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WORLD JEWISH RESTITUTION ORGANIZATION

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FRAME WORK FOR ALLOCATION PLAN OF FUNDS RECEIVED IN GLOBAL SETTLEMENT WITH THE SWISS BANKS & OTHERS PROPOSAL TO THE COURT

Final
October 1999

Background Notes

1. The first priority is those persons with specific claims as described in the Settlement Agreement (category I).

2. The following plan relates to Jewish victims of the Holocaust only. No proposal by W.J.R.O. is made regarding non-Jewish victims.

3. There shall be consultation with the Government of Israel regarding the plan and its goals.

Allocation Plan

I. Claims

Those persons awarded funds by the claims resolution procedure established by Independent Committee of Eminent Persons (the Volker process) shall be paid directly by the banks and this sum shall be deducted from the overall settlement amount (in accordance with the terms of the settlement). Persons with other claims approved by the court should also be treated as a priority.

II. Victims of the Holocaust – Direct Payments

Direct cash payments should be made on the basis of need to:
Jewish victims of the Holocaust who lived in a country at a time when it was:

under Nazi regime,
under Nazi occupation, or
under the regime of Nazi collaborators

Members (alphabetical order): Agudath Israel World Organization; American Gathering/Federation of Jewish Holocaust Survivors; American Jewish Joint Distribution Committee; Bnai Brith International; Centre of Organizations of Holocaust Survivors in Israel; Conference of Jewish Material Claims Against Germany; EJC/ECJC - Joint European Delegation; Jewish Agency for Israel; World Jewish Congress; World Zionist Organization

The direct cash payment program should be implemented by the World Jewish Restitution Organization by utilizing the existing mechanism established for payments worldwide from the Swiss Fund for Needy Victims of the Holocaust.

III. Victims of the Holocaust – Services

Services (food, home care, etc.) – should be provided to:

Jewish victims of the Holocaust who lived in a country at a time when it was:

under Nazi regime,
under Nazi occupation, or
under the regime of Nazi collaborators

as well as those who fled persecution.

The services project should be implemented during the remaining years of the lifetime of the victims of the Holocaust by the World Jewish Restitution Organization, by utilizing the existing mechanism established and operated by the Claims Conference for making grants for social welfare programs for Jewish Nazi victims worldwide.

IV. In the Memory of the Holocaust

Allocations should be made, over the long term for:

- Programs for the commemoration of the Holocaust

- Research related to the Holocaust

- Education imbuing values of democracy and tolerance

- Teaching Jewish culture and heritage

- Continuation of Jewish Life and Culture ensuring Jewish Survival

The project should be implemented by a special mechanism to be established for this purpose.

Proposed Allocation

The allocation shall be as follows:

Category II: Victims of the Holocaust – Direct Payments	55%
Category III: Victims of the Holocaust – Services	25 %
Category IV: In Memory of the Holocaust	20%

Funds unspent from Category II should be allocated to Category IV.

F63229

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

IN RE: HOLOCAUST VICTIMS' ASSETS	:	**Master Docket No. CV-96-4849 (EKJ)**

THE WORLD JEWISH RESTITUTION ORGANIZATION'S BRIEF IN SUPPORT OF ITS PROPOSED PLAN TO ALLOCATE AND DISTRIBUTE SETTLEMENT FUNDS

On March 31, 1999, the Court appointed Judah Gribetz "as a Special Master to develop a proposed plan of allocation and distribution by which the proceeds of the settlement [in the Holocaust/Swiss Banks litigation] can be allocated and distributed among the class members in a fair and equitable manner." *Referral to Special Master for Development of Plan to Allocate and Distribute Settlement Proceeds* at 2. Recognizing that "the development of a proposed Plan of Allocation and Distribution may be a complicated undertaking," the Court further empowered Special Master Gribetz "to conduct hearings and to interview or otherwise communicate with members of the Settlement Classes or their representatives concerning the factors to be included in the proposed Plan of Allocation and Distribution," and to "discuss any aspect of the allocation and distribution issues." *Id.* at 3.

On November 22, 1999, the World Jewish Restitution Organization ["WJRO"] submitted its proposed Plan of Allocation and Distribution (attached as Exhibit A) for Special Master Gribetz's consideration. It now submits this detailed brief in support of such plan, and extends an invitation to Special Master Gribetz to continue his dialogue with the WJRO's officers, members and counsel regarding allocation and distribution issues.

I. HISTORICAL PERSPECTIVE

A. Early and Ongoing Restitution and Compensation Efforts with Germany and Austria – the Jewish Restitution Successor Organization and the Conference on Jewish Material Claims Against Germany

In the immediate aftermath of World War II, as the world was learning the horrors of the Nazi's "Final Solution to the Jewish Question," Jewish organizations worldwide turned to the victorious Allies – primarily the United States – to secure restitution of Jewish property in Germany. As a result of such efforts, in November, 1947, the U.S. Military Government ["USMG"] in Germany introduced the first property restitution legislation in that country – USMG Law 59, which addressed the restitution of identifiable property in the American Zone of Occupation. In recognition of the fact that ordinary precepts of international law could not be applied in dealing with the consequences of this unprecedented tragedy, Law 59 espoused the principle that heirless and unclaimed property of Nazi victims should not become the property of the successor state of the Third Reich. Consequently, Law 59 was fashioned to provide for the designation of a successor organization to recover heirless and unclaimed property in the American Zone of Occupation.[1]

Shortly after USMG Law 59 was enacted, influential Jewish organizations established the Jewish Restitution Successor Organization ["JRSO"] under the laws of the State of New York. In 1948, the JRSO was designated by the USMG as the successor organization contemplated by Law 59.[2] Thereafter, when the German Federal Republic was

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[1] Similar laws were enacted by the British and French Military Governments for their respective occupation zones, as well as for what became West Berlin.

