. The $50 million allocated to the governmental plaintiffs was distributed on the basis of the number of hospital beds in each state as a percentage of the total number of hospital beds in the U.S. The $37 million allocated for the claims of individual purchasers was distributed according to each State's proportion of the U.S. population. The pro rata allocation utilized under the *cy pres* doctrine in *Chas Pfizer* therefore supports HSF's argument that Looted Assets class funds should be allocated according to each country's proportion of the world Survivor community, given the existence of actual need in such countries. See HSF Plan, at 5-7.[4]

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[4] Recent demographic data show substantially different population figures around the world, and more severe levels of economic distress for Survivors and Nazi victims in the United States, than

Similarly, in *In re Toys "r" Us Antitrust Litig.*, 191 F.R.D. 347 (E.D.N.Y. 2000), settlement funds were distributed uniformly throughout the country for toys and educational programs. The court justified the use of *cy pres* on traditional grounds, because of the difficulty of identifying proper claimants and the difficulty and costs that such recoveries and their administration would have entailed. *Id.* But the funds so allocated were done so *uniformly*: "the cash portion of the settlement, will be allocated among all of the States, the District of Columbia, and the Commonwealth of Puerto Rico *based on each entity's percentage share of the total population of the United States* . . . ." *Id.*. (Emphasis supplied). There were no criteria superimposed that would deny benefits to children who happened to reside in certain jurisdictions based on the relative generosity of other government programs or the wealth of the jurisdictions' other citizens.[5]

None of the other cases cited by Mr. Neuborne support the allocation of settlement funds to only part of the class just because a *cy pres* allocation is used. In *Jones v. National Distillers*, 56 F. Supp. 2d 355 (S.D.N.Y. 1999), two decades after claims were paid to eligible plaintiffs, the court approved use of the remainder as a charitable donation to the Legal Aid Society. In so doing, the court cited the Second Circuit's caution "against a 'fluid recovery' scheme that creates a class fund but deviates too much from the principled individual damage calculations and pro rata

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the ones upon which this Court relied when it adopted the Special Master's initial report. HSF contends that these data require an extensive review of the assumptions underlying the current allocation formula, and a change in that formula.

[5] Counsel's research has not yielded a case in which class action settlement benefits were varied among class members in different jurisdictions based on whether those jurisdictions had (1) more or less generous public assistance programs, or (2) other sources of private funding that lead counsel thought should be tapped in lieu of settlement funds such as wealthy co-religionists. This is different than allocating settlement benefits differently among class members from different jurisdictions because the jurisdiction's substantive law provides for greater or lesser rights of recovery for the underlying class action claim.

distributions to class members." *Id.* The court also noted that while the law does not forbid all fluid recoveries based on *cy pres* principles; it does caution "against going to excess in creating class funds that do not meaningfully benefit the class as a whole," *Id.*, citing *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (3d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974).[6]

In *Nelson v. Greater Gadsden Housing Auth.*, 802 F.2d 405 (11th Cir. 1986), after all known members of the plaintiff class obtained their full recoveries, there was still money in a fund that had been set aside for compensatory damages which were not claimed within the time specified. The court allowed those funds to be used by the Defendant housing authority to increase the energy efficiency of the apartment units or to improve the defendant-supplied appliances with the units, *id.*, at 409. But in *Nelson,* no willing and known class members who made claims in a timely manner were excluded from settlement benefits.

Similarly, in *Powell v. Georgia Pacific Corp.*, 843 F.Supp. 491 (W.D. Ark. 1994), *aff'd* 119 F.3d 703 (8th Cir. 1997) settlement funds were distributed to class members in an employment discrimination action. Ten years later, the court found that funds which had originally been set aside for unidentified class members (almost $1 million) would then be "extremely difficult to distribute" pro rata, so it approved use under the *cy pres* doctrine for a scholarship program for black students in the vicinity. This was a classic *cy pres* distribution to a "next best" use because of the impracticability of paying it pro rata to the original plaintiffs. Not only had each plaintiff been fully compensated in accordance with the terms of the original consent decree, in *Powell,* there was no distribution that benefitted some members of the class but not others.

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[6] Again, the basis for employing a *cy pres* remedy, which HSF does not challenge here, was traditional: while "class counsel and class fund administrators have a duty to try to find missing class members, they need not continue searching forever . . . ." *Id.*, at 357.

b. The Model of Justice Offered by Mr. Neuborne to Justify the Current Allocation Scheme Does Not Conform to *Cy Pres* Law.

The application of the *cy pres* doctrine in the class action context requires any allocation plan to benefit the class as a whole. The Special Master's October 2 proposal, and the two previous allocation plans, plainly fail this test. In apparent recognition of this deficiency, Mr. Neuborne offers a model of distributive justice as a substitute for an accepted allocation formula under the prevailing *cy pres* law:

> [W]hen a destitute resident of the former Soviet Union is benefitted by a *cy pres* distribution, Looted Assets class members residing throughout the world receive a benefit. When a needy resident of the United States is benefitted by a *cy pres* distribution, Looted Assets class members residing throughout the world receive a benefit. When a needy resident of Israel is benefitted by a *cy pres* distribution, Looted Assets class members residing throughout the world receive a benefit.

Para. 38. Mr. Neuborne's political theory is no substitute for proper and fair distribution of settlement funds, even under the *cy pres* doctrine.

Ironically, at the time of the initial settlement, Mr.Neuborne said that the Swiss settlement funds could *not* be used for *charity*, but represented the proceeds of a legal settlement:

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

See Submission of Lead Settlement Counsel in Support of the Special Master's Proposed Plan of Allocation and Distribution of Settlement Proceeds, at 3 (Emphasis supplied). Mr. Neuborne took the same position in letters to several HSF members in the summer of 2002 when they petitioned the Court for an interim allocation of settlement proceeds due to the unexplained delays in the processing of

Deposited Assets class funds and lack of information about the timing of a further distribution. *See, e.g.* Letter from Burt Neuborne to Leo Rechter, President of the National Association of Jewish Holocaust Survivors, July 9, 2002. What a difference two and a half years apparently makes. Today , it would appear Swiss settlement funds are no longer subject to the claims of the victims whose losses created the settlement, but a source of charity to be disposed of according to his values.

Philosophical musings about how lonely, sick and desperate Holocaust Survivors in Chicago, Jerusalem, Los Angeles, Brooklyn, Houston, Tel Aviv, Las Vegas, Queens, Miami Beach, Boston, and dozens of other cities and towns around the world who cannot obtain any assistance for their own needs "benefit" by allocations made to others also in need but who stand in the identical position legally, from the dollars fought for in the names of *all* Survivors, are absurd. The HSF Survivors have made it clear over and over in this case that they support fair allocations everywhere. They need no instruction about charity or Tzedakah. They do not deserve lectures about sacrifice. From the standpoint of U.S. Survivors in need of assistance who participated in the Swiss case and can not obtain adequate assistance for their daily needs, lead counsel's principle of justice is worse than abstract; it is unprecedented, and very damaging.

c. Mr. Neuborne's Current Position Regarding the Proper Allocation of Looted Assets Settlement Funds is in Conflict with the Rights and Interests of the Survivors in Need Who Live in the United States.

Mr. Neuborne has staked out a position in the allocation phase of the case that directly conflicts with the rights and interests of Looted Assets Class members in the United States. Yet he misperceives the HSF Survivors' position concerning his failure to honor his May 2001 commitment to support a fair share of Looted Assets funds for the needs of Survivors in the United States, and his

subsequent actions adverse to their interests.[7] Mr. Neuborne describes HSF as contending:

> it is inequitable to continue to apply the original allocation formula to the United States because doing so violates the letter and the spirit of a claimed promise by Lead Settlement counsel to support an increase in funds available to survivors residing in the United States, allegedly made as a *quid pro quo* for the dismissal of an appeal challenging the fairness of the settlement and the legality of the plan of allocation and distribution recommended by the Special Master. Mr. Dubbin goes so far as to argue that Lead Settlement counsel had "broken a promise to thousands of his clients.

Supplemental Declaration, at 18-19.

The problem with the variance between Mr. Neuborne's actions that defied his personal commitment is not that it renders the Special Master's interim recommendation "inequitable." The results on their face are inequitable. The problem is that Mr. Neuborne's present position is in contrast with the *advocacy* he promised the American Survivor leadership he would provide when they withdrew their appeals in May 2001, and it is now in conflict with the rights and interests of Looted Assets class members in the United States who have until now been denied significant access to Looted Assets class funds.

The text of the letter speaks for itself. On May 15, 2001, Mr. Neuborne wrote:

> In connection with the secondary distribution, I have a great deal of sympathy with the argument that the needs of poor survivors in the United States should be carefully considered. *I will support thoughtful plans designed to assure that the needs of the American survivor community are addressed, with resources in a fair proportion to their overall numbers, and with due regard for the fact that they have not received significant allocations up to this point.* I would be delighted to support a serious, realistic plan for providing home and health care to needy survivors in the United States.

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[7] HSF and counsel reject most of the statements contained in Mr. Neuborne's version of the facts presented in paragraphs 23-31 of his Supplemental Declaration.

(Emphasis supplied).[8] Although Mr. Neuborne unqualifiedly committed to support an allocation to assist Survivors in the United States in fair proportion to their "overall numbers," in subsequent allocations, failed to do so. When more funds became available, and after the HSF supplied the Court with a serious, detailed plan prepared by the Association of Jewish Family and Children's Services Association (AFJCA) to provide needed home care, health care, emergency services, and outreach for thousands of Survivors and Mr. Neuborne had the opportunity to rectify past imbalances and to support an increased allocation for the U.S., he not only failed to support a proportionate allocation, he opposed the U.S. Survivors' request and publicly ridiculed them.

