UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE:
HOLOCAUST VICTIM ASSETS
LITIGATION

This Document Relates to: All Cases

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

KORMAN, C.J.

I address here the identity of the Swiss-owned or affiliated companies which fall within the parameters of "Slave Labor Class II" as defined under the Settlement Agreement and as approved in my opinion of July 26, 2000 (corrected August 2, 2000). See In re Holocaust Victim Assets, 105 F.Supp.2d 139 (E.D.N.Y. 2000) (the "Approval Order").

In the Approval Order, I took note of the "absence of information concerning the identities of the Slave Labor Class II members," observing that potential class members would not necessarily know if the company for which they labored was Swiss-owned or a Swiss affiliate. The lack of data was compounded by an inconsistency in the assessment of the size of the class: "When this class was included in the Settlement Agreement, the defendant banks represented that Slave Labor Class II consists of an extremely small number of persons who may have performed slave labor directly for an extremely small number of Swiss companies during World War II. Since then, they have backed off of this representation." In re Holocaust Victim Assets Litigation, 105 F.Supp.2d at 162.

Because of the scarcity of publicly available data concerning the identity of the "Slave Labor Class II" companies, I asked for the cooperation of the companies seeking releases:

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> Under these circumstances, those Swiss entities that seek releases from Slave Labor Class II are directed to identify themselves to the Special Master within 30 days of the date of this memorandum and order. The failure of Swiss entities seeking releases from Slave Labor Class II claims to identify themselves will result in the denial of a release and permit those who have claims against those entities to pursue such claims independently of this lawsuit. Those three Swiss companies with respect to which the SFA already has provided information are now entitled to the benefits of releases for the utilization of approximately 2,500 slave laborers, subject to compliance with their good faith duty to provide information in their possession regarding the names of these slave laborers .... I do not propose to deny releases to which Swiss companies who utilized slave laborers are entitled. I am simply requiring them to identify themselves and provide information (if they possess it) that is critical to the fair and efficient administration of Slave Labor Class II .... [I]t seems reasonable to conclude that the small number of Swiss companies who the defendant banks suggested utilized slave laborers have good reason to know who they are. Nor is it my intention that any company be certain that it or its affiliates employed slave labor. The fact that they believe that it was likely or probable will suffice.

Id. at 162-64, emphasis added.

As described in the Special Master's September 11, 2000 Plan of Allocation and Distribution (the "Plan"), in response to the Court's Order, a number of Swiss companies wrote to the Special Master to identify themselves under Slave Labor Class II. These companies are described in Annex I of the Plan and its Exhibit 1, a table of "Companies Which Seek a Release Under the Settlement Agreement by Identifying Themselves to the Special Master."

Following my adoption of the Plan on November 22, 2000, to clarify certain outstanding issues, on December 8, 2000, I issued a supplemental order concerning Slave Labor Class II:

> By no later than January 19, 2001, the entities which have identified themselves to the Special Master (as set forth in Annex I to the Distribution Plan) are directed to notify the Special Master as to whether they possess the names of former slave laborers and, if so, to provide such names to the Special Master.

Several companies responded to this Order, among them Georg Fischer and Nestle, each of which helpfully provided lists of thousands of individuals who worked for those companies (and affiliates) during the War era, many of whom may have performed slave labor. Other companies

updated their research reports and promised to supplement the data as information became available. Many companies also offered to assist in identifying former laborers as part of the claims process, a good faith offer of cooperation which will be quite useful to the International Organization for Migration ("IOM"), which is charged with analyzing all claims filed under Slave Labor Class II.

Against this background, I set forth below a list of the companies (and affiliates, subsidiaries or predecessors) which comprise the "Slave Labor Class II List." Claimants who file claims with the IOM and who plausibly demonstrate that they performed slave labor for one or more of the companies on the Slave Labor Class II List are eligible for compensation from the Settlement Fund. Each company appears on the list because it meets the following criteria: (a) it timely "self-identified" to the Special Master as required by the Approval Order; (b) it was Swiss-owned in whole or in part during the War era; and (c) it has provided the Special Master with names of persons believed possibly to have been slave laborers, or it has represented that such names are unavailable despite diligent investigation. A company's appearance on the Slave Labor Class II List does not necessarily mean that it used slave laborers.[1]

The companies on the Slave Labor Class II List are entitled to releases under the terms of the Settlement Agreement, subject to their continuing obligation to (1) supplement the information they

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[1] Two of the companies which self-identified, Otto Suhner and Gessner, contended that their wartime management was anti-Nazi and therefore would not have used slave labor. Although these companies do not actually require releases, since no slave labor claims against them could stand based upon their representations, they are nevertheless released because of their self-identification to the Special Master. Other companies stated that they did not believe that they used slave labor but could not entirely rule out the possibility, citing, among other reasons, the lack of records from the Nazi era. See Distribution Plan, Annex I, Exhibit 1.

have provided should additional data become available, and (2) cooperate with the IOM and the Court as needed throughout the claims process.