[2] In 1955, President Eisenhower designated the JRSO – under Public Law No. 626 – the successor organization for heirless and unclaimed properties of Jewish victims of Nazi persecution which were seized during World War II by the Office of Alien Property.

formally constituted, principles of the Allied restitution laws were incorporated into the German national law.

Recognizing the significance of post-war Jewish issues, German Chancellor Konrad Adenauer invited the Government of Israel and World Jewry to enter into negotiations with Germany, in September, 1951, for material recompense. Accordingly, twenty-three national and international Jewish organizations established the Conference on Jewish Material Claims Against Germany ["Claims Conference"] in October, 1951, to represent World Jewry in the interest of Holocaust survivors.[3] At the conclusion of six months of negotiations between the Claims Conference and the German Federal Republic, Protocol No. 1 was signed on September 10, 1952, providing for the enactment of restitution and compensation legislation, and providing funds for relief and resettlement of Holocaust survivors and reconstruction of Jewish communities devastated by the National Socialist regime. *See* Nana Sagi, German Reparations – A History of the Negotiations (1980); Ronald Zweig, German Reparations and the Jewish World – A History of the Claims Conference (1987).

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[3] The principal objectives of the Claims Conference were (and are):

- to gain indemnification for injuries inflicted upon individuals of Nazi persecution;
- to secure restitution of assets confiscated by the Nazis;
- to obtain funds for the relief, rehabilitation and resettlement of Jewish victims of Nazi persecution;
- to aid in rebuilding Jewish communities which Nazi persecution had devastated; and
- to foster commemoration, research, documentation and education of the Holocaust.

Subsequent to the execution of Protocol No. 1, the Claims Conference continued to negotiate with the German government for amendments to the various legislative commitments contained therein, and to monitor the implementation of the various compensation and restitution laws. By the end of 1998, the German Federal Republic had expended nearly DM 118 billion in satisfaction of claims under the laws negotiated by the Claims Conference.

Continuing negotiations between the Claims Conference and the German Federal Republic resulted in a 1980 agreement for the establishment of a special hardship fund, to be administered by the Claims Conference, which primarily provides compensation to Holocaust survivors who emigrated from Eastern Europe and the Soviet Union after the expiration of the filing periods under the original German Federal Indemnification Law.[4] After the Berlin Wall fell in 1989, and East Germany elected its first truly democratic parliament, the Claims Conference entered into negotiations with the German Democratic Republic for compensation and restitution legislation in East Germany. Such negotiations became moot, however, when East and West Germany united in 1990.

Not to be dissuaded, the Claims Conference initiated negotiations with the government of the united Germany, seeking additional compensation measures for the benefit of Holocaust survivors who received no or only minimal compensation in the past, and the enactment of property restitution legislation in the territory of the former German Democratic Republic (East Germany). As a result of those negotiations, and the strong support of the U.S. State Department, the unification agreement between the two Germanys contained an explicit commitment by the unified German Federal Government to:

> enter into agreements with the Claims Conference for additional fund arrangements in order to provide hardship

[4] To date, nearly 200,000 claimants have been paid from the fund.

> payments to persecutees who thus far received no or only minimal compensation according to the legislative provisions of the German Federal Republic.

Subsequent negotiations resulted in the establishment of the German "Article 2 Fund," which provides, *inter alia*, monthly pensions for survivors meeting the agreed upon eligibility criteria.[5] The Claims Conference also negotiated for the establishment of a fund providing pensions for Holocaust survivors residing in Central and Eastern Europe.

In 1990, the Claims Conference successfully negotiated the enactment of restitution laws for property located in the former German Democratic Republic (East Germany). As a result, original Jewish owners and their heirs have the right to file claims for misappropriated property. Furthermore, the Claims Conference was appointed as the successor organization for unclaimed or heirless individual property, and for the property of dissolved Jewish communities and organizations. The proceeds from the sale of these properties are being used for the benefit of Holocaust survivors.

The Claims Conference continues to represent the Jewish world in restitution negotiations with Germany and Austria.[6]

B. Restitution and Compensation Efforts with Other Nations – the World Jewish Restitution Organization

In 1992, the Claims Conference and seven of the most prominent Jewish organizations – the Jewish Agency for Israel [the "Jewish Agency"], the World Zionist Organization, the World Jewish Congress ["WJC"], the American Jewish Joint Distribution Committee [the "Joint"], B'nai Brith International, the American Gathering of Jewish

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[5] Between 1995 and 1997, the Claims Conference, which administers the fund, has paid out in excess of DM 750 million (approximately $450 million) to Holocaust survivors who meet the eligibility criteria.

[6] A detailed summary of the Claims Conference's Committee on Austria, and its work over the past five decades, is attached as Exhibit B.