On October 23, 2003, Mr. Neuborne wrote the following in a letter to the *Miami Herald:*

> I disagree . . . that survivors in South Florida and elsewhere are being short-changed. Even if one assumes that 25% of all Holocaust survivors reside in the United States (a highly debatable assumption), that doesn't mean that the court should allocate 25% of the relief funds to the United States.
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> . . . .
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> Until now, the federal court has correctly allocated relief funds on the basis of an assessment of where the poorest survivors reside and the intensity of their needs. That formula has resulted in substantial allocations to the United States, but even greater allocations to poor survivors elsewhere, especially the former Soviet Union.
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> While poor U.S. Survivors are in great need, I question whether the answer to the plight of elderly Holocaust Survivors in South Florida is to take food away from survivors in the Former Soviet Union. Surely resources exist within the American Jewish community to meet the needs of elderly Holocaust survivors without diverting scarce Holocaust relief funds from elderly survivors in far less fortunate places.

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[8] He now describes his commitment as a mere "expression of sympathy and not a commitment." *See, e.g.* "Playing Solomon," *The Jerusalem Report*, January 12, 2003.

See HSF Response to Special Master's Interim Recommendation, Exhibit 3.[9] The HSF leaders were entitled to expect Mr. Neuborne to be their advocate. Instead, he became their adversary.

In short, the issue is not, as Mr. Neuborne insists, whether there was a *quid pro quo* in exchange for his May 2001 commitment. For Mr. Neuborne to now say it defensible that he broke his promise to U.S. Holocaust Survivors because it was *not supported by consideration* is disturbing. The pertinent inquiry today is not whether the HSF Survivor leaders and their members can *sue* Mr. Neuborne for breach of contract or for fraud. The question is whether he has staked out a position that creates an irreconcilable conflict with Looted Assets Class members who live in the United States who would not, it appears, under his legal and philosophical framework, be entitled to assistance from Looted Assets class funds because there is great poverty in the Former Soviet Union because "social safety nets" and sources of private philanthropy in the United States. These are sources, it should by now seem clear, which have not been adequate to meet the needs of the Survivors in this country.

Further, Mr. Neuborne's statement in the Supplemental Declaration purporting to "remain committed" to assisting U.S. Survivors is difficult to accept because it is a re-hashing of a

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[9] HSF disagrees that $1.4 million out of $145 million (or $205 million) represents a "substantial" allocation. Mr. Neuborne's reference to 4% in the Supplemental Declaration is also surprising. HSF is not aware of any binding (or non-binding) 4% commitment. In any event, 4% is also not "substantial" in relation to the funds available and the scope of the need demonstrated by U.S. Survivors.

It is also ironic that Mr. Neuborne, who attempts to justify the decision to bypass the Supreme Court-mandated process for appointing separate counsel for each conflicting subclass in the initial settlement on the grounds that such a process would "pit survivors against each other," did just that when, among other actions, he inaccurately accused the Survivors in the United States who are merely trying to help their fellows in need of seeking assistance at the expense of "starving" residents of the FSU.

Further, Mr. Neuborne's attempt to describe payments to Deposited Assets class members who live in the United States in his discussion of the propriety of the Looted Assets allocation is not helpful or relevant.

promise he already failed to keep. He purports to support funding for U.S. Survivors' needs if only "a serious plan" were presented. This is precisely what HSF, in collaboration with the Association of Jewish Family and Children's Services Agencies (AJFCA) filed with the Court over one year ago. It is a plan that, as Mr. Neuborne acknowledged in his initial Declaration, adequately demonstrated that there were severe, unmet needs among Survivors in the United States. It is the plan he *ignored* over the last 15 months despite repeated urging by HSF and its counsel for assistance, and the emergence of a huge pool of funds destined for the Looted Assets class. At the same time, he simultaneously mocked American Survivors in need and urged them to seek help from the Jewish community so others such as he could decide *how best to use Holocaust Survivors' funds.*

The question today is whether Mr. Neuborne can continue to hold himself out as "lead plaintiffs' counsel" as he does in his Supplemental Declaration, or whether he represents the Special Master. By all appearances, it is the latter. Therefore, Mr. Neuborne's Declaration and Supplemental Declaration opposing HSF's Motion for Immediate Interim Allocation of Swiss Settlement Proceeds, and HSF's Objections to the Special Master's Interim Recommendation, are simply in conflict with the interests of a substantial number of members of the plaintiff class and hence should be rejected.[10]

2. The Withdrawal of the Initial Allocation Appeal Does Not Foreclose HSF's Challenges to Subsequent Allocations.

One of Mr. Neuborne's more surprising arguments is that the HSF Survivors cannot

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[10] Hence, Mr. Neuborne's conclusion that the Special Master's recommendation is "within the range of his discretion" misses the point. *See* Supplemental Declaration at Paragraph 27, and Letter to Chief Judge Korman dated December 16, 2003. Is Mr. Neuborne the Judge? Is he the appellate court? Shouldn't the "lead plaintiffs' counsel" use his position to advocate for the interests of the class?

challenge subsequent allocations from the Looted Assets Funds because of the withdrawal of the initial appeal in 2001. Today, Mr. Neuborne argues: "prior judicial approval of the identical allocation formula on two occasions makes it highly likely that additional judicial challenges at this point are precluded." Neuborne Supplemental Declaration at 7, *citing Allen v. McCurry*, 449 U.S. 90 (1980); and *Federated Department Store v. Moitie*, 452 U.S. 394 (1981)." His arguments are contrary to the law and contrary to the facts, and contrary to Mr. Neuborne's actions and statements about future allocations in this case.

a. Challenges To Subsequent Allocations Involve Different Facts Are Not Res Judicata.

The cases cited by Mr. Neuborne, *Allen* and *Moitie,* do not preclude the HSF Survivors from challenging subsequent allocations of Swiss settlement proceeds.[11] First, and most obviously, the subsequent allocations of Looted Assets funds that have occurred since the initial allocation, and that will occur under the Court's schedule in 2004, are separate decisions and subject to separate processes for objection and review. In *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955), the Supreme Court held that *res judicata* does not bar a subsequent action based on different facts even if it arises out of the same course of conduct that resulted in an earlier judgment or dismissal with prejudice. "That both suits involved 'essentially the same course of wrongful conduct' is not decisive. Such a course of conduct – for example – an abatable nuisance – may

[11] Although initially raised by Mr. Neuborne in connection with HSF's objections to the Special Master's October 2, 2003 Interim Recommendation, these points and authorities apply both to HSF's Motion for Reconsideration of the Court's approval of the $60 million interim recommendation, and, although the HSF leaders obviously hope the final allocation will obviate the causes of disagreement over past allocations, the possibility that the Court's decisions at this final allocation stage might not adequately address the needs of U.S. Survivors. *See* Letter from HSF Board of Directors to the Honorable Edward R. Korman, January 30, 2004, attached as Exhibit 2 to HSF Plan.

frequently give rise to more than a single cause of action. . . . While [a prior judgment] precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case." *Id.*, at 328.[12]

As the Second Circuit held in *Securities and Exchange Comm'n v. First Jersey Securities, Inc.*, 101 F.3d 1450 (2d Cir. 1996): "If the second litigation involved different transactions, there generally is no claim preclusion." *Id.*, at 1464. The court held that the SEC was free to bring an administrative complaint charging a brokerage firm with defrauding customers in 1982-1985, even though an action based on the same kind of fraud by the same firm between 1975 and 1979 had been settled in 1984. The court held: "At the time the SEC filed its charges and throughout the period of the hearing, the transactions at issue here had not yet occurred." *Id.*, at 1464.

Similarly, in *Prime Management Co. v. Steinegger*, 904 F.2d 811 (2d Cir. 1990), the Second Circuit held: "Whether or not the first judgment will have preclusive effect depends in part on whether the same transaction or connected series of transactions is at issue, whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first." *Id.*, at 816, citing *N.L.R.B. v. United Technologies Corp.*, 706 F.2d 1254, 1260 (2d Cir. 1983)(the circumstance that several operative facts may be common to successive actions between the same parties does not mean that the claim asserted in the second is the same claim that was litigated in the first and that litigation of the second is therefore precluded by judgment in the first.").

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[12] Accordingly, *Allen v. McCurry* is completely inapplicable on its face. Moreover, one of the principles recognized in *Allen v. McCurry*, that collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a full and fair opportunity to litigate the issue in the earlier case, would be severely tested if this issue is pressed. *See, e.g.* Affidavit of David Mermelstein filed in support of HSF's Response on Issue of Standing; and *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2d Cir. 249), *aff'd in relevant part* 123 S.Ct. 2161 (2003).