Companies which did not self-identify are not entitled to releases. See In re Holocaust Victim Assets Litigation, 105 F.Supp.2d at 162-63 ("The failure of Swiss entities seeking releases from Slave Labor Class II claims to identify themselves will result in the denial of a release and permit those who have claims against those entities to pursue such claims independently of this lawsuit"). Nor are releases appropriate for slave labor-using companies which were acquired by Swiss entities after the War but which were owned or controlled by German or other non-Swiss interests during the period of slave labor use.[2] The Settlement Agreement makes this clear. Specifically, the "Definitions" part of the Agreement contains a long inclusive definition of "Releasees." Of particular relevance here is the following definition of "Owned or Controlled Affiliates:"

> [A]ll affiliates of Swiss-based Concern (whether organized as corporations, partnerships, sole proprietorships or otherwise) wherever headquartered, organized, or incorporated in which the Swiss-based Concern owns or controls directly or indirectly at least 25 percent of any class of voting securities or controls in any manner the election or appointment of a majority of the board of directors, trustees or similar body ("Owned or Controlled Affiliates").

Independent Committee of Eminent Persons ("ICEP"), Report on Dormant Accounts of Victims of Nazi Persecution in Swiss Banks, App. O (1999). The definition of "Releasee" then goes on to set forth exclusions. The first relevant category of excluded releasees is contained in the first two sentences set forth below:

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[2] See Plan, Annex 1, Exhibit 1 at n. 2 (certain companies "provided lists of subsidiaries acquired after World War II. Because Slave Labor Class II employers must have been Swiss-owned during the War era, they are not listed on [the] table.")

> *The term Releasees also excludes parent companies and other affiliates of Swiss-based Concerns that (1) before 1945 were headquartered, based, or incorporated in Germany or any other Axis country or other country occupied by an Axis country between 1933 and 1946, (2) were not Owned or Controlled Affiliates as defined herein, and (3) disguised the identity, value or ownership of Cloaked Assets or used Slave Labor.* A company shall not be deemed a Releasee by virtue of being Owned or Controlled Affiliate if (1) the company was headquartered, based, or incorporated in Germany or any other Axis country or other country occupied by an Axis country between 1933 and 1946, and (2) the company's parent was a Swiss-based Concern for the sole purpose of disguising the identity, value, or ownership of Cloaked Assets.

Settlement Agreement, Section 1 (emphasis added).

The defendants argue that the first sentence sets forth "three cumulative criteria for excluding Swiss companies from the definition of releasees." Letter of Roger Witten, dated February 16, 2001. Specifically, "where under criterion (1) the company was before 1945 headquartered, based, or incorporated in Germany or another Axis country and under criteria (2) was not an Owned or Controlled Affiliate, the company would be excluded from the definition of 'Releasee' if in addition it either 'disguised the identity, value or ownership of Cloaked Assets or used Slave Labor.'" Id. While I agree with the defendants that the criteria are cumulative, this argument is of no avail to them here because the plain language excludes slave labor-using companies that were acquired by Swiss entities after the war, but which were owned or controlled by German or other non-Swiss entities.

The defendants' argument to the contrary essentially involves altering the clear language defining excluded releasees. Specifically, the second condition for exclusion in the first sentence is that "parent companies and other affiliates of Swiss-based concerns . . . . (2) were not Owned or Controlled Affiliates as defined herein." The words "as defined herein" refer to the definition of "Owned or Controlled Affiliates" earlier in the paragraph defining "Releasees" in the "Definitions"

part of the agreement. The requirement that the defendants would add to "Owned or Controlled Affiliates" -- that they must also have been established for the sole purpose of disguising the identity, value or ownership of cloaked assets -- completely alters the definition. Indeed, the construction of the first sentence urged by the defendants would, for all practical purposes, read the words "or used Slave Labor" out of the first sentence.

The negotiating history to which the defendants allude is not sufficient to override the plain language of the agreement. Under New York law, which is controlling here,

> a court may not, under the guise of interpretation, make a new contract for the parties or change the words of a written contract so as to make it express the real intention of the parties if to do so would contradict the clearly expressed language of the contract . . . . [W]e concern ourselves with what the parties intended, but only to the extent that they evidenced what they intended by what they wrote.

Rodolitz v. Neptune Paper Products, Inc., 22 N.Y.2d 383, 386-87, 292 N.Y.S.2d 878, 881 (1968) (internal quotation marks omitted); see also Settlement Agreement ¶ 16.2 (merger clause).

This consideration aside, the negotiating history, at best, sends conflicting signals. The Slave Labor II Class to which this clause relates was represented by the defendants to consist "of an extremely small number of persons who may have performed slave labor for an extremely small number of Swiss companies during World War II." In re Holocaust Victim Assets Litigation, 105 F.Supp.2d at 162. While this representation has turned out to be factually incorrect, the plain language of the clause cited above is much more faithful to it than the construction argued for by the defendants.

In sum, slave-labor using companies acquired by Swiss entities after 1945 plainly are excluded as "releasees" under the Settlement Agreement. Those that are included are attached to this Order as Annex 1.

SO ORDERED.

Dated: Brooklyn, New York
April 4, 2001

Edward R. Korman
United States District Judge