Holocaust Survivors, and the Centre of Organizations of Holocaust Survivors in Israel, – in coordination with the Government of Israel,[7] established the World Jewish Restitution Organization, whose purpose is to:

> centralize and coordinate the efforts of the Members in their attempts to help recover Jewish assets which belonged to individuals, communities and organizations who became victims of National-Socialist rule and of the Holocaust, in all the countries where such assets are situated except Germany and Austria . . . and to arrange for compensation for personal suffering of Holocaust survivors residing in or originating from those countries.[8]

Since its founding, the WJRO has negotiated agreements and helped obtain legislation in the nations of Hungary, Romania and Poland. *See* Agreements and Legislation (attached as Exhibit E). Other governments to whom overtures have been made, or negotiations have been initiated and are on-going, include the Czech Republic, Slovakia, Hungary, Romania, Ukraine, Croatia, Estonia, Latvia and Lithuania, and Norway. *See* Report of the WJRO dated November 1, 1998 (attached as Exhibit F).

1. Early Negotiations with Switzerland

As previously noted, in the immediate aftermath of World War II, major Jewish organizations began working to secure restitution of Jewish property and compensation for Nazi victims. Such efforts extended beyond Germany to encompass other European nations, including Switzerland.

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[7] A copy of the Memorandum of Agreement Between the Government of Israel and the Jewish Restitution Organization Concerning the Restitution of Jewish Property in Eastern European Countries is attached as Exhibit C.

[8] A description of each of the WJRO's original constituent members, and the two organizations later joined the membership of the WJRO (Agudath Israel World Organization and the European Jewish Communities), is attached as Exhibit D.

Part I, Article 8 of the Final Act of the Paris Conference on Reparations of December 21, 1945,[9] and the Five Power Washington Accord of June 14, 1946, allocated heirless assets in neutral countries to the Intergovernmental Committee on Refugees and its successor organization, the International Refugee Organization, for the rehabilitation and resettlement of certain classes of non-repatriable victims of German action. Under the Five Power Accord, 95% of heirless assets were to be used for the rehabilitation and resettlement of Jewish victims, and 5% for non-Jewish victims. The 95% of heirless funds to be used for the benefit of Jewish victims were to be made available to "appropriate Jewish field organizations." Pursuant to the Letter of Instruction dated June 21, 1946, the Joint and the Jewish Agency were designated as the appropriate Jewish field organizations to receive the 95% of the heirless funds, as well as portions of other funds allocated for the benefit of Jewish victims.

Negotiations between the Swiss Banks and the WJC, the Jewish Agency and the Joint took place intermittently throughout the 1950's and 1960's. As a result, in 1962, the Swiss Parliament passed a law whereby a limited amount of funds was turned over by the

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[9] Under Part I, Article 8, which reflected the strong moral conviction that the assets of Nazi victims should not fall into the hands of neutral countries or be used to pay German debts to neutral countries, but rather should be handed over to Jewish people:

> All non-monetary gold [*i.e.*, gold wedding rings, tooth fillings, etc.] found by the Allied Armed Forces in Germany and in addition a sum not exceeding 25 million dollars shall be allocated for the rehabilitation and resettlement of non-repatriable victims of German action.
>
> The sum of 25 million dollars shall be met from a part of the proceeds of German assets in neutral countries which are available for reparation.
>
> Governments of neutral countries shall be requested to make available for this purpose (in addition to the sum of $25 million dollars) assets in such countries of victims of Nazi action who have since died and left no heirs.

banks to the Swiss Jewish community. These funds were allocated by the Joint and the Jewish Agency.

2. Revival of Swiss Negotiations

In early 1995, the specific issue of dormant Swiss bank accounts, containing unclaimed assets of Holocaust victims, came under public scrutiny when Jacques Picard, a young Swiss Jewish historian, published his book – *Switzerland and the Jews 1933-1945.* Based on newly released archives, Picard's book exposed the Swiss wartime government's anti-Semitism as much worse than previously thought.

Against this background, Swiss President Kaspar Villiger chose the fiftieth anniversary of the end of the war to exhort his countrymen that Switzerland must apologize to the Jewish community for turning away thousands of Jewish refugees from Nazi Germany before and during World War II. The story gained international attention when *Newsweek* and *The Wall Street Journal* published articles regarding Villiger's entreaty.

Thereafter, in early September, 1995 – during a WJRO-sponsored session on Jewish restitution at the European Parliament in Brussels – the WJRO released Israeli Prime Minister Yitzhak Rabin's letter authorizing WJRO president, Edgar Bronfman, to address the issue "of restitution of Jewish assets deposited in Switzerland, along with the issues of restitution of Jewish property . . . in countries of Central and Eastern Europe," on behalf of "the Jewish people and the State of Israel." Letter from Prime Minister Yitzhak Rabin to Edgar Bronfman dated September 10, 1995 (attached as Exhibit G). Such release was in preparation for, and to coincide with, the Swiss Bankers Association's [the "SBA"] (with whom the WJRO was in contact through the Swiss Jewish community) publication of its findings regarding dormant accounts, scheduled for September 12, 1995.

On September 14, 1995, WRJO/WJC President Bronfman, WJC Executive Secretary Dr. Israel Singer and Avrum Burg led a delegation that met with President Villiger

and the SBA to formally initiate discussions regarding restitution issues. Such discussions continued throughout the Fall of 1995. At a formal meeting between the WJRO and the SBA on December 12, 1995 in Bern, a six-point agenda was developed, regarding which both the WJRO and the SBA committed to negotiate in an environment of confidentiality and honesty. The SBA further committed to conduct another comprehensive survey among its members for all dormant accounts.