HSF's objections to the Special Master's second and third allocation recommendations, i.e. of the $45 million in "interest and tax savings" in 2002 and the $60 million in 2003, involve a different set of facts than the original allocation. These subsequent allocations of Looted Assets funds that were not part of the initial settlement and final approval order are no different analytically than the successive claims which the Supreme Court in *Lawlor* and its progeny held were not barred by *res judicata*.[13]

Clearly, the propriety of subsequent allocations in this case depends on different evidence than the facts applicable to the initial allocation. As one example, one of the issues raised by HSF is that the Special Master's 2002 and 2003 "interim" recommendations are themselves in conflict with the Court's prior Order approving the initial allocation recommendation, making the preclusion argument completely inapplicable. HSF contends that the subsequent allocation recommendations were not preceded by the accounting required of program expenditures, nor were the additional expenditures specifically requested or supported by the documentation or justification required under the Court's Order. *See* HSF's Motion for Reconsideration, October 9, 2002, citing the Special Master's Initial Allocation Report at 136-137. ("The Special Master's recommendation to dedicate additional funds to the existing programs in future years gave no substantive reasons for adding more resources to programs that are currently receiving funds. . . . In the absence of any

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[13] Further, in *First Jersey Securities*, the Second Circuit held that the extent to which claims involving the latter offenses were foreclosed by the 1984 settlement "depends on the intent of the parties to the settlement." *Id.*, at 1465. By analogy, it is clear that the HSF Survivor leaders did not intend to foreclose the ability to challenge future allocations when they withdrew their appeals in May 2001. The text of Mr. Neuborne's May 15, 2001 letter negates any inference to that effect, and HSF's actions since that time consistently reflect that the U.S. Survivors have maintained the right to challenge subsequent allocations by objection or appeal if necessary. *See* HSF Motion for Reconsideration, October 9, 2002; and HSF Motion for Reconsideration of Court's Memorandum and Order of November 17, 2003.

reports containing the required information as to the use of the funds earmarked in the initial allocation, and in the absence of any effort by the Special Master to document additional need in those programs that received the bulk of the initial funding, the Court's decision to increase the funds to these programs is . . . manifest error . . . ."). *See also* HSF Response to Special Master's Interim Recommendation, October 31, 2003, at 3-10.

Therefore, Mr. Neuborne's preclusion argument ignores not only the inherently distinct nature of the subsequent allocations, but the very reason the Court imposed a standard initially on future allocations. What is the purpose of the Court's setting a standard to govern future allocations if the affected class members, including those who withdrew their appeal of the initial allocation in reliance on a fair allocation of future distributions, including the *existence of a standard for such distributions*, can not object and appeal if necessary due to the failure of those standards to be followed?

b. The Second Circuit did not address the propriety of the initial allocation formula.

The factual premise of Mr. Neuborne's preclusion argument, that the "Special Master's proposed allocation formula . . . has already been upheld by the Second Circuit in connection with its approval of the original plan of allocation and distribution," is incorrect. *See id.*, at 7, 7-8.[14] The Second Circuit's opinion approving this Court's initial allocation plan, after the HSF Survivors and Thomas Weiss, M.D. withdrew their appeals, is *silent* on the question of the allocation of the funds within the Looted Assets class. The reason is clear: no party whose appeals proceeded to

[14] Mr. Neuborne's argument that the Special Master's Looted Assets allocation forumula has already been upheld by the Second Circuit is repeated several times in the Supplemental Declaration, at pages 7, 7-8, 7 n.9, 9 n.11, and 12. HSF reserves the right to address the *res judicata* or collateral estoppel issue in greater depth if necessary at a future date.

decision in the Second Circuit challenged the allocation of the Looted Assets funds. Consequently, the argument that subsequent challenges to the formula (or subsequent allocations utilizing the same formula are precluded by the Second Circuit decision is unavailing. *See National Labor Relations Bd. v. United Techcnologies Corp*, 706 F.2d 1254, 1250 (2d Cir. 1986) (collateral estoppel or issue preclusion only prevents "relitigation of an issue of law or fact that was (a) raised, (b) litigated, and (c) actually decided by a judgment in a prior proceeding between the parties, if the determination of the issue was essential to the judgment."); *See also Prime Management Co. v. Steinegger*, 904 F.2d 811, 816 (2d Cir. 1990)(though plaintiff's methodology in calculating the percentage rents was raised in earlier case for accounting, where it did not appear that the issue was actually litigated and it was clear that it was not actually decided, there was no merit in defendant's argument that subsequent counterclaim raising the issue was barred by collateral estoppel).

The only issues addressed in the Second Circuit appeal were raised by Abraham Friedman, Eliazar Bloshteyn, and Sofiya Bloshteyn. *In re Holocaust Victim Assets Litigation*, 2001 WL 868507 (2d Cir. 2001). Appellant Friedman "objected to the appointment of the Conference on Jewish Material Claims Against Germany, Inc. (Claims Conference) as one of the organizations that will process claims and distribute funds under the settlement." *Id.*, at *1. The claims process and distribution process about which Friedman complained, hence those before the Second Circuit, concerned only slave labor and refugee claims. Mr. Neuborne's brief on behalf of appellees concedes as much:

> *This appeal raises a single issue*: Did the District Court abuse its discretion when it accepted the Special Master's carefully supported recommendation that the Conference on Jewish Material Claims against Germany (the "Claims Conference") act as the conduit for the distribution of funds to eligible members of the *Slave Labor* and *Refugee Classes*?

See Brief of Plaintiff-Appellee, at 1 (Emphases supplied). It continues: "Mr. Abraham Friedman, the appellant herein, objects to the choice of the Claims Conference as the *vehicle to distribute Swiss Slave Labor I funds to Jewish beneficiaries*, claiming that its policies and direction are insufficiently sensitive to the needs of Holocaust survivors." *Id.* (Emphasis supplied).

Mr. Neuborne argued before the Second Circuit that Mr. Friedman had no real basis to object to the Claims Conference's handling of the slave labor payments because that entity had also been given the responsibility of distributing slave labor payments from the German Foundation Agreement: "It is difficult to understand how the receipt of Slave Labor I payments from the Claims Conference, as opposed to receiving the identical payments from the conduit of his choice, imposes any cognizable injury-in-fact on Mr. Friedman. Accordingly, this appeal should be dismissed for want of Article III standing." *Id.*, at 2-3. The allocation issue was not raised or addressed in connection with Friedman's appeal.

Further, the Second Circuit decision makes it clear that the other appellants did not challenge the allocation of the Looted Assets class funds:

> Appellants Eliazar and Sofiya Bloshteyn object to (1) the inadequacy of the total settlement amount of $1.25 billion; (2) the allocation of $800 million to the "Deposited Assets" class, including adjustments for interest, fees, and inflation; (3) the application of the doctrine of cy pres to resolve the claims of the "Looted Assets" class, rather than require – or permit – claimants to put forth documentary evidence of their actual losses; and (4) the asserted limitation of "applications" to 560,000."

2001 WL 868507 at **2. Although the Second Circuit approved the Court's decision in principle to utilize a *cy pres* remedy for the Looted Assets Class, and to favor the Deposited Assets class in the allocation of the initial settlement total, HSF is not challenging those decisions here. But it is clear that neither the Second Circuit's opinion, nor the briefs of any party, addressed the allocation formula

for the Looted Assets class.[15] It is simply not accurate for Mr. Neuborne to suggest, as he does repeatedly, that the specific formula chosen by the Special Master and approved by this Court in the initial allocation was approved or even reviewed by the Court of Appeals, much less necessary to the decision as required to be preclusive.[16]

c. Mr. Neuborne previously acknowledged HSF's right to challenge allocations after the appeals were withdrawn.

Mr. Neuborne's new position is contrary to his previous positions which acknowledged HSF's right to appeal the Looted Assets allocations at a subsequent date. For example, in October 2002, after HSF moved for reconsideration of the Court's September 25, 2002 Order approving the allocation of the $45 million in looted assets class funds Mr. Neuborne wrote: "[I]f Mr. Dubbin wishes to pursue an appeal to the Second Circuit challenging the plan of allocation and distribution as unfair to Holocaust survivors residing in the United States, I am anxious to begin the appeals process immediately in order to minimize further delays in distributions." Letter from Burt Neuborne, Esquire, to the Honorable Edward R. Korman, October 10, 2002. Exhibit 2.[17]

3. Mr. Neuborne's Declarations Err on Several Issues.

This section will briefly address some of the misstatements of Mr. Neuborne's that, while not directly related to any of the above issues, give an inaccurate picture of this case and need to be corrected so they do not form the basis for a decision by the Court.

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[15] The briefs of the parties are available at 2001 WL 868507.

[16] Moreover, a decision is not binding on a party who was not a litigant in the earlier case. *Id.*

[17] Mr. Neuborne explicitly recognized HSF's ability to appeal in several private discussions as well.

a. Administration of Looted Assets Funds.

Contrary to Mr. Neuborne's claim, HSF Does Not Seek to Administer Looted Assets Funds. In Paragraph 2 of his Supplemental Declaration, Mr. Neuborne contends that "in an earlier filing, Mr. Dubbin urged that settlement funds earmarked for survivors residing in United States be held in escrow and administered by the HSF-USA, rather than by the Claims Conference." Although Mr. Neuborne does not identify the filing to which he refers, this statement is untrue.

