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2685.001

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January 15, 2004

Hon. Edward R. Korman
Special Master Judah Gribetz
Holocaust Victim Assets Litigation
P.O. Box 8300
San Francisco, California 94128-8300

Re: In re: Holocaust Victim Assets Litigation

Dear Judge Korman and Mr. Gribetz:

I am writing to express my concerns with regard to the proposed redistribution of funds allocated to the Deposited Assets subclass.

Although I have not previously participated in this litigation, I have been actively involved in various Holocaust restitution-related matters, including my role as lead counsel in *Zeisl v. Neuborne (In re: Austrian and German Bank Holocaust Litig)*, 317 F.3d 91 (2d Cir. 2003) and *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002), *amended* 327 F.3d 1246, *cert. granted* 124 S.Ct. 46 (Sep. 30, 2003), and my participation at the invitation of the State Department in the negotiation of the Austrian General Settlement Fund.

I have submitted looted asset claims to the Claims Resolution Tribunal on behalf of my mother Barbara Zeisl Schoenberg claiming accounts of her great-uncle Dr. Ernst Jellinek, and on behalf of my client Maria Altmann claiming deposited assets of her uncle Ferdinand Bloch-Bauer.

I am very concerned about the proposed redistribution of funds from the Deposited Assets subclass at this stage. Although I understand the desire to use seemingly available funds to assist Holocaust survivors, I feel there are very strong legal and moral grounds that advise a more cautious approach.

According to the information available on its website as of January 5, 2004, the CRT has received 33,496 claims related to deposited assets. Of those, approximately 12,000 match published account holder names. To date, just 1,031 awards have been

certified by the CRT and approved by the Court. The total amount awarded to date is approximately $123 million.

I can speak only from my own experience, but it has been extremely difficult to obtain information about pending claims form the CRT. The claims I submitted very early on for my mother and for Maria Altmann have both not been resolved, as far as I know. My mother's claim concerns her great-uncle Dr. Ernst Jellinek of Vienna, Austria. His name appeared already in the very first list of accounts as the owner of four accounts. I have attempted to discover the status of this claim, but without much success. Attached is an e-mail containing my correspondence with the CRT. Mrs. Altmann has also not received any communication from the CRT. Although her uncle was not identified as account-holder on the CRT website, we submitted documentation proving that the Schweizerische Bankgesellschaft Zürich held 7,215 shares of the Österreichische Zuckerindustriegesellschaft A.G. for Mr. Bloch-Bauer (the President of the company) and that these shares had been dutifully transferred to the aryanizer of that company as a result of discriminatory judgments obtained against Mr. Bloch-Bauer when he fled from Vienna in 1938. Although I obviously cannot predict whether either of these claims will be considered valid by the CRT, I can assure you that they are well-documented and not frivolous. And they are still pending.

I can only presume from this limited experience that there must be many, many other potentially valid claims still awaiting adjudication by the CRT. As the example of Mrs. Altmann's claim demonstrates, the fact that a claim does not match a published account name is not necessarily dispositive. Only 1,031 of the 33,496 claims have been adjudicated. Those claimants whom the CRT intends to reject have not received any notification. They have not been informed of the grounds of the denial. Nor have they been given an opportunity to submit further information or appeal the denial of their claims. In my view, it may be too early for the CRT to assess "the probable existence and amount of unclaimed funds, if any, that will be available for possible re-allocation and distribution."

As the Court and Special Master are aware, the decision to allocate the lion's share of the settlement proceeds to claims for Deposited Assets was met with consternation by those who had hoped that the settlement proceeds could be used for humanitarian ends. But the rationale of the Court's decision has not changed. As the Court concluded, the deposited asset claims were the most substantial of the claims asserted in the lawsuit and therefore those claims deserved a larger allocation. The Second Circuit agreed in *Friedman v. Union Bank of Switzerland (In re: Holocaust Victim Asset Litig.)*, 14 Fed Appx. 132 (2001):

> The existence and estimated value of the claimed deposit accounts was established by extensive forensic accounting. In addition, these claims are based on well-established legal principles, have the ability of being proved

> with concrete documentation, and are readily valuated in terms of time and inflation. By contrast, the claims of the other four classes are based on novel and untested legal theories of liability, would have been very difficult to prove at trial, and will be very difficult to accurately valuate. Any allocation of a settlement of this magnitude and comprising such different types of claims must be based, at least in part, on the comparative strengths and weaknesses of the asserted legal claims.

Although the district court is afforded great discretion in allocating settlement proceeds, its discretion to revisit and substantially alter prior orders that have been approved by the Court of Appeals is not as great. See FRCP Rule 59(e) and 60(b). Considerable caution should be exercised.

Although I am certain that those urging reallocation of the deposited asset fund are well-intentioned, there is a sort of Robin Hood character to their goals. They seek to take money that was held by once wealthy Jews and redistribute it to poor and needy Holocaust survivors. While we all would certainly applaud the goal, the method leaves something to be desired.

One must remember that the formerly wealthy Jewish families whose deposited assets were taken were also victims of the Nazis. In many cases, they never recovered the wealth that they had before the war. Mrs. Altmann, for example, grew up in the lap of luxury in Vienna but after the age of 22 had to rebuild her life from scratch. At age 87 she still sells dresses from her home to earn money. At this stage, the valid claimants to the deposited asset fund should not be presumed to be any more wealthy than other Holocaust victim family members.

My suggestion to the Court and the Special Master would be as follows:

1. Direct the CRT to take measures to expedite its claims processing. In other words, use the expected "excess" to hire more staff and speed up the resolution of these claims.

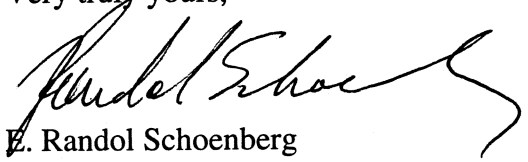
2. Delay any *cy pres* distribution from the deposited asset fund until all, or nearly all, of the claims have been finally adjudicated, including administrative appeals. Most of the claimants have heard nothing from the CRT since they filed their claims several years ago. It is possible that in response to rejection notices, they will be able to submit further information that might lead to a different assessment. Claimants should not be barred from providing such supplemental information in support of their claims. The first order of priority for the deposited asset fund should be resolving the 33,496 claims made to that fund. Only 1,031 have been resolved to date.

3. Consider a supplemental allocation to claimants with valid claims to account for the punitive damage component of the claims. The lawsuits claimed punitive damages based on allegations of reprehensible conduct by the Swiss banks in denying the existence of accounts for decades. The settlement amount no doubt reflected the defendants' concern that they might be liable for such damages. However, the allocation formula so far provides only the present value of the deposited assets without any punitive damage component. If there are excess funds after paying the present value of the deposited assets, the claimants should receive a supplemental punitive damage award.

4. Ask the CRT to reconsider its "average" payout. When there is a valid claim but no existing evidence of the amount of assets that had been deposited, the CRT uses an "average" deposit amount to determine the award to the claimant. I have not done a complete analysis, but it does appear that the "average" award is far less than the average of the awards for which the deposited amount is known. Perhaps the "average" is calculated from a pool with domestic bank customers and does not reflect the more substantial funds of those foreign customers who make up the vast majority of the deposited asset claims. It may be necessary to recalculate and make additional payments to those receiving "average" awards.

5. The allocation of the "excess" after taking these measures is extremely complicated and I am sure that you will receive dozens of well-meaning suggestions. I wish you much luck in deciding among them. My primary concern is that the deposited asset claimants be taken care of first and that their claims be handled appropriately.

Very truly yours,



E. Randol Schoenberg

Enclosure