In early 1996, dissatisfied with the SBA's attitude toward on-going negotiations, Bronfman and Singer met with Senator Alfonse D'Amato, Chairman of the Senate Banking Committee, to solicit his and the Administration's support of Jewish/Swiss restitution issues.

Shortly thereafter, the Swiss announced the results of the SBA's 1996 dormant account survey, in violation of the December 12th understanding. Bronfman and Burg, speaking for the WJRO, immediately issued a statement condemning the Swiss' actions, which position was subsequently endorsed by the American Gathering of Jewish Holocaust Survivors and Congressman Benjamin Gillman, Chairman of the House International Relations Committee.

Things came to a head, however, on February 23, 1996, when Senator D'Amato announced that the Senate Banking Committee would hold a hearing on April 24 regarding Jewish assets held by Swiss banks. At the hearing, at which Holocaust survivors testified, Bronfman quoted President William J. Clinton:

> As the democracies of Europe and America seek to build a new and better world for the 21st century, we must confront and, as best we can, right the terrible injustices of the past. I thus support the efforts of the World Jewish Restitution Organization and the World Jewish Congress to help resolve the question of Jewish properties confiscated during and after the Second World War.

Letter from President Clinton to Edgar Bronfman dated September 8, 1995 (attached as Exhibit H). Following the hearing, Bronfman was received at the White House by President Clinton, who affirmed his support of the WJRO's efforts. Thereafter, in a letter dated May 2, 1996, the President reiterated the Administration's support:

> I would like to express my continuing support in the area of restitution of Jewish property. Our most recent conversation with regard to the return of Jewish assets in Swiss banks enjoys the support of this Administration, as I outlined to you during our conversation last week at the White House.

Letter from President Clinton to Edgar Bronfman dated May 2, 1996 (attached as Exhibit I).

Meanwhile, the WJRO began releasing documents and the results of its research regarding the scope of the WJRO's claims and their historical background. One document in particular – the "Lecca Document" – which had been found in the archives of the Rumanian Secret Service, confirmed the Swiss banks' destruction of wartime records and their holding of a so-called "Nazi account."

Under pressure in the aftermath of the D'Amato hearings, and as a result of the attendant public outcry, on May 2, 1996, the SBA and the WJRO jointly agreed to establish the Independent Committee of Eminent Persons [the "Volcker Commission"], which is charged with auditing dormant Swiss bank accounts. Thereafter, on May 8, in conjunction with the establishment of the Volcker Commission, the Swiss Government declared that it would enact legislation to positively address "the request addressed to it by the parties to the agreement to look into the question of whether Swiss financial institutions deposited looted assets in the period before, during and immediately after World War II."

As the Volcker Commission established its agenda and commenced its work, and the Swiss Government moved to enact the legislation necessary to allow the Commission to function effectively, WJRO research revealed that gold plundered by the Nazis, which had moved through Switzerland and other nations, was still stored in New York and London. In a

September, 1996 letter to President Clinton, Bronfman apprised him of the status of the negotiations with the Swiss, particularly with respect to the agreements reached with the SBA and the Swiss Government regarding the Volcker Commission. In separate letters to the Prime Ministers of Great Britain and France, Bronfman asked that the remaining six tons of Nazi gold stored in New York and London be released for the benefit of Holocaust survivors.

Subsequent discussions between representatives of the WJRO and U.S. government officials, including the White House staff, led to the establishment of an American governmental inter-agency task force, headed by Stuart Eizenstat – then Undersecretary of State and Special Envoy for Property Restitution in Central and Eastern Europe, now Deputy Secretary of the Treasury – and charged with investigating the seizure, retrieval and disposition of Nazi and other assets during and after World War II.

In the midst of this frenzy of activity initiated by the WJRO, the first class action lawsuit was filed. Yet, notwithstanding the filing of the lawsuit, the Swiss government responded to the creation of the Eizenstat task force by appointing their own special task force, headed by Thomas Borer, which was to supervise the country's investigation of the fate of the assets of the Nazis' victims.

Thereafter, in November, 1996, Congressman James Leach, the Chairman of the House Banking Committee, announced additional hearings on the question of Jewish assets deposited in Swiss banks. In his testimony at Congressman Leech's December 11 hearing, Bronfman noted that, although some minimal progress had been made, the WJRO was extremely disappointed by the delays caused by SBA's ombudsman process. He therefore called upon the Swiss to establish a humanitarian fund – as "a good-faith financial gesture" – until the issues were ultimately resolved. By the end of 1996, however, no firm commitments were forthcoming from the Swiss.

Furthermore, the new Swiss President, Jean-Pascal Delamuraz, balked at Bronfman's suggestion, calling the WJRO's demand for a humanitarian fund "nothing less than extortion and blackmail." Following public outcry, Delamuraz apologized to Bronfman for his comments, and the SBA announced the formation of the "Humanitarian Fund for the Victims of the Holocaust."

Meanwhile, H. Carl McCall, Comptroller of the State of New York, barred the use of Swiss banks for overnight investments on January 30, 1997. The ban remained in effect until February 26, when McCall announced that he was lifting the ban "[b]ased on the recommendation of the World Jewish Congress . . . ." With respect to the alleged Nazi gold, on February 4, 1997, the governments of the United States, Great Britain and France agreed to freeze the remaining gold stored in New York and London, as had been requested the previous September by Bronfman.