On September 23, 2002, HSF submitted the Proposal for Improved Services for Holocaust Survivors in the United States, prepared by the Association of Jewish Family and Children's Services Agencies (AFJCA). HSF adopted that Proposal as a framework for allocations of Looted Assets Class Funds for the benefit of Survivors in the United States. That proposal provides, at pages 6-7:

> Court Supervised Oversight
>
> It is vital that an improved, responsive oversight and allocations mechanism be established under Court supervision to ensure comprehensiveness and national uniformity. While it is possible that this system could be provided within the existing framework, it is also possible that a different mechanism needs to be created. AJFCA is prepared to assist in the creation of this improved, responsive mechanism. No matter how the program is administered, the system must be responsible to audit both the funds and services provided by the agencies, under the strictest of professional guidelines. *The direction and oversight of the system should by provided by a Steering Committee composed of a representative from AJFCA, two representatives from service delivery agencies, three representatives from the Federation system, a representative from the Claims Conference, and three representatives from the survivor community. This group, bringing their various skills and expertise to the table, will be in an excellent position to make sure that services get to those most in need most rapidly, efficiently, professionally, and flexibly.*

This proposed arrangement was confirmed in HSF's Motion for Immediate Interim

Distribution of Swiss Settlement Proceeds filed September 10, 2003. In footnote 1, HSF states: "In accordance with the Association of Jewish Family and Children's Services Agencies (AJFCA) Proposal HSF submitted in September 2002, HSF requests that the funds be set aside in trust to be spent in accordance with the decisions of a committee of HSF Survivors and representatives appointed by the AJFCA and the UJC-Federations, as well as a representative of the Conference on Jewish Material Claims Against Germany (Claims Conference), and the Court." It is reiterated in HSF's current Plan.

HSF's statement concludes: "The use of such funds would be guided by an assessment of current need, and the likelihood and timing of funds from other sources such as the Claims Conference (Successor Organization funds), the International Commission on Holocaust Era Insurance Claims (ICHEIC) "humanitarian funds," and the Final Secondary Distribution in this case." *Id.* Consequently, Mr. Neuborne's straw man arguments premised on the claim that HSF is seeking to have a procedure established that is contrary to Second Circuit law under *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 145 (2d Cir. 1987), is incorrect and should be disregarded.

b. Analysis of Conformity of Allocations Recommendations with Existing Orders

Mr. Neuborne characterizes the issues raised by HSF in its Response to the Special Master's Interim Recommendation as charging the American Joint Distribution Committee with "improperly using" settlement funds. This is another false claim. HSF contends that the allocations of the $45 million in interest and tax savings, and the $60 million recently approved by the Court, do not adhere to the provisions of the Court's Order adopting the Special Master's initial allocation plan, with the reporting requirements and requirements for justifying additional allocations. HSF's Response called for *more scrutiny and accountability in those processes*: "[B]efore more funds are allocated to the JDC for these programs, it would seem that a great deal more information about the

entire FSU program is required." Response, at 9. HSF stands by this argument. As stated in HSF's Response, the remedy is not

Such scrutiny and accountability would, one would ordinarily believe, be undertaken by Mr. Neuborne in his role as "lead plaintiffs' counsel" and by the Special Master himself. The automatic acceptance of proposed additional allocations without any effort to determine the conformity with the Court's orders, on which all class members relied including the HSF Survivors who withdrew their appeals, is not appropriate in the allocation process. Neither is the response of Mr. Neuborne, which was to attack the Survivor leaders who are simply attempting to secure a fair, proportional allocation for their fellows in need.[18]

Conclusion

For the foregoing reasons, the Holocaust Survivors Foundation, USA, Inc., on behalf of thousands of Holocaust Survivors and Nazi victims who are Looted Assets class members in the United States, urges this Court to allocate sufficient funds for the needs of Survivors and Nazi victims in the United States, based on the United States' proportion of Survivors and Nazi victims worldwide.

Respectfully submitted,

DUBBIN & KRAVETZ, LLP
220 Alhambra Circle, Suite 400
Coral Gables, Florida 33134
Telephone: (305) 357-9004

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[18] There are several other blatant errors, such as Mr. Neuborne's familiar and inaccurate characterization of HSF's actions as causing delays in distributions, but HSF will resist addressing each and every misstatement, in the interest of focusing on the merits and the hope that the Court will find that the current proposals, and the currently available funds, warrant help for U.S. Survivors in need, today.

By: _____
Samuel J. Dubbin, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum of Law in Support of the Holocaust Survivors Foundation-USA, Inc. Plan for Providing Assistance to U.S. Survivors was furnished by mail to the Holocaust Victims Asset Litigation, P.O. Box8300, San Francisco, CA 94128-8300; Burt Neuborne, Esquire, 40 Washington Square South, Room 307, New York, New York, 10012, and Special Master Judah Gribetz, 399 Park Avenue, New York, New York. 10022, this 30th day of January, 2004, and other counsel on the attached service list on February 2, 2004.

By: _____
Samuel J. Dubbin, P.A.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE

MASTER DOCKET NO. CV. 96-4849 (ERK) (MDG) (Consolidated with CV-96-5161 and CV-97-461

HOLOCAUST VICTIM ASSETS LITIGATION

MEMORANDUM OF LAW OF HOLOCAUST SURVIVORS FOUNDATION-USA, INC. IN SUPPORT OF PLAN FOR PROVIDING ASSISTANCE FOR NEEDY NAZI VICTIMS IN THE UNITED STATES

The Holocaust Survivors Foundation-USA, Inc. (HSF) submits this Memorandum of Law in Support of the Plan for Providing Assistance for Needy Nazi Victims in the United States, submitted herewith ("HSF Plan").[1] This Memorandum also addresses several of the issues raised in Mr. Burt Neuborne's previous declarations and other submissions.[2] HSF has constantly maintained that Looted Assets funds belong to *all* Survivors, and should be used to help *all* Survivors, as soon as possible. The Plan submitted to the Special Master on this day, again, proposes a system of allocation that permits an adequate sum of Looted Assets funds for Survivors and Nazi victims in need all over the world.

That has been the goal of the HSF leadership at all times herein, beginning with their withdrawal of the appeals in 2001, their submission of a viable Proposal Improved Services for Holocaust Survivors in the United States in September 2002; their acquiescence in the Court's request

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[1] Preliminarily, HSF acknowledges Mr. Neuborne's withdrawal of his opposition to HSF's standing under Article III to participate fully in these proceedings, as stated in his letter to the Court dated December 16, 2003, after HSF's submission to the Court on December 11, 2003. At this time, HSF respectfully requests an Order from the Court to the same effect to clarify the record, inasmuch as the Court's November 17, 2003 Order reflects agreement with Mr. Neuborne's prior position.

[2] HSF's December 11, 2003 response on the issue of standing indicated that the other issues raised by Mr. Neuborne would be addressed in a later filing.

that they not appeal the September 25, 2002 Order allocating $45 million in interest and tax savings; and their September 2003 Motion for Immediate Interim Allocation of Swiss Settlement Proceeds which sought an ample amount of funds for *all* Survivors in the short term, to alleviate suffering for which no restitution funds have been made available despite their abundance. Nevertheless, for some reason, the rights and interests of Looted Assets class members who live in the United States continue to be attacked, minimized, and even ridiculed. HSF respectfully urges the Court to reject the latest obstacles and attacks, and take favorable action on HSF's proposed Plan for a fair share of Looted Assets funds to be distributed for the benefit of all Survivors and Nazi victims in need.

1. With The Level of Need That Exists For Survivors Everywhere, A Pro Rata Allocation Plan is the Only Fair and Reasonable Allocation Plan Under Rule 23

The allocation of the Swiss settlement funds must satisfy Rule 23's requirement that it be "fair, reasonable, and adequate." *Staton v. Boeing Co.*, 327 F.3d 938 (9th Cir. 22003); *In re Paine Webber Limited Partnerships Litig.*, 171 F.R.D. 104 (S.D.N.Y. 1997); *In re Ikon Office Solutions, Inc., Securities Litig.*, 194 F.R.D. 166 (E.D. Penn. 2000). Moreover, in order for an allocation to meet the test of reasonableness, it must conform to *objective* standards that the members of the class, and their representatives attempting to advance their clients' interests, can ascertain and apply and that the Court of Appeals can, if necessary, review with any proper lens. *Staton*, 327 F.3d at 975.

The allocation plan previously followed does not satisfy the test of objectivity nor the test of reasonableness, because it provides Looted Assets class members who live in the United States, (or Israel or Europe) no concrete, objective guidelines. The undefined "neediness" criterion, however well-intended, is standardless. HSF's factual concerns in this regard are spelled out in Paragraphs 22-26 of the attached Plan. There has been extensive information before the Court, which

the recent UJC and New York City UJA-Federation submissions confirm, showing that thousands of Survivors and Nazi victims have Survivors in the United States have severe, unmet needs for home and health care and other emergency services. With this base level of need established, and with ample funds available to permit serious funding to begin today in all places, HSF contends that there are no objective criteria that can reasonably be applied by the Court to justify withholding settlement funds from Looted Assets members in need who live in the United States.

Therefore, the only fair and reasonable allocation formula at this stage of the case is one that recognizes that there are Looted Assets Class members in need throughout the world, and allocates the remaining funds pro rata according to each country's share of the world Survivor and Nazi victim population. Based on the population analyses and surveys and estimates from the United Jewish Communities, the State of Israel, and the JDC Brookdale Institute, as reviewed and reconciled by respected demographer Professor Ira Sheskin, HSF submits that the proper percentage for the United States is 20% (19.7%). *See* HSF Plan, Exhibit 3, at 7.

a. Cy Pres Allocations Must Benefit the Class As A Whole.

HSF's pro-rata allocation proposal is the only way the Court can satisfy the rule that allocations of settlements under the *cy pres* doctrine must benefit the class *as a whole*. As HSF has argued in prior filings, the allocations at issue do not satisfy the rule that *cy pres* allocations in class actions requires that the allocations benefit the class as a whole.[3] None of the cases cited by Mr. Neuborne at pages 27-28 of his Supplemental Declaration deviates from this principle, and none holds that a Court can discriminate among members of a class with identical injuries in the allocation of

[3] HSF adopts and incorporates herein its arguments and citations on this point from its initial Objections to the Special Master's recommendation, September 23, 2002, and its Response to the Special Master's Interim Allocation Recommendation, October 31, 2003,

settlement funds under the *cy pres* doctrine. No case allows a court to use settlement funds to assist some class members but not others based on an assessment of relative "need" or an any other basis.