At approximately the same time, representatives of the WJRO met with Alan Hevesi, Comptroller of the City of New York, who undertook an informational mission to Switzerland, and ultimately established an *ad hoc* committee, composed of approximately 800 public finance officers from across the country, to assess and monitor progress by the Swiss banks toward resolving Holocaust-era claims.

On February 14, 1997, representatives of the WJRO, the Swiss, the Government of Israel and the United States government met to address outstanding issues. After the meeting, they announced agreement on the format for future negotiations, and the means by which the Swiss Humanitarian Fund would be distributed.

All the while, the U.S. government's inter-agency investigation into "Nazi Gold" and other assets continued, with full cooperation and support of the WJRO/WJC. Specifically, the WJRO delivered documents to, and privately briefed, the Eizenstat task force regarding the transfer of victims' gold to Switzerland. Such efforts gained further

support on February 18, 1997 when, in response to a formal request by WJC Vice President and Member of Parliament Greville Janner, Great Britain announced that it would support the holding of an international conference on Nazi gold. Eizenstat's report – which was published in May, 1997, and confirmed that tons of Nazi gold had come from Jewish victims and was transferred to Switzerland – was a historic turning point. So too was the International Nazi Gold Conference, held in London in December, 1997.

At another conference, on December 8, 1997 in New York, the Hevesi Committee discussed the burgeoning U.S. boycott against Swiss banks. At the request of WJRO President Bronfman, however, the Committee agreed to fix a moratorium on sanctions, until March 31, 1998, at which time the Committee would again review Swiss progress.

Yet only as the moratorium waned – on March 26, 1998 – did Union Bank of Switzerland ["UBS"], Swiss Bank Corporation and Credit Suisse issue their written pledge of "a global and moral conclusion through a global resolution of Holocaust era issues." On the basis of such letter to WJC Secretary General Israel Singer, which arrived mere minutes before the Hevesi Committee would have imposed sanctions, the WJRO recommended a ninety-day extension of the moratorium, until July 1, 1998. Thereafter, as UBS and the Swiss Bank sought to merge, then Undersecretary of State Eizenstat secured the pledge of a forthcoming, good faith offer from the Swiss banks, in exchange for the WJC's promise not to stand in the way of the proposed merger. However, no agreement had been reached by the July 1 deadline.

At that juncture, Bronfman informed the Hevesi Committee that the WJRO would not stand in the way of the Committee's decision to impose sanctions against the Swiss banks. Accordingly, the moratorium was lifted and the Committee developed a plan

for a rolling series of sanctions, to begin September 1, 1998. At that point, Eizenstat again stepped in.

In a series of meetings over approximately six weeks, Eizenstat entreated the Swiss, the WJRO and plaintiffs to resolve their differences. It was not until the parties met with Judge Korman, however, that the deadlock was broken and the $1.25 billion settlement was reached – on August 12, 1998, a mere nineteen days before the sanctions were to take effect.

Between August and January, 1999, the Swiss, plaintiffs' counsel and the WJRO attempted to negotiate a formal agreement memorializing the terms of the settlement. It was only in the wee hours of January 22, 1999, however, that an agreement was reached. At the same time, it was agreed that the WJRO would intervene as a party to the litigation, and would be a representative of the settlement classes. Thereafter, the WJRO's counsel was named one of Settlement Class Counsel.

Since January, the WJRO and its counsel have been actively involved in all aspects of the litigation. Perhaps most notable though, the WJRO was instrumental in identifying the need for and establishing supplemental outreach programs to assist Holocaust survivors to complete initial claims forms in the United States and Israel. It also organized and brought the supplemental fairness hearing – held in Jerusalem on December 14, 1999 – to fruition.

The WJRO now seeks to provide its views regarding allocation, not merely because of the key role it played in bring about a resolution of the Jewish/Swiss issue, but

also because it has the credentials,[10] experience,[11] and operational expertise[12] to present what is in the best interest of Holocaust survivors.

II. PROPOSED PLAN OF ALLOCATION AND DISTRIBUTION

The following proposed Plan of Allocation and Distribution, which relates to Jewish victims of the Holocaust only, has been developed by the WJRO in consultation with its constituent members and the Government of Israel. No proposal is made regarding non-Jewish victims.[13]

As the Special Master is well aware, the Settlement Classes are defined in the Settlement Agreement as:

> All persons or entities (and their heirs or successors) who were persecuted or targeted for persecution by the Nazi Regime during World War II because they were or were believed to be Jewish, Romani, Jehovah's Witness, homosexual, or physically or mentally handicapped ["Victims or Targets of Nazi Persecution"], and who:
>
> 1. had assets on deposit in any Swiss bank or investment fund prior to May 9, 1945, and have claims relating to those assets ["Deposited Assets Class"], or

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[10] The WJRO brings representation of the class (and, indeed, the wide Jewish world) to the table. The WJRO not only includes victims in its membership, but the universally representative bodies of Holocaust survivors in the United States and Israel as well. These two countries are home to the overwhelming number of survivors in the world.

[11] As previously discussed, the WJRO and its constituent members have, for more than fifty years, consistently negotiated and secured restitution and reparation agreements and legislation.

[12] For example, as detailed in the WJRO's December 15, 1999 report regarding distribution of the Swiss Fund for Needy Victims of the Holocaust (attached as Exhibit J), and the Claims Conference's *1998 Annual Report* (attached as Exhibit K), the constituent members of the WJRO have over fifty years' experience in allocating funds and implementing programs for Nazi victims.