For example, *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179 (2d Cir. 1987), which HSF has discussed at length in its prior filings, does not support use of *cy pres* to benefit only part of the class. As described by one District Court, the *cy pres* remedy in *Agent Orange* was a plan in which the court "approved use of portion of settlement fund to fund assistance programs for the class as a whole where distribution to individuals not feasible." *In re Matzo Food Products Litig.*, 156 F.R.D. 600 (D.N.J. 1994). The court in *Matzo Food Products* thus agrees with HSF that under *Agent Orange*, use of *cy pres* allocations in class actions requires that they benefit the class *as a whole*. It does not support use of *cy pres* funds to benefit only part of the class.

Further, *West Va. v. Chas. Pfizer & Co.*, 314 F.Supp. 179, 185 (S.D.N.Y. 1970), *aff'd* 440 F.2d 1079(2d Cir. 1970), cited by Mr. Neuborne, actually arrives at a result analogous to that advocated by HSF here, not the one urged by Mr. Neuborne. In *Chas Pfizer*, the $100 million antitrust settlement against pharmaceutical manufacturers and pharmacies was allocated among the states on a pro-rata basis. The $50 million allocated to the governmental plaintiffs was distributed on the basis of the number of hospital beds in each state as a percentage of the total number of hospital beds in the U.S. The $37 million allocated for the claims of individual purchasers was distributed according to each State's proportion of the U.S. population. The pro rata allocation utilized under the *cy pres* doctrine in *Chas Pfizer* therefore supports HSF's argument that Looted Assets class funds should be allocated according to each country's proportion of the world Survivor community, given the existence of actual need in such countries. See HSF Plan, at 5-7.[4]

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[4] Recent demographic data show substantially different population figures around the world, and more severe levels of economic distress for Survivors and Nazi victims in the United States, than

Similarly, in *In re Toys "r" Us Antitrust Litig.*, 191 F.R.D. 347 (E.D.N.Y. 2000), settlement funds were distributed uniformly throughout the country for toys and educational programs. The court justified the use of *cy pres* on traditional grounds, because of the difficulty of identifying proper claimants and the difficulty and costs that such recoveries and their administration would have entailed. *Id.* But the funds so allocated were done so *uniformly*: "the cash portion of the settlement, will be allocated among all of the States, the District of Columbia, and the Commonwealth of Puerto Rico *based on each entity's percentage share of the total population of the United States* . . . ." *Id.*. (Emphasis supplied). There were no criteria superimposed that would deny benefits to children who happened to reside in certain jurisdictions based on the relative generosity of other government programs or the wealth of the jurisdictions' other citizens.[5]

None of the other cases cited by Mr. Neuborne support the allocation of settlement funds to only part of the class just because a *cy pres* allocation is used. In *Jones v. National Distillers*, 56 F. Supp. 2d 355 (S.D.N.Y. 1999), two decades after claims were paid to eligible plaintiffs, the court approved use of the remainder as a charitable donation to the Legal Aid Society. In so doing, the court cited the Second Circuit's caution "against a 'fluid recovery' scheme that creates a class fund but deviates too much from the principled individual damage calculations and pro rata

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the ones upon which this Court relied when it adopted the Special Master's initial report. HSF contends that these data require an extensive review of the assumptions underlying the current allocation formula, and a change in that formula.

[5] Counsel's research has not yielded a case in which class action settlement benefits were varied among class members in different jurisdictions based on whether those jurisdictions had (1) more or less generous public assistance programs, or (2) other sources of private funding that lead counsel thought should be tapped in lieu of settlement funds such as wealthy co-religionists. This is different than allocating settlement benefits differently among class members from different jurisdictions because the jurisdiction's substantive law provides for greater or lesser rights of recovery for the underlying class action claim.

distributions to class members." *Id.* The court also noted that while the law does not forbid all fluid recoveries based on *cy pres* principles; it does caution "against going to excess in creating class funds that do not meaningfully benefit the class as a whole," *Id.*, citing *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (3d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974).[6]

In *Nelson v. Greater Gadsden Housing Auth.*, 802 F.2d 405 (11th Cir. 1986), after all known members of the plaintiff class obtained their full recoveries, there was still money in a fund that had been set aside for compensatory damages which were not claimed within the time specified. The court allowed those funds to be used by the Defendant housing authority to increase the energy efficiency of the apartment units or to improve the defendant-supplied appliances with the units, *id.*, at 409. But in *Nelson*, no willing and known class members who made claims in a timely manner were excluded from settlement benefits.

Similarly, in *Powell v. Georgia Pacific Corp.*, 843 F.Supp. 491 (W.D. Ark. 1994), *aff'd* 119 F.3d 703 (8th Cir. 1997) settlement funds were distributed to class members in an employment discrimination action. Ten years later, the court found that funds which had originally been set aside for unidentified class members (almost $1 million) would then be "extremely difficult to distribute" pro rata, so it approved use under the *cy pres* doctrine for a scholarship program for black students in the vicinity. This was a classic *cy pres* distribution to a "next best" use because of the impracticability of paying it pro rata to the original plaintiffs. Not only had each plaintiff been fully compensated in accordance with the terms of the original consent decree, in *Powell*, there was no distribution that benefitted some members of the class but not others.

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[6] Again, the basis for employing a *cy pres* remedy, which HSF does not challenge here, was traditional: while "class counsel and class fund administrators have a duty to try to find missing class members, they need not continue searching forever . . . ." *Id.*, at 357.

b. The Model of Justice Offered by Mr. Neuborne to Justify the Current Allocation Scheme Does Not Conform to *Cy Pres* Law.

The application of the *cy pres* doctrine in the class action context requires any allocation plan to benefit the class as a whole. The Special Master's October 2 proposal, and the two previous allocation plans, plainly fail this test. In apparent recognition of this deficiency, Mr. Neuborne offers a model of distributive justice as a substitute for an accepted allocation formula under the prevailing *cy pres* law:

> [W]hen a destitute resident of the former Soviet Union is benefitted by a *cy pres* distribution, Looted Assets class members residing throughout the world receive a benefit. When a needy resident of the United States is benefitted by a *cy pres* distribution, Looted Assets class members residing throughout the world receive a benefit. When a needy resident of Israel is benefitted by a *cy pres* distribution, Looted Assets class members residing throughout the world receive a benefit.

Para. 38. Mr. Neuborne's political theory is no substitute for proper and fair distribution of settlement funds, even under the *cy pres* doctrine.

Ironically, at the time of the initial settlement, Mr.Neuborne said that the Swiss settlement funds could *not* be used for *charity*, but represented the proceeds of a legal settlement:

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

See Submission of Lead Settlement Counsel in Support of the Special Master's Proposed Plan of Allocation and Distribution of Settlement Proceeds, at 3 (Emphasis supplied). Mr. Neuborne took the same position in letters to several HSF members in the summer of 2002 when they petitioned the Court for an interim allocation of settlement proceeds due to the unexplained delays in the processing of

Deposited Assets class funds and lack of information about the timing of a further distribution. *See, e.g.* Letter from Burt Neuborne to Leo Rechter, President of the National Association of Jewish Holocaust Survivors, July 9, 2002. What a difference two and a half years apparently makes. Today , it would appear Swiss settlement funds are no longer subject to the claims of the victims whose losses created the settlement, but a source of charity to be disposed of according to his values.

Philosophical musings about how lonely, sick and desperate Holocaust Survivors in Chicago, Jerusalem, Los Angeles, Brooklyn, Houston, Tel Aviv, Las Vegas, Queens, Miami Beach, Boston, and dozens of other cities and towns around the world who cannot obtain any assistance for their own needs "benefit" by allocations made to others also in need but who stand in the identical position legally, from the dollars fought for in the names of *all* Survivors, are absurd. The HSF Survivors have made it clear over and over in this case that they support fair allocations everywhere. They need no instruction about charity or Tzedakah. They do not deserve lectures about sacrifice. From the standpoint of U.S. Survivors in need of assistance who participated in the Swiss case and can not obtain adequate assistance for their daily needs, lead counsel's principle of justice is worse than abstract; it is unprecedented, and very damaging.

c. Mr. Neuborne's Current Position Regarding the Proper Allocation of Looted Assets Settlement Funds is in Conflict with the Rights and Interests of the Survivors in Need Who Live in the United States.

Mr. Neuborne has staked out a position in the allocation phase of the case that directly conflicts with the rights and interests of Looted Assets Class members in the United States. Yet he misperceives the HSF Survivors' position concerning his failure to honor his May 2001 commitment to support a fair share of Looted Assets funds for the needs of Survivors in the United States, and his

subsequent actions adverse to their interests.[7] Mr. Neuborne describes HSF as contending:

> it is inequitable to continue to apply the original allocation formula to the United States because doing so violates the letter and the spirit of a claimed promise by Lead Settlement counsel to support an increase in funds available to survivors residing in the United States, allegedly made as a *quid pro quo* for the dismissal of an appeal challenging the fairness of the settlement and the legality of the plan of allocation and distribution recommended by the Special Master. Mr. Dubbin goes so far as to argue that Lead Settlement counsel had "broken a promise to thousands of his clients.