[13] The WJRO would note, however, that its allocation plan could also be applied to Romani, Jehova's Witness, homosexual and handicapped class members.

2. have claims against Swiss entitles relating to assets that were looted or taken by the Nazi Regime, or relating to "Cloaked Assets," which are assets disguised by a Swiss entity for he benefit of an Axis company or person associated with the Nazi Regime, between 1933 and 1946 ["Looted Assets Class"], or

3. performed slave labor for companies that deposited the revenue or proceeds of that labor with Swiss entities ["Slave Labor Classes"]; or

4. unsuccessfully sought entry into Switzerland to avoid Nazi persecution or after gaining entry, were mistreated, and have related claims against any Swiss entity ["Refugee Class"].

See Settlement Agreement at ¶ 8.2. The reality of the situation, however, is that all eight million Jews who lived in Nazi-occupied Europe (including the occupied territory of the former Soviet Union), or their heirs, are members of at least one settlement class. Deposited Assets, Slave Labor and Refugee Claims aside, nearly every Jewish family possessed some highly liquid assets, most of which were looted and confiscated by the Nazis. Even those valuables that Jews were able to hide were eventually taken away in concentration camps, along with wedding rings and the gold teeth of those murdered. Nearly all of these assets were sent back to Germany, where they were concentrated and sold to Swiss entities. Because this process brought together assets that cannot be distinguished from one another, it is impossible to trace the movement of assets of an individual Jew to Switzerland.[14] It can be said, however, that it is most likely that some portion of every family's assets were included in the confiscated assets the Nazis sold to Switzerland.

The same can be said for the approximately 1.5 million Jews who were compelled to perform slave labor for the Third Reich. While it would be extremely difficult – if not impossible – to establish a direct link between an individual claimants and the profits

[14] A small exception would be artwork that can be traced through Swiss dealers.

that the company they slaved for placed in Swiss financial institutions, it is clear that all major German firms had financial dealings with Switzerland. Indeed, with the outbreak of World War II, Switzerland became the only major international outlet for financial arrangements for German enterprises. Consequently, it is equally clear that a portion – if not the majority – of German companies' profits were channeled into and through Switzerland.

That being the case, the WJRO advocates the following, equitable allocation of the $1.25 billion settlement, under *cy pres* principles.[15] The first priority is those persons with specific claims as described in the Settlement Agreement (Category A, below). The bulk of the remaining funds should be distributed as direct payments to victims of the Holocaust (55%), as social services to victims of the Holocaust (25%), and in memory of the Holocaust (20%).

A. Claims

Those persons awarded funds by the claims resolution procedure established by the Independent Committee of Eminent Persons [the "Volcker Commission"] shall be paid directly by the banks and this sum shall be deducted from the overall settlement amount (in accordance with the terms of the settlement). Persons with other claims approved by the Court should also be treated as a priority.

B. Victims of the Holocaust – Direct Payments

Direct cash payments should be made on the basis of need to Jewish victims of the Holocaust who lived in a country at a time when it was:

- under the Nazi regime;
- under Nazi occupation; or
- under the regime of Nazi collaborators.

[15] By advocating a *cy pres* allocation, the WJRO is not suggesting that individual claims be discounted or in any way undermined.

The direct cash payment program should be implemented by the WJRO, by utilizing the existing mechanism established for payments worldwide from the Swiss Fund for Needy Victims of the Holocaust. Any unspent funds from this category, moreover, should be allocated to Category D (see below).

C. Victims of the Holocaust – Social Services

Services (food, home care, etc.) should be provided to Jewish victims of the Holocaust who lived in a country at a time when it was:

- under the Nazi regime;
- under Nazi occupation; or
- under the regime of Nazi collaborators,

as well as those who fled persecution.

The services project should be implemented during the remaining years of the lifetime of the victims of the Holocaust by the WJRO, by utilizing the existing mechanism established and operated by the Claims Conference for making grants for social welfare programs for Jewish Nazi victims worldwide.

D. In the Memory of the Holocaust

Finally, allocations should be made, over the long term for:

- programs for the commemoration of the Holocaust;
- research related to the Holocaust;
- education imbuing values of democracy and tolerance;
- teaching Jewish culture and heritage; and
- continuation of Jewish life and culture, ensuring Jewish survival.

This project should be implemented by a special mechanism to be established for this purpose.[16]

III. LEGAL MEMORANDUM

It is axiomatic that there is absolutely no legal precedent for the momentous task assigned to the Special Master. Never before has a Court been challenged to distribute settlement funds to compensate the living, and at the same time to honor the memory of six million murdered, absent class members.