Supplemental Declaration, at 18-19.

The problem with the variance between Mr. Neuborne's actions that defied his personal commitment is not that it renders the Special Master's interim recommendation "inequitable." The results on their face are inequitable. The problem is that Mr. Neuborne's present position is in contrast with the *advocacy* he promised the American Survivor leadership he would provide when they withdrew their appeals in May 2001, and it is now in conflict with the rights and interests of Looted Assets class members in the United States who have until now been denied significant access to Looted Assets class funds.

The text of the letter speaks for itself. On May 15, 2001, Mr. Neuborne wrote:

> In connection with the secondary distribution, I have a great deal of sympathy with the argument that the needs of poor survivors in the United States should be carefully considered. *I will support thoughtful plans designed to assure that the needs of the American survivor community are addressed, with resources in a fair proportion to their overall numbers, and with due regard for the fact that they have not received significant allocations up to this point.* I would be delighted to support a serious, realistic plan for providing home and health care to needy survivors in the United States.

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[7] HSF and counsel reject most of the statements contained in Mr. Neuborne's version of the facts presented in paragraphs 23-31 of his Supplemental Declaration.

(Emphasis supplied).[8] Although Mr. Neuborne unqualifiedly committed to support an allocation to assist Survivors in the United States in fair proportion to their "overall numbers," in subsequent allocations, failed to do so. When more funds became available, and after the HSF supplied the Court with a serious, detailed plan prepared by the Association of Jewish Family and Children's Services Association (AFJCA) to provide needed home care, health care, emergency services, and outreach for thousands of Survivors and Mr. Neuborne had the opportunity to rectify past imbalances and to support an increased allocation for the U.S., he not only failed to support a proportionate allocation, he opposed the U.S. Survivors' request and publicly ridiculed them.

On October 23, 2003, Mr. Neuborne wrote the following in a letter to the *Miami Herald:*

> I disagree . . . that survivors in South Florida and elsewhere are being short-changed. Even if one assumes that 25% of all Holocaust survivors reside in the United States (a highly debatable assumption), that doesn't mean that the court should allocate 25% of the relief funds to the United States.
>
> . . . .
>
> Until now, the federal court has correctly allocated relief funds on the basis of an assessment of where the poorest survivors reside and the intensity of their needs. That formula has resulted in substantial allocations to the United States, but even greater allocations to poor survivors elsewhere, especially the former Soviet Union.
>
> While poor U.S. Survivors are in great need, I question whether the answer to the plight of elderly Holocaust Survivors in South Florida is to take food away from survivors in the Former Soviet Union. Surely resources exist within the American Jewish community to meet the needs of elderly Holocaust survivors without diverting scarce Holocaust relief funds from elderly survivors in far less fortunate places.

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[8] He now describes his commitment as a mere "expression of sympathy and not a commitment." *See, e.g.* "Playing Solomon," *The Jerusalem Report*, January 12, 2003.

See HSF Response to Special Master's Interim Recommendation, Exhibit 3.[9] The HSF leaders were entitled to expect Mr. Neuborne to be their advocate. Instead, he became their adversary.

In short, the issue is not, as Mr. Neuborne insists, whether there was a *quid pro quo* in exchange for his May 2001 commitment. For Mr. Neuborne to now say it defensible that he broke his promise to U.S. Holocaust Survivors because it was *not supported by consideration* is disturbing. The pertinent inquiry today is not whether the HSF Survivor leaders and their members can *sue* Mr. Neuborne for breach of contract or for fraud. The question is whether he has staked out a position that creates an irreconcilable conflict with Looted Assets Class members who live in the United States who would not, it appears, under his legal and philosophical framework, be entitled to assistance from Looted Assets class funds because there is great poverty in the Former Soviet Union because "social safety nets" and sources of private philanthropy in the United States. These are sources, it should by now seem clear, which have not been adequate to meet the needs of the Survivors in this country.

Further, Mr. Neuborne's statement in the Supplemental Declaration purporting to "remain committed" to assisting U.S. Survivors is difficult to accept because it is a re-hashing of a

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[9] HSF disagrees that $1.4 million out of $145 million (or $205 million) represents a "substantial" allocation. Mr. Neuborne's reference to 4% in the Supplemental Declaration is also surprising. HSF is not aware of any binding (or non-binding) 4% commitment. In any event, 4% is also not "substantial" in relation to the funds available and the scope of the need demonstrated by U.S. Survivors.

It is also ironic that Mr. Neuborne, who attempts to justify the decision to bypass the Supreme Court-mandated process for appointing separate counsel for each conflicting subclass in the initial settlement on the grounds that such a process would "pit survivors against each other," did just that when, among other actions, he inaccurately accused the Survivors in the United States who are merely trying to help their fellows in need of seeking assistance at the expense of "starving" residents of the FSU.

Further, Mr. Neuborne's attempt to describe payments to Deposited Assets class members who live in the United States in his discussion of the propriety of the Looted Assets allocation is not helpful or relevant.

promise he already failed to keep. He purports to support funding for U.S. Survivors' needs if only "a serious plan" were presented. This is precisely what HSF, in collaboration with the Association of Jewish Family and Children's Services Agencies (AJFCA) filed with the Court over one year ago. It is a plan that, as Mr. Neuborne acknowledged in his initial Declaration, adequately demonstrated that there were severe, unmet needs among Survivors in the United States. It is the plan he *ignored* over the last 15 months despite repeated urging by HSF and its counsel for assistance, and the emergence of a huge pool of funds destined for the Looted Assets class. At the same time, he simultaneously mocked American Survivors in need and urged them to seek help from the Jewish community so others such as he could decide *how best to use Holocaust Survivors' funds.*

The question today is whether Mr. Neuborne can continue to hold himself out as "lead plaintiffs' counsel" as he does in his Supplemental Declaration, or whether he represents the Special Master. By all appearances, it is the latter. Therefore, Mr. Neuborne's Declaration and Supplemental Declaration opposing HSF's Motion for Immediate Interim Allocation of Swiss Settlement Proceeds, and HSF's Objections to the Special Master's Interim Recommendation, are simply in conflict with the interests of a substantial number of members of the plaintiff class and hence should be rejected.[10]

2. The Withdrawal of the Initial Allocation Appeal Does Not Foreclose HSF's Challenges to Subsequent Allocations.

One of Mr. Neuborne's more surprising arguments is that the HSF Survivors cannot

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[10] Hence, Mr. Neuborne's conclusion that the Special Master's recommendation is "within the range of his discretion" misses the point. *See* Supplemental Declaration at Paragraph 27, and Letter to Chief Judge Korman dated December 16, 2003. Is Mr. Neuborne the Judge? Is he the appellate court? Shouldn't the "lead plaintiffs' counsel" use his position to advocate for the interests of the class?

challenge subsequent allocations from the Looted Assets Funds because of the withdrawal of the initial appeal in 2001. Today, Mr. Neuborne argues: "prior judicial approval of the identical allocation formula on two occasions makes it highly likely that additional judicial challenges at this point are precluded." Neuborne Supplemental Declaration at 7, *citing Allen v. McCurry*, 449 U.S. 90 (1980); and *Federated Department Store v. Moitie*, 452 U.S. 394 (1981)." His arguments are contrary to the law and contrary to the facts, and contrary to Mr. Neuborne's actions and statements about future allocations in this case.

a. Challenges To Subsequent Allocations Involve Different Facts Are Not Res Judicata.

The cases cited by Mr. Neuborne, *Allen* and *Moitie*, do not preclude the HSF Survivors from challenging subsequent allocations of Swiss settlement proceeds.[11] First, and most obviously, the subsequent allocations of Looted Assets funds that have occurred since the initial allocation, and that will occur under the Court's schedule in 2004, are separate decisions and subject to separate processes for objection and review. In *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955), the Supreme Court held that *res judicata* does not bar a subsequent action based on different facts even if it arises out of the same course of conduct that resulted in an earlier judgment or dismissal with prejudice. "That both suits involved 'essentially the same course of wrongful conduct' is not decisive. Such a course of conduct – for example – an abatable nuisance – may

[11] Although initially raised by Mr. Neuborne in connection with HSF's objections to the Special Master's October 2, 2003 Interim Recommendation, these points and authorities apply both to HSF's Motion for Reconsideration of the Court's approval of the $60 million interim recommendation, and, although the HSF leaders obviously hope the final allocation will obviate the causes of disagreement over past allocations, the possibility that the Court's decisions at this final allocation stage might not adequately address the needs of U.S. Survivors. *See* Letter from HSF Board of Directors to the Honorable Edward R. Korman, January 30, 2004, attached as Exhibit 2 to HSF Plan.

frequently give rise to more than a single cause of action. . . . While [a prior judgment] precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case." *Id.*, at 328.[12]

As the Second Circuit held in *Securities and Exchange Comm'n v. First Jersey Securities, Inc.*, 101 F.3d 1450 (2d Cir. 1996): "If the second litigation involved different transactions, there generally is no claim preclusion." *Id.*, at 1464. The court held that the SEC was free to bring an administrative complaint charging a brokerage firm with defrauding customers in 1982-1985, even though an action based on the same kind of fraud by the same firm between 1975 and 1979 had been settled in 1984. The court held: "At the time the SEC filed its charges and throughout the period of the hearing, the transactions at issue here had not yet occurred." *Id.*, at 1464.

Similarly, in *Prime Management Co. v. Steinegger*, 904 F.2d 811 (2d Cir. 1990), the Second Circuit held: "Whether or not the first judgment will have preclusive effect depends in part on whether the same transaction or connected series of transactions is at issue, whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first." *Id.*, at 816, citing *N.L.R.B. v. United Technologies Corp.*, 706 F.2d 1254, 1260 (2d Cir. 1983)(the circumstance that several operative facts may be common to successive actions between the same parties does not mean that the claim asserted in the second is the same claim that was litigated in the first and that litigation of the second is therefore precluded by judgment in the first.").

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[12] Accordingly, *Allen v. McCurry* is completely inapplicable on its face. Moreover, one of the principles recognized in *Allen v. McCurry*, that collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a full and fair opportunity to litigate the issue in the earlier case, would be severely tested if this issue is pressed. *See, e.g.* Affidavit of David Mermelstein filed in support of HSF's Response on Issue of Standing; and *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2d Cir. 249), *aff'd in relevant part* 123 S.Ct. 2161 (2003).

HSF's objections to the Special Master's second and third allocation recommendations, i.e. of the $45 million in "interest and tax savings" in 2002 and the $60 million in 2003, involve a different set of facts than the original allocation. These subsequent allocations of Looted Assets funds that were not part of the initial settlement and final approval order are no different analytically than the successive claims which the Supreme Court in *Lawlor* and its progeny held were not barred by *res judicata*.[13]

Clearly, the propriety of subsequent allocations in this case depends on different evidence than the facts applicable to the initial allocation. As one example, one of the issues raised by HSF is that the Special Master's 2002 and 2003 "interim" recommendations are themselves in conflict with the Court's prior Order approving the initial allocation recommendation, making the preclusion argument completely inapplicable. HSF contends that the subsequent allocation recommendations were not preceded by the accounting required of program expenditures, nor were the additional expenditures specifically requested or supported by the documentation or justification required under the Court's Order. *See* HSF's Motion for Reconsideration, October 9, 2002, citing the Special Master's Initial Allocation Report at 136-137. ("The Special Master's recommendation to dedicate additional funds to the existing programs in future years gave no substantive reasons for adding more resources to programs that are currently receiving funds. . . . In the absence of any

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[13] Further, in *First Jersey Securities*, the Second Circuit held that the extent to which claims involving the latter offenses were foreclosed by the 1984 settlement "depends on the intent of the parties to the settlement." *Id.*, at 1465. By analogy, it is clear that the HSF Survivor leaders did not intend to foreclose the ability to challenge future allocations when they withdrew their appeals in May 2001. The text of Mr. Neuborne's May 15, 2001 letter negates any inference to that effect, and HSF's actions since that time consistently reflect that the U.S. Survivors have maintained the right to challenge subsequent allocations by objection or appeal if necessary. *See* HSF Motion for Reconsideration, October 9, 2002; and HSF Motion for Reconsideration of Court's Memorandum and Order of November 17, 2003.

reports containing the required information as to the use of the funds earmarked in the initial allocation, and in the absence of any effort by the Special Master to document additional need in those programs that received the bulk of the initial funding, the Court's decision to increase the funds to these programs is . . . manifest error . . . ."). *See also* HSF Response to Special Master's Interim Recommendation, October 31, 2003, at 3-10.

Therefore, Mr. Neuborne's preclusion argument ignores not only the inherently distinct nature of the subsequent allocations, but the very reason the Court imposed a standard initially on future allocations. What is the purpose of the Court's setting a standard to govern future allocations if the affected class members, including those who withdrew their appeal of the initial allocation in reliance on a fair allocation of future distributions, including the *existence of a standard for such distributions*, can not object and appeal if necessary due to the failure of those standards to be followed?

b. The Second Circuit did not address the propriety of the initial allocation formula.

The factual premise of Mr. Neuborne's preclusion argument, that the "Special Master's proposed allocation formula . . . has already been upheld by the Second Circuit in connection with its approval of the original plan of allocation and distribution," is incorrect. *See id.*, at 7, 7-8.[14] The Second Circuit's opinion approving this Court's initial allocation plan, after the HSF Survivors and Thomas Weiss, M.D. withdrew their appeals, is *silent* on the question of the allocation of the funds within the Looted Assets class. The reason is clear: no party whose appeals proceeded to

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[14] Mr. Neuborne's argument that the Special Master's Looted Assets allocation forumula has already been upheld by the Second Circuit is repeated several times in the Supplemental Declaration, at pages 7, 7-8, 7 n.9, 9 n.11, and 12. HSF reserves the right to address the *res judicata* or collateral estoppel issue in greater depth if necessary at a future date.

decision in the Second Circuit challenged the allocation of the Looted Assets funds. Consequently, the argument that subsequent challenges to the formula (or subsequent allocations utilizing the same formula are precluded by the Second Circuit decision is unavailing. *See National Labor Relations Bd. v. United Techcnologies Corp*, 706 F.2d 1254, 1250 (2d Cir. 1986) (collateral estoppel or issue preclusion only prevents "relitigation of an issue of law or fact that was (a) raised, (b) litigated, and (c) actually decided by a judgment in a prior proceeding between the parties, if the determination of the issue was essential to the judgment."); *See also Prime Management Co. v. Steinegger*, 904 F.2d 811, 816 (2d Cir. 1990)(though plaintiff's methodology in calculating the percentage rents was raised in earlier case for accounting, where it did not appear that the issue was actually litigated and it was clear that it was not actually decided, there was no merit in defendant's argument that subsequent counterclaim raising the issue was barred by collateral estoppel).

The only issues addressed in the Second Circuit appeal were raised by Abraham Friedman, Eliazar Bloshteyn, and Sofiya Bloshteyn. *In re Holocaust Victim Assets Litigation*, 2001 WL 868507 (2d Cir. 2001). Appellant Friedman "objected to the appointment of the Conference on Jewish Material Claims Against Germany, Inc. (Claims Conference) as one of the organizations that will process claims and distribute funds under the settlement." *Id.*, at *1. The claims process and distribution process about which Friedman complained, hence those before the Second Circuit, concerned only slave labor and refugee claims. Mr. Neuborne's brief on behalf of appellees concedes as much:

> *This appeal raises a single issue*: Did the District Court abuse its discretion when it accepted the Special Master's carefully supported recommendation that the Conference on Jewish Material Claims against Germany (the "Claims Conference") act as the conduit for the distribution of funds to eligible members of the *Slave Labor* and *Refugee Classes*?

See Brief of Plaintiff-Appellee, at 1 (Emphases supplied). It continues: "Mr. Abraham Friedman, the appellant herein, objects to the choice of the Claims Conference as the *vehicle to distribute Swiss Slave Labor I funds to Jewish beneficiaries*, claiming that its policies and direction are insufficiently sensitive to the needs of Holocaust survivors." *Id.* (Emphasis supplied).

Mr. Neuborne argued before the Second Circuit that Mr. Friedman had no real basis to object to the Claims Conference's handling of the slave labor payments because that entity had also been given the responsibility of distributing slave labor payments from the German Foundation Agreement: "It is difficult to understand how the receipt of Slave Labor I payments from the Claims Conference, as opposed to receiving the identical payments from the conduit of his choice, imposes any cognizable injury-in-fact on Mr. Friedman. Accordingly, this appeal should be dismissed for want of Article III standing." *Id.*, at 2-3. The allocation issue was not raised or addressed in connection with Friedman's appeal.

Further, the Second Circuit decision makes it clear that the other appellants did not challenge the allocation of the Looted Assets class funds:

> Appellants Eliazar and Sofiya Bloshteyn object to (1) the inadequacy of the total settlement amount of $1.25 billion; (2) the allocation of $800 million to the "Deposited Assets" class, including adjustments for interest, fees, and inflation; (3) the application of the doctrine of cy pres to resolve the claims of the "Looted Assets" class, rather than require – or permit – claimants to put forth documentary evidence of their actual losses; and (4) the asserted limitation of "applications" to 560,000."

2001 WL 868507 at **2. Although the Second Circuit approved the Court's decision in principle to utilize a *cy pres* remedy for the Looted Assets Class, and to favor the Deposited Assets class in the allocation of the initial settlement total, HSF is not challenging those decisions here. But it is clear that neither the Second Circuit's opinion, nor the briefs of any party, addressed the allocation formula

for the Looted Assets class.[15] It is simply not accurate for Mr. Neuborne to suggest, as he does repeatedly, that the specific formula chosen by the Special Master and approved by this Court in the initial allocation was approved or even reviewed by the Court of Appeals, much less necessary to the decision as required to be preclusive.[16]

c. Mr. Neuborne previously acknowledged HSF's right to challenge allocations after the appeals were withdrawn.

Mr. Neuborne's new position is contrary to his previous positions which acknowledged HSF's right to appeal the Looted Assets allocations at a subsequent date. For example, in October 2002, after HSF moved for reconsideration of the Court's September 25, 2002 Order approving the allocation of the $45 million in looted assets class funds Mr. Neuborne wrote: "[I]f Mr. Dubbin wishes to pursue an appeal to the Second Circuit challenging the plan of allocation and distribution as unfair to Holocaust survivors residing in the United States, I am anxious to begin the appeals process immediately in order to minimize further delays in distributions." Letter from Burt Neuborne, Esquire, to the Honorable Edward R. Korman, October 10, 2002. Exhibit 2.[17]

3. Mr. Neuborne's Declarations Err on Several Issues.

This section will briefly address some of the misstatements of Mr. Neuborne's that, while not directly related to any of the above issues, give an inaccurate picture of this case and need to be corrected so they do not form the basis for a decision by the Court.