"District courts enjoy 'broad supervisory powers over the administration of class action settlements to allocate the proceeds among the claiming class members . . . equitably.'" *In re Agent Orange Product Liability Litigation*, 818 F.2d 179, 181 (2d Cir. 1987) (*quoting Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978)), *on remand* 689 F. Supp. 1250 (E.D.N.Y. 1988). Moreover, when a district court adopts a distribution scheme as being in the best interest of the class as a whole, a reviewing court may only disturb that scheme upon a showing of an abuse of discretion. *Id.* *See also* Federal Judicial Center, Manual for Complex Litigation § 30.42 (3d ed. 1995). Courts, furthermore, routinely approve class action settlements similar to the allocation scheme proposed by the WJRO – that is, settlements that provide for direct payments to certain categories of claimants, or for certain types of claims or injuries, but do not provide direct payments to other class members

[16] One such mechanism might be a humanitarian fund committee that is composed of qualified individuals, and is under court supervision. "[A] district court may, in order to maximize 'the beneficial impact of the settlement fund on the needs of the class,' set aside a portion of the settlement proceeds for programs designed to assist that class. However, . . . the district court must in such circumstances designate and supervise, perhaps through a special master, the specific programs that will consume the settlement proceeds." *Agent Orange*, 818 F.2d at 185.

or claimants. Perhaps the most well-known of these is the settlement and allocation plan approved in the *In re Agent Orange Product Liability Litigation.*[17]

"Agent Orange" was a notorious herbicide used by the United States during the Vietnam War to defoliate areas in order to reduce the military advantage afforded enemy forces by the jungle and to destroy enemy food supplies. *Agent Orange*, 818 F.2d at 148. In 1979, military veterans commenced a multi-national class action suit against the United States government and several major chemical companies for injuries suffered by members of the United States, Australian and New Zealand armed forces and their families as the result of the servicepersons' exposure to Agent Orange. *Id.* In *Agent Orange*, the Second Circuit upheld a plan of allocation that provided for direct payments (75% of the $180 million settlement) only to those class members who suffered from long-term total disabilities and to the surviving spouses or children of exposed veterans who had died – in other words, to those who suffered the greatest at the hands of the defendants. *Id.* at 158 & 184. The remaining 25% of the *Agent Orange* settlement funds were allocated to a class assistance foundation for the benefit of the class as a whole. *Id.* at 158-59.

As was the case in *Agent Orange*, here "a relatively modest settlement fund must be allocated equitably among a large and diverse group of claimants." *Id.* at 181-82. *See also Curtiss-Wright Corp. v. Helfand*, 687 F.2d 171, 174 (7th Cir. 1982) ("[T]he allocation of an inadequate fund among competing complainants is a traditional equitable function, using 'equity' to denote not a particular type of remedy, procedure, or jurisdiction, but a mode of judgment based on broad ethical principles rather than narrow rules."). For the

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[17] The *Agent Orange* allocation, which is structurally similar to the distribution plan proposed by the WJRO, was approved in *In re Agent Orange Product Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984) (preliminary memorandum and order on settlement approving settlement amount), 611 F. Supp. 1396 (E.D.N.Y. 1984) (order and judgment on distribution of settlement fund), *aff'd*, 818 F.2d 179 (2d Cir. 1987), *on remand*, 689 F. Supp. 1250 (E.D.N.Y. 1988) ["*Agent Orange*"].

same reasons that an equitable allocation was warranted in *Agent Orange*, the WJRO's allocation plan should be adopted and implemented here.

First, when a settlement fund is "not sufficient to satisfy the claimed losses of every class member," it is "equitable to limit payments to those with the most severe injuries," and "to give as much help as possible to individuals who, in general, are most in need of assistance." 818 F.2d at 158. Such is the case here. There is absolutely no question that Holocaust survivors, who are now elderly and frequently living on fixed incomes, have suffered direct, personal and severe injuries, and are typically in need of such assistance.

Second, minimizing claims process costs is a legitimate reason to limit direct compensation to certain class members. *Id.* It goes without saying that if every heir of every victim were eligible, in addition to survivors themselves, the claims process would be completely unmanageable. Rather than approximately 400,000 claimants, the court would have to verify the records of literally millions of claimants.

Finally, an allocation plan that allows for a streamlined claims process that "obviates the necessary for particularized proof . . . is a fair response to the particular difficulties . . . [a] class would have in gathering and presenting evidence of damages." *Id.* An allocation plan that provides for direct payments only to survivors who can attest to their personal wartime experiences obviates the need to determine what level of proof would be necessary in order to verify their claims.

Furthermore, "[a] district court may, in order to maximize 'the beneficial impact of the settlement fund on the needs of the class,' set aside a portion of the settlement proceeds for programs designed to assist the class." *Agent Orange*, 818 F.2d at 185. As a corollary, in a settlement context, when an aggregate class recovery cannot economically be distributed to individual class members, or when a balance of the recovery fund remains after individual distribution, the parties (subject to court approval) may agree that funds will be

distributed or expended for the indirect benefit of the class. 2 Newberg, Newberg On Class Actions § 11.20 at 11-26 (2d ed. 1992), *citing Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990). Such a distribution of funds (*i.e.*, distributing them for the "next best use," which indirectly benefits the class), has been approved under the equitable power of courts under the analogous *cy pres* doctrine. Also referred to as "fluid class recovery" in the class action context, the *cy pres* doctrine originated when courts sought to prevent the failure of charitable trusts. Newberg § 11.20 at 11-26, *citing* G. Bogart, The Law of Trusts and Trustees §§ 431-50 (2d ed. 1964); E. Fisch, *Cy Pres* Doctrine in the United States at 128 (1950).

Courts typically grant *cy pres* relief in three class action contexts: (1) when it is difficult or impracticable to compensate direct victims of the alleged wrongdoing; (2) when there is a strong correlation between the proposed use of the funds and the class benefited; and (3) when the proposed relief furthers the purposes of a relevant statute. This litigation is particularly well-suited to the application of the *cy pres* doctrine.