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[15] The briefs of the parties are available at 2001 WL 868507.

[16] Moreover, a decision is not binding on a party who was not a litigant in the earlier case. *Id.*

[17] Mr. Neuborne explicitly recognized HSF's ability to appeal in several private discussions as well.

a. Administration of Looted Assets Funds.

Contrary to Mr. Neuborne's claim, HSF Does Not Seek to Administer Looted Assets Funds. In Paragraph 2 of his Supplemental Declaration, Mr. Neuborne contends that "in an earlier filing, Mr. Dubbin urged that settlement funds earmarked for survivors residing in United States be held in escrow and administered by the HSF-USA, rather than by the Claims Conference." Although Mr. Neuborne does not identify the filing to which he refers, this statement is untrue.

On September 23, 2002, HSF submitted the Proposal for Improved Services for Holocaust Survivors in the United States, prepared by the Association of Jewish Family and Children's Services Agencies (AFJCA). HSF adopted that Proposal as a framework for allocations of Looted Assets Class Funds for the benefit of Survivors in the United States. That proposal provides, at pages 6-7:

> Court Supervised Oversight
>
> It is vital that an improved, responsive oversight and allocations mechanism be established under Court supervision to ensure comprehensiveness and national uniformity. While it is possible that this system could be provided within the existing framework, it is also possible that a different mechanism needs to be created. AJFCA is prepared to assist in the creation of this improved, responsive mechanism. No matter how the program is administered, the system must be responsible to audit both the funds and services provided by the agencies, under the strictest of professional guidelines. *The direction and oversight of the system should by provided by a Steering Committee composed of a representative from AJFCA, two representatives from service delivery agencies, three representatives from the Federation system, a representative from the Claims Conference, and three representatives from the survivor community. This group, bringing their various skills and expertise to the table, will be in an excellent position to make sure that services get to those most in need most rapidly, efficiently, professionally, and flexibly.*

This proposed arrangement was confirmed in HSF's Motion for Immediate Interim

Distribution of Swiss Settlement Proceeds filed September 10, 2003. In footnote 1, HSF states: "In accordance with the Association of Jewish Family and Children's Services Agencies (AJFCA) Proposal HSF submitted in September 2002, HSF requests that the funds be set aside in trust to be spent in accordance with the decisions of a committee of HSF Survivors and representatives appointed by the AJFCA and the UJC-Federations, as well as a representative of the Conference on Jewish Material Claims Against Germany (Claims Conference), and the Court." It is reiterated in HSF's current Plan.

HSF's statement concludes: "The use of such funds would be guided by an assessment of current need, and the likelihood and timing of funds from other sources such as the Claims Conference (Successor Organization funds), the International Commission on Holocaust Era Insurance Claims (ICHEIC) "humanitarian funds," and the Final Secondary Distribution in this case." *Id.* Consequently, Mr. Neuborne's straw man arguments premised on the claim that HSF is seeking to have a procedure established that is contrary to Second Circuit law under *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 145 (2d Cir. 1987), is incorrect and should be disregarded.

b. Analysis of Conformity of Allocations Recommendations with Existing Orders

Mr. Neuborne characterizes the issues raised by HSF in its Response to the Special Master's Interim Recommendation as charging the American Joint Distribution Committee with "improperly using" settlement funds. This is another false claim. HSF contends that the allocations of the $45 million in interest and tax savings, and the $60 million recently approved by the Court, do not adhere to the provisions of the Court's Order adopting the Special Master's initial allocation plan, with the reporting requirements and requirements for justifying additional allocations. HSF's Response called for *more scrutiny and accountability in those processes*: "[B]efore more funds are allocated to the JDC for these programs, it would seem that a great deal more information about the

entire FSU program is required." Response, at 9. HSF stands by this argument. As stated in HSF's Response, the remedy is not

Such scrutiny and accountability would, one would ordinarily believe, be undertaken by Mr. Neuborne in his role as "lead plaintiffs' counsel" and by the Special Master himself. The automatic acceptance of proposed additional allocations without any effort to determine the conformity with the Court's orders, on which all class members relied including the HSF Survivors who withdrew their appeals, is not appropriate in the allocation process. Neither is the response of Mr. Neuborne, which was to attack the Survivor leaders who are simply attempting to secure a fair, proportional allocation for their fellows in need.[18]

Conclusion

For the foregoing reasons, the Holocaust Survivors Foundation, USA, Inc., on behalf of thousands of Holocaust Survivors and Nazi victims who are Looted Assets class members in the United States, urges this Court to allocate sufficient funds for the needs of Survivors and Nazi victims in the United States, based on the United States' proportion of Survivors and Nazi victims worldwide.

Respectfully submitted,

DUBBIN & KRAVETZ, LLP
220 Alhambra Circle, Suite 400
Coral Gables, Florida 33134
Telephone: (305) 357-9004

[18] There are several other blatant errors, such as Mr. Neuborne's familiar and inaccurate characterization of HSF's actions as causing delays in distributions, but HSF will resist addressing each and every misstatement, in the interest of focusing on the merits and the hope that the Court will find that the current proposals, and the currently available funds, warrant help for U.S. Survivors in need, today.

By: _____
Samuel J. Dubbin, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum of Law in Support of the Holocaust Survivors Foundation-USA, Inc. Plan for Providing Assistance to U.S. Survivors was furnished by mail to the Holocaust Victims Asset Litigation, P.O. Box 8300, San Francisco, CA 94128-8300; Burt Neuborne, Esquire, 40 Washington Square South, Room 307, New York, New York, 10012, and Special Master Judah Gribetz, 399 Park Avenue, New York, New York, 10022, this 30th day of January, 2004, and other counsel on the attached service list on February 2, 2004.

By: _____
Samuel J. Dubbin, P.A.

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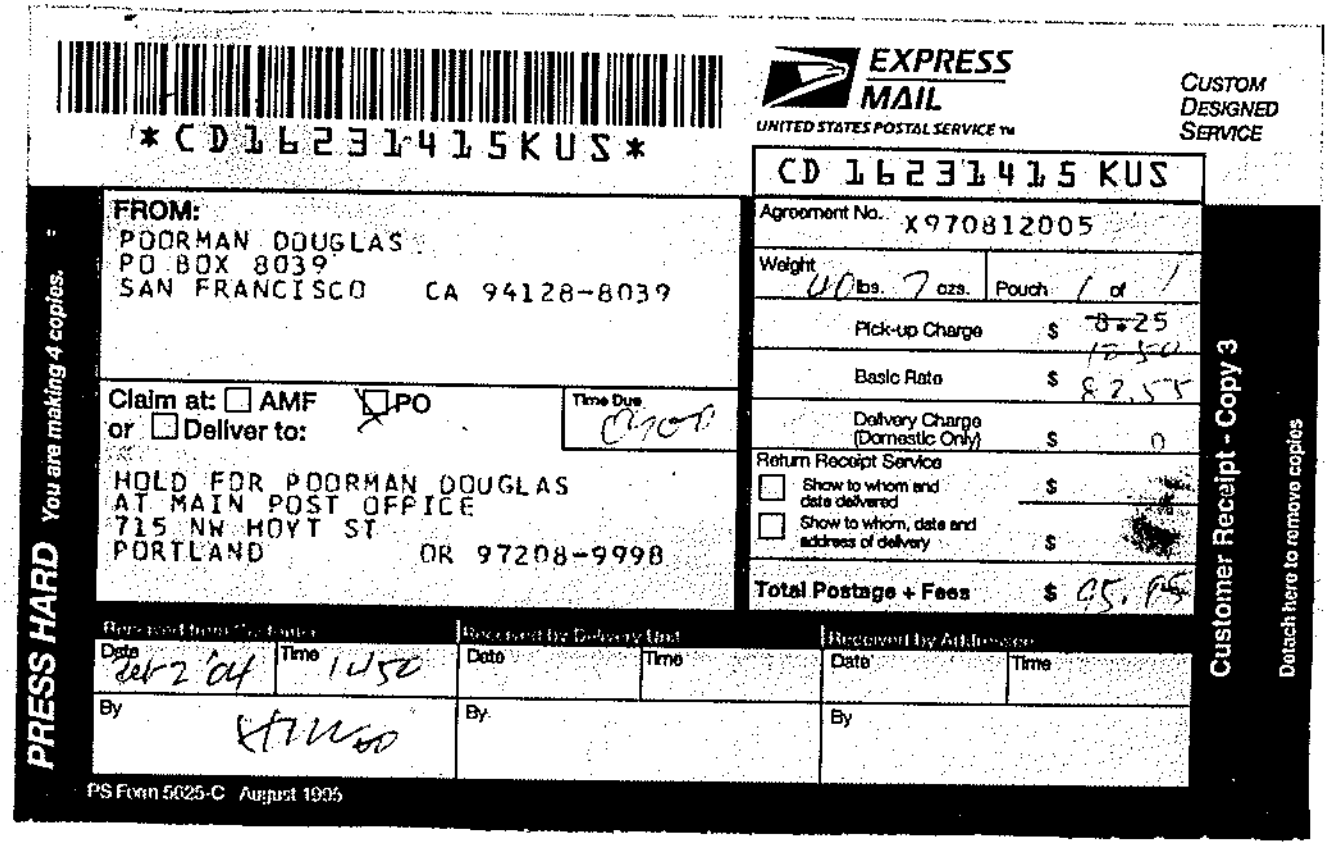

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