It is well-settled that fluid recovery and *cy pres* distributions should be used where, as here, there are large classes with relatively small individual claims, and identification, notification and administrative costs would consume a substantial portion of the class fund, or frustrate the goal of establishing and implementing an equitably sound use for the fund. In *Agent Orange*, the Second Circuit specifically held that the $180 million settlement fund, which was modest in light of the "large and diverse group of claimants," was particularly ill-suited to being distributed pursuant to "a conventional scheme for 'tort-based' recovery by individuals," and was better suited to alternative distribution mechanisms. 818 F. 2d at 181-82. It further noted that the trial judge could approve an allocation and distribution scheme governed by criteria "that are relatively easy and inexpensive to apply,"

rather than criteria that would resolve "trial-type issues of liability," and that would more directly link payments to particular proofs of injuries. *Id.* at 183.

Other courts are in accord. For example, in *Democratic Central Comm. v. Washington Metro. Area Transit Comm'n*, 84 F.3d 451 (D.C. Cir. 1996), the court of appeals upheld the use of a *cy pres* remedy (*i.e.*, transferring the settlement funds to the transit authority for the primary purpose of purchasing new buses), where the cost of notifying and distributing the twenty-five year old fund to a generation of overcharged passengers was prohibitive. Likewise, in *New York ex rel. Koppell v. Keds Corp.*, 1994 U.S. Dist. LEXIS 3362 (S.D.N.Y. 1994) (attached as Exhibit L), an antitrust case, the court ordered the plaintiff states to select charities to receive their share of the settlement proceeds, where locating and corresponding with five million unidentified individual class members who had been overcharged for shoes would wipe out any economic benefit of the settlement. *See also Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990) (court favorable toward use of *cy pres* to distribute unclaimed funds from judgment in favor of class of 1,349 undocumented and unidentifiable migrant workers).

Cy pres distribution should also be utilized when, as here, there is a strong correlation between the proposed use of the funds and the class benefited. *Cy pres* has been used, for example, to require defendants to reduce prices or provide discounts for goods or services prospectively until the class recovery fund has been exhausted. In *Daar v. Yellow Cab Co.*, 433 P.3d 732 (Cal. 1967), $950,000 of a $1.4 million settlement was returned to the class by reducing cab fares below the then maximum authorized fare. Likewise, in *In re Montgomery County Real Estate Antitrust Litig.*, 83 F.R.D. 305 (D. Md. 1979), in excess of $1.4 million in negotiable certificates were issued for the future use of class members who sold homes through defendant real estate brokers. And in *Colson v. Hilton Hotels Corp.*, 59 F.R.D. 324 (N.D. Ill. 1972), a mere fraction of an antitrust settlement was paid to verified

claimants, while the majority of the settlement funds were credited to future hotel guests who received discounts at the rate of $0.50 per room per stay.

Yet "while use of funds for purposes closely related to their origin is the best *cy pres* application, the doctrine of *cy pres* and courts' broad equitable powers now permit use of funds for other public interest purposes by educational, charitable, and other public service organizations both for current programs or, where appropriate, to constitute an endowment and source of future income for long-range programs to be used in conjunction with other funds raised contemporaneously." *Superior Beverage Co., Inc. v. Owens-Illinois, Inc.*, 827 F. Supp. 477, 479-80 (N.D. Ill.. 1993). *See also Houck v. Folding Carton Admin. Comm'n*, 881 F.2d 494 (7th Cir. 1988) (court may exercise *cy pres* discretion to dispose of residual antitrust settlement funds via grants to law schools unrelated to antitrust scholarship).

It is beyond doubt that the WJRO's proposed allocation of settlement funds would directly and indirectly benefit the classes. Not only would those individuals with Volcker Commission-identified, and other Court-approved, claims be paid (Section II(A)), but Holocaust victims would also receive direct cash payments (Section II(B)). Not only would funds would be distributed to provide desperately needed social services to survivor members of the class (Section II(C)), but funds allocated for use in memory of the Holocaust (Section II(D)) would benefit survivors, heirs and heirless victims by commemorating and documenting the Holocaust, by educating present and future generations so that the greatest crime of the twentieth century can never be repeated again, and by recognizing the destruction of Jewish life as a result of the Holocaust.

Finally, as previously noted, it is appropriate to apply the *cy pres* doctrine when the proposed relief furthers the purposes of a relevant statute. Although a statutory violation is not at the heart of this litigation, the application of the *cy pres* doctrine is

nonetheless appropriate here, given that the proposed distribution promotes and furthers the goals of the litigation (*i.e.*, the promotion and protection of human rights). Such was also the case in *In re Three Mile Island Litig.*, 557 F. Supp. 96 (M.D. Pa. 1982), where the parties negotiated, and the court approved, a $25 million settlement, pursuant to which $20 million was to applied to class claims; and $5 million of which was set aside for a public health fund to finance studies of the long-term health effects of the Three Mile Island nuclear accident, and to further future evacuation planning.

IV. CONCLUSION

For all of the foregoing reasons, the World Jewish Restitution Organization respectfully suggests that the most equitable allocation of the $1.25 billion settlement would be an allocation utilizing *cy pres* principles, with the first priority being those persons with specific claims as described in the Settlement Agreement. The bulk of the remaining funds should then be distributed as direct payments to victims of the Holocaust (55%), as social services to victims of the Holocaust (25%), and in memory of the Holocaust (20%).

Respectfully submitted,

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